CASES

ON

THE LAW OF CONTRACTS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY ARTHUR L. CORBIN
HOTCHKISS PROFESSOR OF LAW IN YALE UNIVERSITY

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE
GENERAL EDITOR

ST. PAUL
WEST PUBLISHING COMPANY
1921

(Corbin Cont.)

THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond. in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is almost universally required for admission to the bar:

Administrative Law.	Equity Pleading.
Agency.	Evidence.
Bailments.	Insurance.
Bills and Notes.	International Law.
Carriers.	Jurisprudence.
Code Pleading.	Legal Ethics.
Common-Law Pleading.	Partnership.
Conflict of Laws.	Personal Property.
Constitutional Law.	Public Corporations.
Contracts.	Quasi Contracts.
Corporations.	Real Property.
Criminal Law.	Sales.
Criminal Procedure.	Suretyship.
Damages.	Torts.
Domestic Relations.	Trusts.
Equity.	Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law in the University of Chicago.

Agency. By Edwin C. Goddard, Professor of Law in the University of Michigan.

Bills and Notes. By Howard L. Smith, Professor of Law in the University of Wisconsin, and Underhill Moore, Professor of Law in Columbia University.

Carriers. By Frederick Green, Professor of Law in the University of Illinois.

Conflict of Laws. By Ernest G. Lorenzen, Professor of Law in Yale University.

Constitutional Law. By James Parker Hall, Dean of the Faculty of Law in the University of Chicago.

Contracts. By Arthur L. Corbin, Professor of Law in Yale University.

Corporations. By Harry S. Richards, Dean of the Faculty of Law in the University of Wisconsin.

Criminal Law. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Criminal Procedure. By William E. Mikell, Dean of the Faculty of Law in the University of Pennsylvania.

Damages. By Floyd R. Mechem, Professor of Law in the University of Chicago, and Barry Gilbert, of the Chicago Bar.

Equity. By George H. Boke, Professor of Law in the University of Oklahoma.

Evidence. By Edward W. Hinton, Professor of Law in the University of Chicago.

Insurance. By William R. Vance, Professor of Law in Yale University.

International Law. By James Brown Scott, Professor of International Law in Johns Hopkins University.

Legal Ethics, Cases and Other Authorities on. By George P. Costigan, Jr., Professor of Law in Northwestern University.

Partnership. By Eugene A. Gilmore, Professor of Law in the University of Wisconsin.

Persons (including *Marriage and Divorce*). By Albert M. Kales, of the Chicago Bar, and Chester G. Vernier, Professor of Law in Stanford University.

Pleading (*Common Law*). By Clarke B. Whittier, Professor of Law in Stanford University, and Edmund M. Morgan, Professor of Law in Yale University.

Property (Titles to Real Property). By Ralph W. Aigler, Professor of Law in the University of Michigan.

Property (*Personal*). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Rights in Land). By Harry A. Bigelow, Professor of Law in the University of Chicago.

Property (Wills, Descent, and Administration). By George P. Costigan, Jr., Professor of Law in Northwestern University.

Property (*Future Interests*). By Albert M. Kales, of the Chicago Bar.

Quasi Contracts. By Edward S. Thurston, Professor of Law in Yale University.

Sales. By Frederic C. Woodward, Professor of Law in the University of Chicago.

Suretyship. By Crawford D. Hening, formerly Professor of Law in the University of Pennsylvania.

Torts. By Charles M. Hepburn, Dean of the Faculty of Law in the University of Indiana.

Trusts. By Thaddeus D. Kenneson, Professor of Law in the University of New York.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

William R. Vance,
General Editor.

June, 1921.

AUTHOR'S PREFATORY NOTE

NO STUDENT or teacher should suppose that he can learn the law of contracts from one casebook or one text-book. If the law consisted of one set of rules, consistent, uniform, and logically constructed, the author's problem and the student's problem would be greatly simplified, though less interesting. The law is not such a set of rules, and it must be taught as it is—inconsistent, variable, illogical, growing and changing with the growth of civilization. As the mores change, the prevailing notions of social and economic welfare, the conscious and unconscious customs of men, the practices of business affairs, even as the notions of individual groups and of individual men change, so also change the stated rules of law. It has long been impossible to present the story of this growth of Anglo-American contract law in one volume. What was the law prior to the year 1300 as put into Latin by Bracton? What is its tortuous path in Anglo-Latin-French during the centuries of the Year Books (1300–1550)? What are the rules laid down by our industrious reporters in the English tongue, from Plowden to Meeson and Welsby (1550–1850)? What are our American courts going to decide to-morrow?

The purpose of the present casebook is to afford introductory material for answering the last question. Even as such an introduction, it cannot fail to seem inadequate. There are too many jurisdictions, too great a conflict, too great a complexity of affairs, too industrious a production of opinions, for any volume to give full satisfaction. It is indeed true that the last question cannot be answered without answering all the preceding ones and more. Yet the present volume offers no material as early as Bracton; it presents only a small amount from the Year Books; and even the period of the English reporters is sacrificed to include more cases from the recent past. It is hoped that enough of the earlier material has been included to indicate continuity of legal history and to prove that the future is influenced by the remote as well as by the recent past. But student and teacher must go elsewhere for knowledge of the earlier periods. Bracton's age must be left to the historical scholar. The Year Books can and should be read for themselves. For the period between 1550 and 1850, it will generally be sufficient to study the two volumes of cases published by Langdell. To supplement the present volume as to present-day law, there are other excellent collections of cases and there are the amazing digests and the labyrinthine libraries. Some footnotes have been added to as-

sist in making further independent investigation; they are not intended to make such investigation unnecessary.

Of the 594 cases in the present volume, 258 have been decided since 1900, 224 between 1800 and 1899, and 112 prior to 1800; 185 cases are English, while 409 represent the federal courts and 39 different states in the Union. An effort has been made not to neglect leading cases that are commonly cited as having first laid down or established an important rule of law. At least one-fourth of the cases herein will also be found in earlier casebooks on the subject.

The order of arrangement has been chosen with the purpose of making the topics and the individual cases most readily understood by the beginning student. Teachers frequently disagree as to the most desirable order; but it is not difficult to rearrange topics to suit individual taste.

One cannot use a particular casebook in his law school courses for more than 15 years without being greatly influenced by both the choice of cases and the order of their arrangement. For this reason the present writer will be found greatly indebted to Professor Samuel Williston, and through him to his predecessors, Professors Ames and Langdell. Acknowledgment is also due to the work of Professor Keener. The very special debt owed to Professor Hohfeld is shown, not so much in the construction of the casebook as in the critical analysis and comparison of the classroom. Hohfeld's articles on "Some Fundamental Legal Relations as Applied in Judicial Reasoning," 23 Yale Law Journal, 16 (1913), and 26 Yale Law Journal, 710 (1917), reveal new possibilities for constructive work to every student of the law. Acknowledgment is also made to the Oxford University Press for its permission to make use of the notes in the writer's edition of Anson on Contracts, published in 1919.

ARTHUR L. CORBIN

YALE UNIVERSITY SCHOOL OF LAW,
March, 1921.

TABLE OF CONTENTS

CHAPTER I

Offer and Acceptance

CHAPTER II

Consideration

CHAPTER III

CHAPTER IV

Operation of Contract and of Facts Subsequent to Acceptance

CHAPTER X

THE STATUTE OF FRAUDS

*

TABLE OF CASES

Cases printed in ordinary type are the cases reported as the text of this volume. Cases printed in *italics* are found in the footnotes and in text; they are included in this table either because they are stated and discussed, or because they are printed in other casebooks and have become known to many teachers and students, who will thus be enabled to use this table as a supplementary index.

CASES

ON THE

LAW OF CONTRACTS

CHAPTER I

OFFER AND ACCEPTANCE

SECTION 1.—INOPERATIVE PRELIMINARY NEGOTIATION

WEEKS v. TYBALD.

(In the King's Bench, 1605. Nov. 11.)

In an assumpsit the plaintiff alleges, that whereas there was a communication of marriage between the plaintiff and the daughter of the defendant, that the defendant upon speech between the father of the plaintiff and the defendant, for free liberty to the plaintiff to come to the house of the defendant to woo his daughter, the defendant then and there affirm'd and publish't that he would give £100 to him that should marry his daughter with his consent, &c. By the court the action doth not lye, for asseruit et publicavit doth not make words that include a promise.

It is not aver'd nor declar'd to whom the words were spoken, and it is not reason that the defendant should be bound by such general words spoken to excite suitors.

KELLER v. HOLDERMAN.

(Supreme Court of Michigan, 1863. 11 Mich. 248, 83 Am. Dec. 737.)

Action by Holderman against Keller upon a check for $300 drawn by Keller upon a banker at Niles, and not honored. The cause was tried without a jury, and the Circuit Judge found as facts, that the check was given for an old silver watch, worth about $15, which Keller took and kept till the day of trial, when he offered to return it to the plaintiff, who refused to receive it. The whole transaction was a

frolic and banter—the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it; but as he had failed to do so, and had retained the watch, the Judge held him liable, and judgment was rendered against him for the amount of the check.

MARTIN, C. J. When the court below found as a fact that "the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn," the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this court and of the court below.[1]

The other Justices concurred.

HIGGINS v. LESSIG.

(Appellate Court of Illinois, 1893. 49 Ill. App. 459.)

CARTWRIGHT, J.[2] Appellant was the owner of a set of old double harness, worth perhaps $15, which was taken from his premises without his knowledge, and he offered a reward of $100 for the recovery of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch, and appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of $100 to the one who would find out who the thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as a reward, and a trial resulted in a verdict and judgment for appellee for $100.

The evidence showed that the defendant was much excited on the

[1] In accord: McClurg v. Terry, 21 N. J. Eq. 225 (1870); Theiss v. Weiss, 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638 (1895); Bruce v. Bishop, 43 Vt. 161 (1870); Paulus, Digest, XLIV, 7, 3, § 2; German Civ. Code, § 118.

In Plate v. Durst, 42 W. Va. 63, 24 S. E. 580, 32 L. R. A. 404 (1896), the defendant promised plaintiff $1,000 and a diamond ring if she would stay in his service. He now claims this was said in jest. The court said: "Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile." See, to the same effect: Nyulasy v. Rowan, 17 Vict. L. R. 663 (1891); Theiss v. Weiss, supra.

[2] Part of the opinion is omitted.

occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that defendant said, "I will give $100 to any man who will find out who the thief is, and I will give a lawyer $100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetitions of the statement, together with the assertion that he would not have a second-class lawyer, either, and that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning, which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances, would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the conviction of the thief. On this occasion he paid the boy only a trifling sum, and offered only $1 for finding the rest of the property. His further language was in the nature of an explosion of wrath against some supposed thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement, so out of proportion to the supposed cause of it, that it should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract. * * * [3]

[3] In accord: Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296 (1845).

The absence of an intention to create legal relations may be evidenced in various ways. In Balfour v. Balfour, [1919] 2 K. B. 571, Atkin, L. J., said: "There are agreements which do not result in contracts. * * * The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. * * * One of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. * * * They are not contracts, because the parties did not intend that they should be attended by legal consequences."

Sometimes parties merely give their "word of honor, as business men," Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869 (1904); or they may expressly provide that their agreement shall not be enforceable at law, Smith v. Macdonald, 37 Cal. App. 503, 174 Pac. 80 (1918), post, p. 711; Monroe v. Martin, 137 Ga. 262, 73 S. E. 341 (1911).

MONTGOMERY WARD & CO. v. JOHNSON.

(Supreme Judicial Court of Massachusetts, 1911. 209 Mass. 89, 95 N. E. 290.)

Bill by Montgomery Ward & Co. against Mary E. Johnson. Decree for defendant, and plaintiff appeals. Affirmed.

BRALEY, J. The essential allegations of the bill are admitted by the demurrer, but if they fail to show a binding contract between the parties, it cannot be maintained for specific performance, or injunctive relief. The defendant manufactured and sold firearms of certain types, which had acquired in the market a recognized reputation for their quality and style of workmanship. In the management of the business, sales were made only to jobbers, who were to resell to their customers at a uniform price. But having received complaints that the scale of prices in some instances had not been followed, she issued a printed letter, which after reciting the cause of its publication, and that "we have prepared, and are sending under this cover by registered post, a printed document setting forth the terms and conditions upon which Iver Johnson revolvers will be supplied to the jobbing trade," contained the statement that "hereafter no order will be filled except upon the terms set forth in the enclosed document, therefore please read it carefully, for we are going to ask your support and cooperation." The plaintiff apparently was a customer of the defendant, and having received the letter, alleges that it was "a certain offer in writing to make a contract," the terms and conditions of which were expressed in the accompanying document. It is then alleged that, "intending to accept said contract, and to cause that the defendant should be bound by said acceptance; and that the parties should be mutually bound thereby," the plaintiff transmitted to the defendant an order for revolvers; but there is no allegation that this purpose was communicated to her, or that the order was accepted with this understanding.

The plaintiff relies on these transactions as constituting a bilateral contract. But if the letter and document are examined in connection with the recitals, they were not in the nature of a general offer, where upon compliance with the conditions by those to whom it is addressed, a legally binding contract at once springs into existence. The defendant promulgated the terms under which she proposed to do business in the future, not with the plaintiff only, but with the members of the jobbing trade, who were to be treated as licensees, if they would agree to abide by them. It is expressly announced, in the seventh paragraph of the document, that the defendant does not undertake to furnish, or to be responsible for a failure to deliver goods which may be ordered, and the words, "that it can be revoked without liability for damages by thirty days written notice, to date from the actual mailing of the notice," refer to the license to deal in the defendant's product, with a discontinuance of all business relations. "A contract is an agreement which creates an obligation," said Mr. Justice Field in Ashcroft v.

Butterworth, 136 Mass. 511, 514. And an invitation to prospective buyers to negotiate for a license, and to trade with the defendant, even when confined to a definite class, imposes no obligation on the sender of accepting any offer which thereafter might be received. The order of the prospective buyer does not ripen into a contract of sale until the defendant's acceptance, and then only as to goods specifically ordered. Smith v. Gowdy, 8 Allen, 566; Lincoln v. Erie Preserving Co., 132 Mass. 129; Edge Moor Bridge Works v. Bristol, 170 Mass. 528, 49 N. E. 918; Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; Spencer v. Harding, L. R. 5 C. P. 561; Canning v. Farquhar, 16 Q. B. D. 727, 732.

We are of opinion that a fair interpretation of the letter, and document, very plainly shows that it was not a general offer to sell to those addressed, but an announcement, or invitation, that the defendant would receive proposals for sales on the terms and conditions stated, which she might accept or reject at her option. No contract between the parties having been created, the defendant's refusal to accept and fill the plaintiff's orders, as alleged in the bill, was not an actionable wrong, and the further questions of a breach, and the measure and form of relief, and whether the contract was legally terminated by the notice, become immaterial, and need not be discussed.

The decree of the single justice, sustaining the demurrer and dismissing the bill, must be affirmed with costs.

Decree accordingly.

NEBRASKA SEED CO. v. HARSH.

(Supreme Court of Nebraska, 1915. 98 Neb. 89, 152 N. W. 310, L. R. A. 1915F, 824.)

Action by the Nebraska Seed Company, a corporation, against H. F. Harsh. From judgment for plaintiff, defendant appeals. Reversed.

MORRISSEY, C. J. Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Neb., brought this action against the defendant, a farmer residing at Lowell, Kearney county, Neb. The petition alleges:

"That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of $2.25 per hundredweight, F. O. B. Lowell, Neb., which said purchase and contract was evidenced by writing and correspondence passing between the respective parties of which the following is a copy:

" 'Lowell, Nebraska, 4—24—1912.

" 'Neb. Seed Co., Omaha, Neb.—Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell.

" 'Yours truly, H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Neb., on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed to the defendant at Lowell, Neb., a copy of which is as follows:

" '4—26—12.

" 'H. F. Harsh, Lowell, Nebr. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.'

"On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Neb., which said letter was duly stamped, and which the plaintiff charges that the defendant in due course of mail received. That a copy of said letter is as follows:

" '4—26—12.

" 'Mr. H. F. Harsh, Lowell, Neb.—Dear Sir: We received your letter and sample of millet seed this morning and at once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred, wire how soon can load." We confirm this message have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at $2.25 per cwt. your track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples.

" 'Yours truly, The Nebraska Seed Co.' "

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of $900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury with verdict and judgment for plaintiff, and defendant appeals.

In our opinion the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says, "I want $2.25 per cwt. for this seed f. o. b. Lowell." He does not say, "I offer to sell to you." The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them.

They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278e.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." Knight v. Cooley, 34 Iowa, 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels—no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot whether it was more or less than 1,800 bushels.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitations to bid, even though his supply of seed were exhausted. In Lyman v. Robinson, 14 Allen (Mass.) 242, 254, the Supreme Court of Massachusetts has sounded the warning:

"Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding, as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented.

The judgment of the district court is reversed.[4]

[4] In Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516 (1884) the defendant sent the following letter:

"Milwaukee, September 19, 1882.

"J. H. Moulton, Esq., La Crosse, Wis.—Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly, C. J. Kershaw & Son."

The plaintiff replied, saying: "You may ship me two thousand barrels as offered in your letter." It was held that the defendant's letter created no power of acceptance, but was a mere invitation to deal.

In Ahearn v. Ayres, 38 Mich. 692 (1878) the opinion of the court was as follows: "Ahearn sued defendants for not accepting certain stave bolts. It appears that he asked one of the firm what they were paying for bolts, and was answered they would take all he could make and deliver at $2 per cord. He afterwards made a lot of bolts, which he proposed to furnish, but they denied any bargain. There was no contract made out. Ahearn did not inform defendants that he would accept or act on their order, or deliver any

SHEPARD v. CARPENTER.

(Supreme Court of Minnesota, 1893. 54 Minn. 153, 55 N. W. 906.)

Action on a contract by Eugene S. Shepard against Herbert M. Carpenter. Defendant had judgment, and plaintiff appeals. Affirmed.

GILFILLAN, C. J. A contract between two persons, upon a valid consideration, that they will, at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and upon a breach thereof the party having the election or option may recover as damages what such particular contract to be entered into, would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.

bolts, or, if any, how many. The transaction went no further than what occurs when any one asks another what he will either give or take for commodities. Such inquiries may lead to bargains, but do not make them."

In Harvey v. Facey, [1893] A. C. 552, the plaintiff telegraphed: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid." The defendant replied: "Lowest price for Bumper Hall Pen £900." The plaintiff then telegraphed: "We agree to buy Bumper Hall Pen for the sum of £900 asked by you." It was held there was no contract.

In Sellers v. Warren, 116 Me. 350, 102 Atl. 40 (1917) A. offered to buy B.'s interest in certain land for four-elevenths of the total selling price. B. replied: "Cannot accept offer; would not consider less than half." A. telegraphed: "Accept your offer of equal division." There was no contract made.

The following cases held that there was no offer creating any power of acceptance: Patton v. Arney, 95 Iowa, 664, 64 N. W. 635 (1895), defendant wrote that his steers "ought to be worth $4.25; Johnston Bros. v. Rogers Bros., 30 Ont. 150 (1899), "We quote you f. o. b. your station Hungarian $5.40 car lots only. * * * We would suggest your using the wire to order as prices are so rapidly advancing;" State v. Peters, 91 Me. 31, 39 Atl. 342 (1897), quotation of prices; Smith v. Gowdy, 8 Allen (Mass.) 566 (1864); Cherokee Tanning Extract Co. v. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777, 118 Am. St. Rep. 806 (1906); Beaupre v. Pacific & A. Tel. Co., 21 Minn. 155 (1874); Hall v. Kimbark, Fed. Cas. No. 5,938 (1874); Schubmacher v. Lebeck, 103 Kan. 458, 173 Pac. 1072, L. R. A. 1918F, 788 (1918), mere statement of terms of sale to a broker is not an offer to the broker; Boyers & Co. v. Duke, [1905] I. R. 617, 3 B. R. C. 220.

In the following cases the words used constituted an offer: Fairmount Glass Works v. Crunden-Martin Woodenware Co., 106 Ky. 659, 51 S. W. 196 (1899), "We quote you Mason jars * * * pints $4.50 per gross, for immediate acceptance"; Lawrence v. Milwaukee L. S. & W. R. Co., 84 Wis. 427, 54 N. W. 797 (1893); Woldert v. Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1052 (1893). See, further, L. R. A. 1915F, 824, note.

The agreement herein sued on leaves essential terms of the future contract to be fixed by future agreement. It clearly contemplated that the logs to be cut and hauled should be delivered at some one place, but it does not specify what place, but instead thereof provides that the (future) contract shall be for plaintiff to cut into logs, "haul and deliver at the boom or other place of delivery, to be in and by said contract agreed upon," without indicating what boom, or where it may be. The place of delivery was manifestly left to be agreed on, and, when agreed on, inserted in the future contract. How payments were to be made by plaintiff for logs sold by him was a matter of serious importance, but all the contract says of it is: "One-third of the selling price thereof, in cash, to be paid within —— days after such sale shall be made."

It is manifest the parties intended the future contract to specify the number of days within which payment or payments were to be made, but that they had not agreed on the number of days, and so left it to be agreed on and inserted in the future contract. A perhaps still more important matter was within what time the logs should be cut. All the contract says of that is "that the amount of timber or logs to be cut in any one year shall be agreed upon, and be expressed in said contract." Where a final contract fails to express some matter, as, for instance, a time for payment, the law may imply the intention of the parties; but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon. Judgment affirmed.[5]

LESKIE v. HASELTINE.

(Supreme Court of Pennsylvania, 1893. 155 Pa. 98, 25 Atl. 886.)

Assumpsit by Henry B. Leskie against Charles F. Haseltine for breach of an agreement by defendant to give plaintiff the contract, as the successful bidder, for the erection of a building in Philadelphia. From a judgment entered on a verdict in defendant's favor, plaintiff appeals. Affirmed.

The defendant, Charles F. Haseltine, desired to erect a large and costly building in Philadelphia, and requested his architect to ask for estimates. The architect did so by postal cards sent to a number of builders, in the following form: "204 South Fifth Street, March 28th, 1887. Dear Sir: You are requested to estimate on the Haseltine building. My office will be open from 9 A. M to 5 P. M. All bids must be addressed to me, and must be received at this office by noon, Wednesday, April 6th. Yours truly, W. N. Lockington, per W. W. L."

[5] In accord: Sibley v. Felton, 156 Mass. 273, 31 N. E. 10 (1892); St. Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 100 Pac. 647, 28 L. R. A. (N. S.) 637 (1909); Somers v. Musolf, 86 Ark. 97, 109 S. W. 1173 (1908). See, also, Varney v. Ditmars, 217 N. Y. 223, 111 N. E. 822, Ann. Cas. 1916B, 758 (1916).

Ten builders, including H. B. Leskie, the plaintiff in this case, sent written estimates. Most of these were brought to the architect's office at noon on Wednesday, April 6th, the time mentioned in the postal card. The estimates were then opened, Mr. Haseltine and most of the builders or their representatives being present. The plaintiff's bid was the lowest. It was in the alternative for either $152,740 or $153,000, according to whether brick or iron arches were to be used. The plaintiff testified that when the bids were read out the defendant smiled, and said to plaintiff, "You are the lucky man." A witness called by the plaintiff added to this that the defendant said, "You have won, and fairly so." The defendant and his architect testified that all that was said by defendant was, "That is all for the present," and that the matter was adjourned for the purpose of considering the estimates, and this was corroborated by two or three other persons who were present. It was understood by all parties that a formal written contract would have to be entered into for the erection of the building before anything would be done.

The plaintiff testified that during several days after the opening of the estimates, and while the matter was under consideration, some of the details which would enter into such a contract were discussed between him and the defendant, but many of these details remained unsettled. While these matters were under discussion, and before any contract had been prepared or signed, the defendant, who had been investigating the character and ability of the plaintiff, came to the conclusion that he was not a desirable man to whom to intrust so large an undertaking, and notified him that he had concluded to give the contract to another bidder.

Defendant subsequently entered into a formal written contract with one of the higher bidders. The plaintiff then sued him for $15,000, alleging that what took place at the architect's office on the reading of the estimates amounted to a binding contract in law between the plaintiff and defendant for the erection of the building.[6]

Per Curiam. The plaintiff was admittedly the lowest bidder for the erection of defendant's building. It does not follow, however, that because he was the lowest bidder the defendant was bound to award him the contract. The fact that upon the opening of the bids either the architect or the defendant may have said to the plaintiff: "You are the lucky man," amounts to nothing more than a recognition of the fact that he was the lowest bidder. After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfill the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract.

In this case the contract never was awarded to the plaintiff. There were a number of questions to be settled when the defendant and the

[6] The statement of facts is condensed.

bidder were brought together before their minds could be said to have agreed upon anything. The learned judge below submitted the case to the jury under proper instructions, and their verdict is the end of the matter.

Judgment affirmed.[7]

STANTON v. DENNIS.

(Supreme Court of Washington, 1911. 64 Wash. 85, 116 Pac. 650.)

Action by E. M. Stanton against W. H. Dennis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

FULLERTON, J. Some time in 1909, the Thompson-Starrett Company entered into a contract to construct an addition to the Fidelity Trust Company's building in the city of Tacoma. Thereafter they sublet the contract for doing the painting and carpentry work on the building to the appellant, W. H. Dennis. The appellant, being desirous of again subletting the carpentry work, requested one Phil E. Dunnavant to bid thereon, at the same time furnishing him with a copy of the plans and specifications of the work. Later on Dunnavant submitted the following writing:

"Portland, Ore., Jan. 7, 1910. W. H. Dennis, Seattle, Wash.—Dear Sir: Confirming our conversation with you over long distance phone this afternoon we propose to furnish all labor for setting millwork and carpentry on the addition to the Fidelity Trust Co.'s building at Tacoma, Wash., for the sum of five thousand seven hundred and no/100 dollars ($5,700.00). The work above mentioned is to be included and above the seventh floor and is to be in accordance with plans and specifications prepared by D. H. Burnham, Chicago. It is understood that we are not to furnish labor for laying floors, putting up door jacks or setting any centers or grounds. It is also understood that we are to furnish no material of any description used in setting the millwork or in any of the carpentry work. Formal contract to follow. Phil E. Dunnavant & Co., per Phil E. Dunnavant. Accepted: ———————."

This writing with duplicate copies was forwarded to the appellant by Dunnavant, who, upon receipt thereof, wrote his name after the word "Accepted," and returned the same to Dunnavant.

Early in February, 1910, Dunnavant became financially embarrassed and sought the appellant, and suggested to him the idea of putting the contract in the name of a third party. The appellant took the matter under consideration, and Dunnavant returned to his home at Portland, Or., from which place he wrote the appellant as follows: "Portland, Oregon. Feb. 25, 1910. W. H. Dennis, White Building, Seattle, Wash.—Dear Sir: Would like to have you write me and let me know

[7] In accord: United States v. Daniels, 231 U. S. 218, 34 Sup. Ct. 84, 58 L. Ed. 191 (1913); Smith v. Mayor, etc., of City of New York, 10 N. Y. 504 (1853); Kelly v. City of Chicago, 62 Ill. 279 (1871); Spencer v. Harding, L. R. 5 C. P. 561 (1870).

what response you got to the telegram you sent while I was there. I have had to turn all of my work over to the bonding companies as I was unable to pull through. It will help me a great deal if you will give me some information about the Spokane job and also the Tacoma job. I have been expecting a letter from you daily since my return but so far have received none. Thanking you in adavnce, I am, yours very truly, Phil E. Dunnavant."

To this the appellant answered by the following letter: "Feb. 28, 1910. Mr. Phil E. Dunnavant, Portland, Oregon—Dear Sir: In answer to yours of last week, will say that under the circumstances it will be impossible to do the work as we talked of in our talk when you were up here and will have to arrange with some other contractor to do the work at Spokane and Tacoma. Am sorry but cannot do anything else as it has turned out. Yours truly, W. H. Dennis & Son."

To this letter the appellant replied: "Portland, Oregon. March 2, 1910. Mr. W. H. Dennis, Seattle, Wash.—Dear Sir: Your letter of the 28th ult. received and carefully noted, under existing circumstances I do not feel like letting the contracts for the Tacoma and Spokane jobs go as there is good prospects in them for me, if I can make no other arrangements with you I will have to carry them on as was first intended. I will probably be in Seattle some time in the near future and will talk the matter over with you but in the meantime would like to know just how the work stands on the two jobs as I have my men ready to go on short notice. Trusting that I will hear from you as soon as possible I beg to remain, Yours very truly, Phil E. Dunnavant."

No formal contract was ever forwarded for execution by Dunnavant and none in fact was entered into, and thereafter the appellant prosecuted the work described in the writing through other parties. After the completion of the work, Dunnavant assigned his claim to the present respondent, who brought this action on the accepted writing to recover damages as for breach of contract. The cause was tried in the court below by the judge, sitting without a jury, and resulted in a judgment in favor of the respondent for the full amount claimed, namely, $1,700. To reverse the judgment, this appeal is prosecuted.

The principal question suggested by the record is whether the writing containing the bid of Dunnavant and the acceptance thereof by the appellant constituted the completed contract between the parties, or was it an agreement settling some of the terms of a contract to be entered into later. The face of the writing, it is at once apparent, indicates that it was intended as the latter, rather than the former. After specifying certain particulars, it expressly provides that a formal contract is to follow. If the writing itself was intended as the completed contract, there would have been no need for this proviso. A contract complete in itself does not need the sanction of another contract.

Again, the contract, when tested by the surrounding circumstances, seems incomplete. It refers to work of a particular character in a described building, yet it specifies no time when the work shall be begun, when it shall be completed, the character of the work that shall be performed, or when payment for the work shall be made. While the law in such cases implies certain conditions, namely, that the work shall be commenced and completed within a reasonable time after demand, shall be performed in an ordinarily skillful manner, and shall be paid for within a reasonable time after its completion, it is apparent that these conditions might not satisfy the appellant. He was a subcontractor of Thompson-Starrett Company, and bound to perform according to the stipulations of his written contract with them, which might vary materially from the stipulations implied by law. This being true, the appellant very naturally would want the contract under which the work was to be actually performed conditioned so as to accord with his contract with the original builder. The writing, in whatever aspect it is viewed, therefore, seems to us to point to the conclusion that it was not intended to be the final agreement between the parties.

The evidence also, we think, sustains this conclusion. The appellant testifies to the fact positively, and Dunnavant admits that such a thing was talked over between them, but that the purpose was to put the contract in more formal shape, rather than supply any further details. Both parties were men of ability and experience, and it would hardly seem that if they intended this writing to be a complete contract between them they would solemnly provide, both in writing and orally, for a further agreement.

By the conditions of the writing, it was Dunnavant's duty, after the acceptance by the appellant of the terms proposed, to prepare a formal contract embodying such terms and such further details as the character of the work required, and forward the same to the appellant for execution. Failing in this, he had no cause of action against the appellant, as the appellant could not otherwise be put in default, and of course no cause of action passed to his assignee by the assignment.

The judgment appealed from is reversed and the case remanded, with instructions to enter a judgment in favor of the appellant to the effect that the respondent take nothing by his action.[8]

[8] In Mississippi & D. S. S. Co. v. Swift, 86 Me. 248, 29 Atl. 1066, 41 Am. St. Rep. 545 (1894), Emery, J., said: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is

BILLINGS v. WILBY.

(Supreme Court of North Carolina, 1918. 175 N. C. 571, 96 S. E. 50.)

Action by A. U. Billings against William Wilby. Judgment for plaintiff, and defendant excepts and appeals. No error.

HOKE, J.[9] There was evidence on the part of the plaintiff tending to show that plaintiff, a contractor of extended experience and engaged at the time in "grading off the foundation" for the new federal building at Wilkesboro, N. C., on January 16, 1916, received a letter from William Wilby, defendant, then at Selma, Ala., and who had the subcontract for the plumbing and laying the sewer line, inviting a proposition from plaintiff for cutting the ditch and laying the line, etc., according to survey and specifications which had been already made by the government; that on January 13, 1916, plaintiff replied by telegram from North Wilkesboro, as follows:

"Will put in sewer line according to specifications for five hundred dollars you furnish pipe and material North Wilkesboro wire at once if you accept this. [Signed] A. U. Billings."

On same date defendant sent by wire a night letter as follows:

"Forty cents per running foot is best I can do I furnish pipe and you cement. I can do it myself for less than this but want it put in before my man comes. If I cannot get it for the above amount will wait and put it in myself. [Signed] William Wilby."

To this plaintiff replied by telegram at 10:40 a. m. January 14:

"Night letter received. Will accept. Send contract signed at once."

That plaintiff was ready, able, and willing to do the work, and had the hands and tools there for the purpose, and on the night before he was to begin, which was several days after plaintiff's last message, plaintiff received a telegram from defendant to the effect that he

viewed as consummation of the negotiation, there is no contract until the written draft is finally signed." It was held that there was no contract.

In the following cases, also, it was held that the execution of the written document was contemplated by the parties as the final operative fact, prior to which there was no contract: Spinney v. Downing, 108 Cal. 666, 41 Pac. 797 (1895); Las Palmas Winery & Distillery v. Garrett & Co., 167 Cal. 397, 139 Pac. 1077 (1914); Ocala Cooperage Co. v. Florida Cooperage Co., 59 Fla. 390, 52 South. 13 (1910); Strong & Trowbridge Co. v. H. Baars & Co., 60 Fla. 253, 54 South. 92 (1911); Scott v. Fowler, 227 Ill. 104, 81 N. E. 34 (1907); Alexandria Billiard Co. v. Miloslowsky, 167 Iowa, 395, 149 N. W. 504 (1914); Tucker v. Pete, Sheeran Bros. & Co., 155 Ky. 670, 160 S. W. 176 (1913); Barrelli v. Wehrli, 121 La. 540, 46 South. 620 (1908); Donnelly v. Currie Hardware Co., 66 N. J. Law, 388, 49 Atl. 428 (1901); Williams v. Burdick, 63 Or. 41, 125 Pac. 844, 126 Pac. 603 (1912). In Ridgway v. Wharton, 6 H. L. Cas. 238, 268 (1857) it was said that "the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." In Rossdale v. Denny, [1921] 1 Ch. 57, a letter contained several proposed terms and then said: "Subject to a formal contract to embody such reasonable provisions as my solicitors may approve." The court reviewed the cases where the words "subject to" had been used, and it held there was no contract.

[9] The statement of facts is omitted.

would advise plaintiff in a day or two about the work; that defendant never did advise plaintiff further about it, but soon thereafter undertook the work himself, etc.; that plaintiff's damage in the loss of the contract was about $250. On matters relevant to the issue, defendant introduced his own deposition to the effect "that he was a plumber resident in Selma, Ala., and had a subcontract for installing the plumbing and sewer for the building and in addition to the telegrams already in evidence, there was attached to his deposition two other telegrams in terms as follows; one purporting to be from plaintiff to defendant, dated January 18, 3 p. m.:

"I accept your sewer proposition wire at once if you accept mine start work at once in the morning. [Signed] A. U. Billings."

—and another from defendant to plaintiff:

"Will advise you within next few days regarding sewer proposition.

"[Signed] William Wilby."

In reference to the additional telegrams attached to the deposition and purporting to be from plaintiff, "I accept your sewer proposition wire at once if you accept mine start work in the morning," plaintiff recalled testified that he did not send nor authorize any one else to send such a telegram. On perusal of this evidence, we are clearly of opinion that a definite contract to let the work in question was constituted between these parties by the telegram of plaintiff, dated January 14th, in reply to defendant's night letter and in terms, "Night letter received will accept send contract signed at once," and this result is not affected by the closing words of the message, "Send contract signed," etc.—this by correct interpretation meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the recognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed, and which purpose was not carried out. Gooding v. Moore, 150 N. C. 195, 63 S. E. 895; Teal v. Templeton, 149 N. C. 32, 62 S. E. 737; Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; Clark on Contracts (2d Ed.) p. 29, and authorities cited. In Moore's Case, supra, it was held:

"That when parties to an oral contract contemplate a subsequent reducing of it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding on them, though their intent to formally express the agreement in writing was never carried out."

And in 144 N. Y., supra:

"If the correspondence and telegrams between the parties contain all the details of a contract, it is enforceable, though they intended that their agreement should be formally expressed in a single paper which, when signed, should be the evidence of what already had been agreed upon."

This being the correct position, we must approve his honor's charge on the first issue:

"That, if the jury believe the evidence and find the facts to be as testified by the witness and disclosed by the documents produced in evidence, you will answer the first issue Yes."

The parties having entered into a definite contract by the message from the plaintiff, of date January 14th, the additional message introduced by the defendant, even if genuine, evinces no purpose to abandon any rights he had acquired or to reopen the question of what had been done between them, and, if it were otherwise, the charge of his honor, when considered in reference to the testimony and the conditions presented, could only mean, and was clearly intended to mean, that, if the parol evidence given by plaintiff to the effect that he had never sent this telegram or authorized any one else to do so should be accepted by the jury, and, the fact so found, such message should not be allowed to affect the determination of the issue.

On the record, we find no error in the charge or in the refusal of the motion to nonsuit, and the judgment below must be affirmed.

No error.[10]

10 In the following cases it was held that the written document was contemplated as a mere memorial, not as the only operative fact, and that a contract was made without it: Brogden v. Metrop. Ry. Co. (H. L.) 2 App. Cas. 666 (1877); Rossiter v. Miller, 3 App. Cas. 1124 (1878); Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625 (1906); Wehner v. Bauer (C. C.) 160 Fed. 240 (1908); Thomas B. Whitted & Co. v. Fairfield Cotton Mills, 210 Fed. 725, 128 C. C. A. 219 (1913); U. S. v. P. J. Carlin Const. Co., 224 Fed. 859, 138 C. C. A. 449 (1915); Southern R. Co. v. Huntsville Lumber Co., 191 Ala. 333, 67 South. 695 (1914); Skeen v. Ellis, 105 Ark. 513, 152 S. W. 153 (1912); Alexander Amberg & Co. v. Hollis, 115 Ark. 589, 171 S. W. 915 (1914); Conner v. Plank, 25 Cal. App. 516, 144 Pac. 295 (1914), writing mentioned after complete agreement; Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126 (1908); Berman v. Rosenberg, 115 Me. 19, 97 Atl. 6 (1916); Bollenbacher v. Reid, 155 Mich. 277, 118 N. W. 933 (1908); McConnell v. Harrell & Nicholson Co., 183 Mich. 369, 149 N. W. 1042 (1914); Lamoreaux v. Weisman, 136 Minn. 207, 161 N. W. 504 (1917); Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869 (1890); Long v. Needham, 37 Mont. 408, 96 Pac. 731 (1908); Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757 (1894); Gooding v. Moore, 150 N. C. 195, 63 S. E. 895 (1909); Jungdorf v. Town of Little Rice, 156 Wis. 466, 145 N. W. 1092 (1914).

An offer may be accepted orally, even though made in the form of a contract signed by the offerer. Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490 (1917).

In Cottingham v. National Mut. Church Ins. Co., 290 Ill. 26, 124 N. E. 822 (1919), a binding insurance contract was held to exist, even though no formal policy was ever issued.

SECTION 2.—COMMUNICATION OF OFFER

WILLIAMS v. CARWARDINE.

(In the King's Bench, 1833. 4 Barn. & Adol. 621.)

Assumpsit to recover £20, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murderer of Walter Carwardine. Plea, general issue. At the trial before Parke, J., at the last spring assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of March 24th, 1831, at a public-house at Hereford, and was not heard of again till his body was found on April 12th in the river Wye, about two miles from the city. An inquest was held on the body on April 13th and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On April 25th the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murderer of Walter Carwardine should, on conviction, receive a reward of £20; and any person concerned therein, or privy thereto (except the party who actually committed the offense), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the summer assizes 1831, but acquitted.

Soon after this, the plaintiff was severely beaten and bruised by one Williams, and on August 23d, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the £20. The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of £20. That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

DAWKINS v. SAPPINGTON.

(Supreme Court of Indiana, 1866. 26 Ind. 199.)

FRAZER, J. *The appellant was the plaintiff below. The complaint was in two paragraphs: (1) That a horse of the defendant had been stolen, whereupon he published a hand-bill offering a reward of $50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. (2) That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned him to the defendant, who, in consideration thereof, promised to pay $50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the hand-bill offering the reward was not published until after the rescue of the horse and his delivery to the defendant. The plaintiff unsuccessfully demurred to each of these paragraphs, and refusing to reply the defendant had judgment. * * *

3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer therefore did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doc-

*Part of the opinion is omitted.

trine, constituting an exception to the general rule. In Williams v. Carwardine, 4 Barn. & Adolph. 621, there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the King's Bench then present, Denman, C. J., and Littledale, Parke and Patteson, JJ., that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the second paragraph of the answer.[11]

TAFT et al. v. HYATT et al.

(Supreme Court of Kansas, 1919. 105 Kan. 35, 180 Pac. 213.)

Suit by B. L. Taft and others against William S. Hyatt and others in nature of interpleader to determine the right to a reward. From a decree for defendant named, the remaining defendants appeal. Reversed and remanded, with directions.

PORTER, J.[12] The controversy is between rival claimants for a reward offered for the apprehension of a criminal. The suit is an eq-

[11] The following cases held the offerer bound to pay the reward to one who rendered part or all of the service without knowledge of the offer: Gibbons v. Proctor, 64 L. T. 594 (1892); Neville v. Kelly, 12 C. B. (N. S.) 740 (1862); Auditor v. Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728 (1873); Coffey v. Com., 18 Ky. Law Rep. 646, 37 S. W. 575 (1896); Russell v. Stewart, 44 Vt. 170 (1872); Stone v. Dysert, 20 Kan. 123 (1878), plaintiff knew that a reward had been offered, but not by whom or on what terms; Cummings v. Gann, 52 Pa. 484 (1866); Smith v. State, 38 Nev. 477, 151 Pac. 512, L. R. A. 1916A, 1276 (1915); Eagle v. Smith, 4 Houst. (Del.) 293 (1871); Sullivan v. Phillips, 178 Ind. 164, 98 N. E. 868, Ann. Cas. 1915B, 670 (1912); Drummond v. U. S., 35 Ct. Cl. 356 (1900). See 26 Yale L. Jour. 169, 182; 29 Harv. L. Rev. 221; 1 Cornell L. Q. 92.

[12] Parts of the opinion are omitted.

uitable one instituted by the persons who offered the reward, and who alleged that they were threatened with litigation by different parties claiming it, that some one or more of the defendants are entitled to the money, which the plaintiffs brought into court, and asked that defendants be required to set up their respective claims.

On May 16, 1917, it became known in the city of Parsons that Agnes Smith, the wife of Dr. Asa Smith, had been assaulted, and that a negro physician by the name of Robert E. Smith was suspected of the crime. (The victim of the assault died, and Robert E. Smith was charged with and convicted of murder in the first degree. The judgment was affirmed. State v. Smith, 103 Kan. 148, 174 Pac. 551.)

The plaintiffs are Dr. Asa Smith, husband of the murdered woman, and certain individuals who are members of the A. H. T. A. They caused to be published and circulated an offer of $750 reward "for the arrest or information that will lead to" the arrest of the accused.

As to the claims of the defendant Wm. S. Hyatt, the findings of fact are, in substance, these: Hyatt is an attorney at law with an office in the city of Parsons. Another attorney notified him that R. E. Smith desired to see him, and told him where Smith could be found. During the afternoon of May 17, 1917, Hyatt went to the hiding place of the accused in the city of Parsons in compliance with the directions that had been given him, and there found Smith. The two talked together for an hour or more, but were unable to reach an agreement as to the employment of Hyatt to defend Smith. There is a finding that the relation of attorney and client never existed between them at any time, and that Hyatt came away without being employed. Shortly before he went to see Smith, Hyatt learned that the reward had been offered, and after returning from his interview, he went to the office of the county attorney and told him where Smith could be found, and an arrangement was made to have the deputy sheriff go to the place for the purpose of arresting Smith. The deputy sheriff was called, and with Hyatt drove to the place where Smith had been left by Hyatt earlier in the afternoon, when they discovered that Smith was not there, but had been taken away by the other defendants. The court further found that Hyatt gave the first information to the proper officers [13] which would lead to the arrest of Smith after the offer of the reward had been made, and that the information was given more than an hour previous to the time Smith was removed by the other defendants from the house where he had been hiding, and that Hyatt's purpose in giving the information to the county attorney and the deputy sheriff was to obtain the reward offered by the plaintiffs; that the fact that Smith was not arrested from the information given by Hyatt was

[13] Giving the information to a disinterested person in general conversation is no acceptance. Lockhart v. Barnard (Exch.) 14 M. & W. 674 (1845).

due to no fault or neglect of Hyatt. As a conclusion of law the court held that Hyatt was entitled to the reward.

The findings with reference to the other claimants are that Clarence Glass and Charles C. Edwards went to Thomas A. Murry, the chief of police of the city of Parsons, shortly after 6 o'clock on the afternoon of May 17, 1917, and requested Murry to go in a closed cab to a certain place in the city and take charge of Smith and deliver him to the jail at Oswego. Murry complied with the request, and went to the place directed, where he found the accused, together with the defendants Glass, Edwards, Tyson, Cook, and Ransom. All of them got into the cab with the chief of police, and the party went to Oswego, where Smith was delivered to the sheriff of Labette county. Before leaving Parsons, and just as the party got into the cab with the chief of police, the latter told the accused to consider himself under arrest, and informed him of the intention to deliver him at the county jail at Oswego. The evidence shows that the defendants who secured the services of the chief of police in taking the accused to Oswego were all members of the Lodge of Colored Masons, to which the accused belonged. The court finds that Smith expressed to them his fears of mob violence, and it was agreed that he would give himself into their custody, and they agreed to protect him; that none of these defendants had heard of the offer of reward at the time they called Murry, the chief of police, to their assistance. Murry testified that he had heard of the reward before he arrested Smith, and that the reason he placed him under arrest and took him to Oswego was partly to earn the reward and partly to protect Smith from mob violence. The court finds that it was the duty of Murry, as chief of police, to make arrest of fugitives from justice, that at the time of receiving Smith into custody Murry was not armed with a warrant or other process for the arrest, and that Smith had not committed any offense within the view of the chief of police.

The court found in favor of Hyatt and against the other defendants. The costs were directed to be paid out of the fund, and the balance of the $750 was ordered paid to Hyatt. The other defendants bring the case here for review. * * *

It is urged that it would be unconscionable to permit an attorney, under such circumstances, to avail himself of an offer of reward; that to do so would sanction conduct highly unprofessional in an attorney, and would permit him to obtain from one who occupies the position of a prospective client information which he uses to the other's prejudice and to gain a pecuniary benefit to himself. Without passing upon the question of the propriety of the conduct of an attorney in attempting to obtain a pecuniary advantage to the prejudice of an accused person under such circumstances, we think that Hyatt is not entitled to recover, because, from his own statement and the undisputed facts in evidence, his efforts to secure the apprehension of the accused were unavailing. The information which he gave to the

officers did not result, even remotely, in bringing about the apprehension of the accused. The court finds that the information Hyatt gave would lead to the arrest of the guilty person if it had been acted upon promptly, and the fact that it did not bring about this result was through no fault of Hyatt's. But this finding does not help Hyatt's case. It may have been that the officers to whom he confided his information were too slow. Whatever the reason, before any action was taken by them which resulted in apprehending the accused, the latter was on his way to the county jail in the custody of another officer, having, with the aid of his friends, surrendered himself. So far as the apprehension of the guilty person was concerned, Hyatt might as well have kept his information to himself.

The defendants who admit that they had not heard of the offer of the reward until after the accused had been surrendered to the sheriff at Oswego are not entitled to recover. A private offer of reward for the apprehension of a fugitive from justice or of a person suspected or charged with an offense stands, as a general rule, upon a different footing from a statutory offer, or one made by virtue of a statute. 34 Cyc. 1752, 1753, and cases cited in notes. The offer of a private individual is a mere proposal, which, when accepted, becomes a contract. Until it is accepted by some person who upon the strength of the offer takes some steps to earn the reward, there is no contract. Van Vlissingen v. Manning, 105 Ill. App. 255. There must be a meeting of the minds of the parties—on the one side, of the person who makes the offer; on the other, of the person who performs the service. Where a claimant for the reward was not aware that it had been offered until after he had performed his services, there has been no meeting of minds which would constitute a contract. Besides, the undisputed facts with respect to those defendants who called the chief of police to assist them in taking the accused to Oswego are that these claimants were simply assisting the accused in surrendering himself. Their testimony is that what they did was for the purpose of protecting him from mob violence. They had never heard of the reward, and, of course, are not entitled to any part of it.[14]

[14] In accord: Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791 (1868); Vitty v. Eley, 51 App. Div. 44, 64 N. Y. Supp. 397 (1900); Sheldon v. George, 132 App. Div. 470, 116 N. Y. Supp. 969 (1909); Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654 (1873); Williams v. West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278 (1901); Mayor, etc., of City of Hoboken v. Bailey, 36 N. J. Law, 490 (1873); Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296 (1845); Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65 (1880); Fidelity & Deposit Co. of Maryland v. Messer, 112 Miss. 267, 72 South. 1004 (1916); Chicago & A. R. Co. v. Sebring, 16 Ill. App. 181 (1885); Board of Trustees of Police Pension Fund of South Bend, Ind., v. Kentucky Ticket Protective Bureau, 175 Ill. App. 464 (1912); Couch v. State, 14 N. D. 361, 103 N. W. 942 (1905); Smith v. Vernon, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324 (1905); Broadnax v. Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057 (1907).

As to whether identical offers crossing in the mail make a contract, see Tinn v. Hoffmann & Co., post, p. 155.

Thomas A. Murry cannot recover, because, as chief of police of the city of Parsons, it was his duty to make an arrest of fugitives from justice or persons charged with or suspected of crimes. The fact that he was not armed with a warrant or other process for the arrest of the accused is immaterial, because there was reasonable ground for believing that Smith had committed the particular offense charged against him, and his subsequent conviction established his actual guilt. * * *

It has been repeatedly held that public policy does not permit an officer to claim a reward for merely doing his duty.[15] * * *

Inasmuch as none of the defendants are entitled to recover any part of the reward, we think it would be a harsh rule to say that the plaintiffs are estopped from claiming it because of the admissions in their petition. In our view of the matter, justice requires that the trial court be directed to render judgment against all of the defendants, and that the plaintiffs, after paying the costs of the proceeding, be entitled to the return of the money.[16]

The judgment is reversed, and the cause remanded, with directions to carry this order into effect. All the Justices concurring.[17]

15 The court cited authorities on this point. For cases herein, see post, p. 381.

16 The discussion of the reasons for giving the plaintiff a judgment that he did not ask in his bill of interpleader is mostly omitted.

17 In a number of cases, similar in many respects to the principal case, although not in all, the reward was apportioned by the court among several claimants, who had not acted jointly, but whose united efforts caused the result desired by the offerer. Some of these were interpleader suits brought by the offerer. Bloomfield v. Maloney, 176 Mich. 548, 142 N. W. 785, Ann. Cas. 1915B, 662 (1913); Fargo v. Arthur, 43 How. Prac. (N. Y.) 193 (1872); Rochelle v. Pacific Exp. Co., 56 Tex. Civ. App. 142, 120 S. W. 543 (1909). Others were suits brought by one or more claimants. Whitcher v. State, 68 N. H. 605, 34 Atl. 745 (1894); Goldsborough v. Cradie, 28 Md. 477 (1867); Chambers v. Ogle, 117 Ark. 242, 174 S. W. 532 (1915); Lancaster v. Walsh, 4 M. & W. 14 (1835).

Where a reward is offered for lost property, it has been held that one who returns a part is entitled pro tanto. Deslondes v. Wilson, 5 La. 397, 25 Am. Dec. 187 (1833); Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142 (1810); Hawk v. Marion County, 48 Iowa, 472 (1878).

Apportionment was refused where a reward was offered for two persons and only one was captured. Blain v. Pacific Express Co., 69 Tex. 74, 6 S. W. 679 (1887).

A reasonable construction must be given to the published offer. A reward for "arrest and conviction" can be earned without personally arresting the criminal. Doing acts that are the substantial cause of the arrest and conviction is enough. Elkins v. Board of Com'rs of Wyandotte County, 91 Kan. 518, 138 Pac. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915D, 257 (1914); Id., 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662 (1912); Stone v. Dysert, 20 Kan. 123 (1878); Hall v. State, 102 Wash. 519, 173 Pac. 429 (1918); Choice v. Dallas, infra. Cf. Shuey v. United States, post, p. 178. McClaughry v. King, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216, 8 Ann. Cas. 856 (1906).

CHOICE et al. v. CITY OF DALLAS.

(Court of Civil Appeals of Texas, 1919. 210 S. W. 753.)

Action by Mrs. M. P. Choice against the City of Dallas and A. E. Firmin and wife, with cross-bill by defendant Firmin and wife. General and special exceptions urged by defendant city to plaintiff's petition and to the cross-bill sustained, and plaintiff and Firmin and wife appeal. Reversed and remanded.

BOYCE, J.[18] This suit was brought by appellant Mrs. M. B. Choice against the city of Dallas to recover a reward offered by the city "for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas." A. E. Firmin and wife, Mrs. Nellie Firmin, were made defendants on allegations that they were claiming the reward. These parties appeared, and by cross-bill sought to recover the reward. The court sustained general and special exceptions urged by the city to the plaintiff's petition and the cross-bill of Mrs. Firmin, and this appeal complains of this action.

Plaintiff alleged in her petition that on January 27, 1917, her residence in the city of Dallas was destroyed by fire set by one Mary Wright, who was by such act guilty of arson; that the plaintiff secured and furnished information and testimony that led to the arrest and conviction of the said Mary Wright of said crime; that at such time there was in force in the city of Dallas an ordinance duly and legally passed at a time long prior to the occurrence of the fire, as follows:

"Arson Reward."

"Whereas, under provisions of law, the state fire insurance commission has provided that, where any city or town maintains a standing reward of a sum equal to $1.00 for each one hundred of population for the arrest and conviction of any one guilty of arson, in that event the insurance key rate of such city or town is entitled to credit of 2%; and

"Whereas, the crime of arson results in loss of property, causes an increase in insurance premiums, and frequently results in the loss of life, and is one of the most serious crimes against society; and

"Whereas, the city of Dallas has now a population of 130,000; and

"Whereas, the people of Dallas, through their city government, are preparing to apply to the state insurance commission for a substantial reduction in our insurance key rate:

"Now, therefore, be it resolved by the board of commissioners that the city of Dallas hereby offers a standing reward in the sum of $1,300.00 for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas, said reward, however, not to apply to the fire marshal, nor any other officer, city, county or state, who makes such arrest in the discharge of his official duties.

[18] Parts of opinion are omitted.

"Be it further resolved that the city fire marshal be, and that he is hereby directed to have prepared and to post placards in all public buildings in the city, showing that such reward has been offered as above described."

It is further alleged that notices of such reward were posted in accordance with the terms of such ordinance, and that by the passage thereof the city did secure the reduction in the key rate of insurance for said city, as referred to in the ordinance; that the plaintiff, with knowledge of, and acting under, said ordinance, secured and furnished such information as caused the arrest and conviction of said Mary Wright. Mrs. Firmin, joined by her husband, alleged in her cross-petition that she, and not the plaintiff, discovered the facts and furnished the information which caused the arrest and conviction of the said Mary Wright, and that she was entitled to the reward. This cross-petition contained no allegations that the cross-petitioner had any knowledge of the offer of reward or acted thereunder.

The demurrers to these pleadings of the plaintiff and cross-petitioner were sustained on three grounds: (1) That the ordinance offering said reward was void as not being within the powers conferred upon the city by its charter;[19] (2) that it did not appear that either of said claimants actually arrested the said Mary Wright; (3) that it did not appear from the cross-petition of Mrs. Firmin that she had knowledge of the offer of reward and was induced to act by reason thereof. We will consider these in the order stated. * * *

The offer of a reward for "arrest and conviction" cannot be taken literally, as the conviction at least requires the action of the courts of the state. So it has been generally held that the terms of such an offer are complied with when one acting thereunder secures and furnishes information necessary to and which results in arrest and conviction by the properly constituted authorities, and we think this is the rule that should be applied in this case. Tobin v. McComb, 156 S. W. 237; Haskell v. Davidson, 91 Me. 488, 40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254; Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012; Elkins v. Board of Wyandotte County, 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662; 34 Cyc. 1747.[20]

It is settled in this state that the recovery of rewards offered by individuals is governed by the principles of the law of contract, and that before recovery can be had it must appear that the party claiming the reward knew of and acted upon the offer when the services for the rendition of which the reward is claimed were rendered. Broadnax v. Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057. The court in that case, however, suggests this distinction, which appellant Mrs. Firmin seeks to apply in this case:

"While we have seen no such distinction suggested, it may well be

[19] The city was held to have power. This part of the opinion is omitted.

[20] Cf. Shuey v. United States, post, p. 178;

supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract."

A suggestion of such a distinction was also made in the cases of Clinton County v. Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780, 1 Ann. Cas. 282, and Drummond v. United States (U. S.) 35 Ct. Cl. 372. The only case we have found in which the distinction was actually applied is that of Smith v. State, 38 Nev. 477, 151 Pac. 512, L. R. A. 1916A, 1276. In that case the Governor of the state of Nevada, acting under the provisions of an act of the Legislature, offered a reward for the arrest and conviction of the murderers of certain ranchmen, and the plaintiffs, who claimed the reward, were not aware of the fact that it had been offered when they did the acts on account of which the reward was claimed. The case of Broadnax v. Ledbetter, supra, was referred to in the opinion, and the above paragraph from the decision was quoted with approval, and it was concluded by the court that in cases of this kind it was not contemplated by the Legislature that any contractual relation was necessary; "that the right to the reward follows by operation of law if a compliance with the provisions of the statute has been shown."

It seems that a general reward offered by the government is regarded by these authorities somewhat in the nature of a bounty. While an ordinance is not a law, in one sense of the word it is a local law, emanating from legislative authority and operative within its limited sphere as effectively as a general law of the sovereignty. Words and Phrases, vol. 6, p. 5024; Second Series, vol. 3, p. 77. Following these authorities, we hold that it was not necessary for the cross-petitioner to allege knowledge of the existence of the reward at the time she took action to secure the arrest and conviction of Mary Wright. * * *

We are of the opinion that the court erred in sustaining the exceptions to the petition and cross-petition, and the case will be reversed and remanded.[21]

[21] The first person giving the required information is entitled to the whole reward. United States v. Simons (D. C.) 7 Fed. 709 (1881); Lancaster v. Walsh (Exch.) 4 M. & W. 16 (1838).

In Lockhart v. Barnard (Exch.) 14 M. & W. 674 (1845) Parke, B., said: "According to the true construction of the advertisement, the information must be given, with a view to its being acted on, either to the person offering the reward, or his agent, or some person having authority by law to apprehend the criminal." A mere statement to a disinterested third person in general conversation was no acceptance.

SECTION 3.—ACCEPTANCE BY POST

ADAMS v. LINDSELL.

(In the King's Bench, 1818. 1 Barn. & Ald. 681.)

Action for non-delivery of wool according to agreement. At the trial at the last Lent assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday, September 2, 1817, written the following letter to the plaintiffs, who were woolen manufacturers residing in Bromsgrove, Worcestershire: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p. m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances the learned judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained, and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties.

Dauncey, Puller & Richardson showed cause. They contended that at the moment of the acceptance of the offer of the defendants by the plaintiffs the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis & Campbell in support of the rule. They relied on Payne v. Cave [3 T. R. 148], and more particularly on Cooke v. Oxley [Id. 653]. In that case Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the con-

tract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons.

But THE COURT said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

Rule discharged.

TAYLOE v. MERCHANTS' FIRE INS. CO. OF BALTIMORE.

(Supreme Court of the United States, 1850. 9 How. 390, 13 L. Ed. 187.)

Mr. Justice NELSON.[22] This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the Court below was this: William H. Tayloe, of Richmond County, Va., applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of $8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of November 25th, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at 70 cents on the $100 the premium amounting to the sum of $56. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following, and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to

[22] The statement of facts and part of the opinion have been omitted.

Tayloe, under date of December 2d, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the mean time, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the Court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The nonpayment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice, and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company and has received their assent, for if the contract is incomplete until notice of the acceptance, till then the company may retract

the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion, that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the

offer by the applicant, on December 21st, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company. * * *

Reversed and remanded.

HOUSEHOLD FIRE & CARRIAGE ACC. INS. CO., Limited, v. GRANT.

(In the Court of Appeal, 1879. 4 Exch. Div. 216.)

Action to recover £94. 15s., being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares, dated the 30th of September 1874.

At the trial before Lopes J., during the Middlesex sittings, 1878, the following facts were proved: In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiff's company,

which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 79s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company, on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert street, Swansea, Glamorganshire. His name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application but, the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of 2½ per cent. was declared on the shares, and in February, 1876, a further dividend at the same rate. These dividends, amounting altogether to the sum of 5s. were also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay, on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury: (1) Was the letter of allotment of the 20th of October in fact posted? (2) Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative. The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of Dunlop v. Higgins, 1 H. L. Cas. 381.

The defendant appealed.

THESIGER, L. J.[23] In this case the defendant made an application for shares in the plaintiffs' company, under circumstances from which we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances, Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is Dunlop v. Higgins, 1 H. L. Cas. 381.[24] It is true that Lord Cottenham might have decided that case

[23] Opinion of Baggallay, L. J., omitted.

[24] In Dunlop v. Higgins, 1 H. L. Cas. 381 (1848), Dunlop wrote from Glasgow offering to sell 2,000 tons of pig iron. Higgins mailed an acceptance at Liverpool on January 30, saying: "We have accepted your offer uncondition-

without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, the court is as much bound to apply that principle constituting as it did a ratio decidendi, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1 H. L. Cas., at page 399): "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered. My view of the effect of Dunlop v. Higgins, 1 H. L. Cas. 381, is that taken by James, L. J., in Harris' Case, L. R. 7 Ch. 587. There, at page 592, he speaks of the former case as "a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment." He adds, the Lord Chancellor "arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it." Mellish, J., also took the same view. He says, at page 595: "In Dunlop v. Higgins, 1 H. L. Cas. 381, the question was directly raised whether the law was truly expounded in the case of Adams v. Lindsell, 1 Barn. & Ald. 681. The house of lords approved of the ruling of that case. The Lord Chancellor Cottenham said, in the course of his judgment, that in the case of a bill of exchange notice of dishonour, given by putting a letter inte the post at the right time, had been held quite sufficient whether that letter was delivered or not; and he referred to Stocken v. Collin, 7 Mees. & W. 515, on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case

ally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill." This letter was misdated "January 31," and because of delay in the mails it was not received in Glasgow until February 1. An acceptance on January 31 would in fact have been too late. It was held that a contract was made.

of Adams v. Lindsell, 1 Barn. & Ald. 681, and quoted the observation of Lord Ellenborough, C. J. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post." Leaving Harris' Case, L. R. 7 Ch. 587, for the moment, I turn to Duncan v. Topham, 8 C. B. 225, in which Cresswell, J., told the jury that if the letter accepting the contract was put into the post-office and lost by the negligence of the post-office authorities, the contract would nevertheless be complete; and both he and Wilde, C. J., and Maule, J., seem to have understood this ruling to have been in accordance with Lord Cottenham's opinion in Dunlop v. Higgins, 1 H. L. Cas. 381. That opinion therefore appears to me to constitute an authority directly binding upon us. But if Dunlop v. Higgins were out of the way, Harris' Case, L. R. 7 Ch. 587, would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retraction of the offer being of effect after the acceptance has been posted. Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of Adams v. Lindsell, 1 B. & Ald. 681, which is recognized authority upon this branch of the law. But, on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then, are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, and it was so considered by Lord Romilly in Hebb's Case, L. R. 4 Eq. at page 12, when in the course of his judgment he said: "Dunlop v. Higgins, 1 H. L. C. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." Alderson, B., also in Stocken v. Collin, 7 M. & W. at page 516, a case of notice of dishonor, and the case referred to by Lord Cottenham, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow that, as soon

as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? This difficulty was attempted to be got over in the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, which was a case directly on all fours with the present and in which Kelly, C. B. (Id., at page 115), is reported to have said: "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter. And to this effect is Potter v. Sanders, 6 Hare, 1. And hence perhaps the mistake has arisen that the contract is binding upon both parties from the time when the letter is written and put into the post, although never delivered; whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified." But with deference I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or, to put the question in the form in which it is put by Mellish, L. J., in Harris' Case, 7 Ch. App. 587, at page 596, how there can be any relation back in a case of this kind as there may be in bankruptcy. If, as the lord justice said, the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. The principle indeed laid down in Harris' Case, as well as in Dunlop v. Higgins, 1 H. L. Cas. 381, can really not be reconciled with the decision in Telegraph Co. v. Colson, L. R. 6 Exch. 108. James, L. J., in the passage I have already quoted,—Harris' Case, L. R. 7 Ch., 592,—affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to Hebb's Case, L. R. 4 Eq. 9. There a distinction was taken by the master of the rolls that the company chose to send the letter of allotment to their own agent, who was not authorized by the applicant for shares to receive it on his behalf, and who never delivered it; but he at the same time assumed that if, instead of sending it through an authorized agent, they had sent it through the post-office, the applicant would have been bound although the letter had never been delivered. Mellish, L. J., really goes as far, and states forcibly the reasons in favour of this view. The mere suggestion thrown out at the close of his judgment, at page 597, when stopping short of actually overruling the decision in Telegraph Co. v. Colson, that although a contract is complete when the letter accepting an offer is posted,

yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says (L. R. 7 Ch. at page 596), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in Brogden v. Directors of Metropolitan Ry. Co., 2 App. Cas. 666, 691, "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in Tayloe v. Merchants' Fire Insurance Co., 9 How. 390, more consistent with the acts and declarations of the par-

ties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.

BRAMWELL, L. J. The question in this case is not whether the post-office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him gives the right to communicate in an ordinary manner, and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C. J. (Y. B. 17 Edw. IV, 2, post, p. 60), and Lord Blackburn: Brogden v. Metropolitan Ry. Co., 2 App. Cas. at page 692.

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal—i. e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post—e. g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he had communicated to me his acceptance of my offer, but not his notice to quit. Suppose a man has paid his tailor by check or bank-note, and posts a letter containing a check or bank-note to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and bank-notes to his banker by post, and posts a letter containing checks and bank-notes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C. J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer

because he had posted a letter. Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post-office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding.[25] It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that if the proposer said, "Unless I hear from you by return of post the offer is withdrawn," that the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in the Times, before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the 14th, though it would and did not reach the offerer till the 15th. Of course there

25 By the American post office regulations a posted letter can be recalled by the sender. By the French law a telegram anticipating the letter of acceptance would render the latter inoperative. See note to Hallock v. Commercial Ins. Co., post, p. 72.

may have been something in that case not mentioned in the report. But as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on June 30th will suffice, though it does not reach till July 31st; but that case does not affect this. There the letter reached, here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as, if the words are "unless I hear from you by return of post," etc., it is necessary the letter should reach him, but "let me know by return of post," it is not; or if in that case it is, yet it is not where there is an offer without those words. Lord Blackburn says that Mellish, L. J., accurately stated that where it is expressly or impliedly stated in the offer, "you may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree; and the same thing is true of any other mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, give your answer to my servant the bearer. Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letter had reached. As to the authorities, I shall not re-examine those in existence before the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108. But I wish to say a word as to Dunlop v. Higgins, 1 H. L. C. 381; the whole difficulty has arisen from some expressions in that case. Mr. Finlay's argument and reference to the case when originally in the Scotch Court has satisfied me that Dunlop v. Higgins, 1 H. L. C. 381, decided nothing contrary to the defendant in this case. Mellish, L. J., in Harris's Case, L. R. 7 Ch. 596, says: "That case is not a direct decision on the point before us." It is true, he adds, that he has great difficulty in reconciling the case of the British and American Telegraph Co. v. Colson, L. R. 6 Ex. 108, with Dunlop v. Higgins. I do not share that difficulty. I think they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the Lord Justice points out in Harris's Case might happen if the law were otherwise when a letter is posted, would equally happen where it is sent otherwise than by the post. He adds that the question before the Lords in Dunlop v. Higgins was whether the ruling of the Lord Justice Clerk was correct, and they held it was. Now Mr. Finlay showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in the British and American Telegraph Co. v. Colson. Since the last case there have been two before Vice-Chancellor Malins, in the earlier of which he thought it "reasonable," and

followed it. In the other, because the Lord Justices had in Harris's Case thrown cold water on it, he appears to have thought it not reasonable. He says, suppose the sender of a letter says, "I make you an offer, let me have an answer by return of post." By return the letter is posted, and A. has done all that the person making the offer requests. Now that is precisely what he has not done. He has not let him "have an answer." He adds there is no default on his part. Why should he be the only person to suffer? Very true. But there is no default in the other, and why should he be the only person to suffer? The only other authority is the expression of opinion by Lopes, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditioned on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me." Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication?

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in Dunlop v. Higgins, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C.

J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before—viz., a communication to affect a man must be a communication—i. e., must reach him.

Judgment affirmed.[26]

LEWIS v. BROWNING.

(Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 173.)

Action for breach of covenants in a lease. The question was whether the terms of a proposed new lease had been accepted by defendant. The negotiations with reference to the new lease were carried on by letter and telegraph. The facts sufficiently appear in the opinion of the court.

GRAY, C. J. In M'Culloch v. Insurance Co., 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the

[26] The American cases are now uniformly agreed that, if the acceptor is expressly or impliedly invited to use the post, the acceptance is complete when the letter of acceptance is mailed. Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262 (1830); McClintock v. South Penn Oil Co., 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785 (1892); Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. Law, 476 (1878); Stephen M. Weld & Co. v. Victory Mfg. Co. (D. C.) 205 Fed. 770 (1913); Wester v. Casein Co. of America, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377 (1912); Vassar v. Camp, 11 N. Y. 441 (1854); Williams v. Burdick, 63 Or. 41, 125 Pac. 844, 126 Pac. 603 (1912); Watson v. Paschall, 93 S. C. 537, 77 S. E. 291 (1913); Kenedy Mercantile Co. v. Western Union Tel. Co. (Tex. Civ. App.) 167 S. W. 1094 (1914); Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752 (1884); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875), acceptance valid when put in offerer's private letter box.

To be so operative, the acceptance must be properly stamped and addressed. Potts v. Whitehead, 20 N. J. Eq. 55 (1869).

The fact that under the postal regulations a letter may be reclaimed by the sender does not operate to change this rule. McDonald v. Chemical Nat. Bank, 174 U. S. 610, 19 Sup. Ct. 787, 43 L. Ed. 1106 (1899).

The contract is regarded as made in the state where the letter of acceptance is mailed. Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849 (1903); Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90 (1903), acceptance by telephone; Cowan v. O'Connor, 20 Q. B. D. 640 (1888). See, also, Newcomb v. De Roos, 2 El. & El. 271 (1859); Taylor v. Jones, L. R. 1 C. P. 87 (1875).

A letter is not mailed by giving it to a postman who is not an official collector of mail. In re London & Northern Bank, [1900] 1 Ch. 220.

The French courts appear to hold as did the Massachusetts court in McCulloch v. Eagle Ins. Co., 1 Pick. 278 (1822), that there is no contract until the offerer learns of the acceptance. S—— v. F—, Merlin, Rép. de Jur. (1913), tit. Vente, 1, art. III, No. XI bis, printed in Langdell's Cases on Contracts; In re Laura et Cie., Journal du Palais (1910) II, 6; In re Romillieux, Journal du Palais (1910) II, 106.

Where in an already completed contract a power of revocation by notice is reserved, the notice is not operative until it is actually received. Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147 (1891); Wheeler v. McStay, 160 Iowa, 745, 141 N. W. 404, L. R. A. 1915B, 181 (1913); Fritz v. Pennsylvania Fire Ins. Co., 85 N. J. Law, 171, 88 Atl. 1065, 50 L. R. A. (N. S.) 35 (1913); Hoban v. Hudson, post, p. 203. And see note in 50 L. R. A. (N. S.) 35.

letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langd. Cont. (2d Ed.) 989–996. In England, New York and New Jersey, and in the supreme court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post office duly addressed. Adams v. Lindsell, 1 Barn. & Ald. 681; Dunlop v. Higgins, 1 H. L. Cas. 381, 398–400; Newcomb v. De Roos, 2 El. & El, 271; Harris' Case, L. R. 7 Ch. 587; Lord Blackburn, in Brogden v. Railway, 2 App. Cas. 666, 691, 692; Insurance Co. v. Grant, 4 Exch. Div. 216; Lindley, J., in Byrne v. Van Tienhoven, 5 C. P. Div. 344, 348; 2 Kent, Comm. 477, note c; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; Hallock v. Insurance Co., 26 N. J. Law, 268, 27 N. J. Law, 645, 72 Am. Dec. 379; Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. Thesiger, L. J., in Insurance Co. v. Grant, 4 Exch. Div. 223; Pol. Cont. (2d Ed.) 17; Leake. Cont. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says, "If you agree to this plan, and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'Yes' or 'No.' If 'No,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'No.'" Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.[27]

[27] See, also, Postal Tel. Cable Co. v. Louisville Cotton Seed Oil Co., 140 Ky. 506, 131 S. W. 277 (1910).

TREVOR et al. v. WOOD et al.

(Court of Appeals of New York, 1867. 36 N. Y. 307, 93 Am. Dec. 511.)

Appeal from a judgment of the Supreme Court rendered at General Term, in the first district, reversing a judgment entered upon the report of Hon. William Mitchell, referee, and ordering a new trial before the same referee.

The appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The appellants are dealers in bullion in New York, and the respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

Or January 30th, 1860, the appellants telegraphed from New York to the respondents, at New Orleans, asking at what price they would sell 100,000 Mexican dollars. On the 31st of the same month the respondents answered that they would deliver 50,000 at 7¼; and on the same day the appellants telegraphed from New York to the defendants, at New Orleans, as follows:

"To John Wood & Co.:

"Your offer, 50,000 Mexicans at 7¼, accepted; send more if you can. Trevor & Colgate."

At the same time the appellants sent by mail to the respondents a letter acknowledging the receipt of the respondents' telegram, and copying the appellants' telegraphic answer. On the same day the respondents had also sent by mail a letter to the appellants, copying respondents' telegram of that date. On the next day (February 1st, 1860) the appellants again telegraphed to the respondents as follows:

"To John Wood & Co.:

"Accepted by telegraph yesterday, your offer for 50,000 Mexicans; send as many more, same price. Reply.

"Trevor & Colgate."

This telegram, as well as that of January 31st, from the appellants, did not reach the respondents until 10 a. m. on February 4th, 1860, in consequence of some derangement in a part of the line used by the appellants, but which was not known to the appellants until February 4th, when the telegraph company reported the line down. On February 3d the respondents telegraphed to the appellants as follows: "No answer to our despatch—dollars are sold." And on the same day they wrote by mail to the same effect. The appellants received this despatch on the same day, and answered it on the same day as follows:

"To John Wood & Co.:

"Your offer was accepted on receipt."

And again the next day:

"The dollars must come, or we will hold you responsible. Reply.

"Trevor & Colgate."

And again on February 4th insisting on the dollars being sent "by this or next steamer," and saying, "Don't fail to send the dollars at any price."

On the same February 4th the respondents telegraphed to appellants: "No dollars to be had. We may ship by steamer twelfth, as you propose, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them. The referee found for the plaintiff $219.33.

SCRUGHAM, J.[28] The offer of the respondents was made on January 31st, and they did not attempt to revoke it until February 3d. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents.

The case of Mactier v. Frith, in the late Court of Errors (6 Wend. 103, 21 Am. Dec. 262) settles this precise question, and was so regarded by this court in Vassar v. Camp, 11 N. Y. 441, where it is said that the principle established in the case of Mactier v. Frith was that it was only necessary "that there should be concurrence of the minds of the parties upon a distinct proposition manifested by an overt act; and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation and consummated the contract from the time it was sent."

There is nothing in either the case of Mactier v. Frith nor in that of Vassar v. Camp, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to which it is sent, and thus marking that aggregatio mentium which is necessary to constitute a contract. * * *

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately despatched from New York by order of the appellants. It cannot, therefore, be said

[28] Parts of the opinion are omitted.

that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches. * * *

Judgment reversed.[29]

HENTHORN v. FRASER.

(In the Court of Appeal, 1892. L. R. [1892] 2 Ch. 27.)

In 1891 the plaintiff was desirous of purchasing from the Huskisson Benefit Building Society certain houses in Flamank Street, Birkenhead. In May he, at the office of the society in Chapel Street, Liverpool, signed a memorandum drawn up by the secretary, offering £600 for the property, which offer was declined by the directors; and on July 1st he made in the same way an offer of £700, which was also declined. On July 7th he again called at the office, and the secretary verbally offered to sell to him for £750. This offer was reduced into writing, and was as follows:

"I hereby give you the refusal of the Flamank Street property at £750 for fourteen days."

The secretary, after signing this, handed it to the plaintiff, who took it away with him for consideration.

On the morning of the 8th another person called at the office and offered £760 for the property, which was accepted, and a contract for purchase signed, subject to a condition for avoiding it if the

[29] If the offer is by telegraph, the acceptance is complete when the telegram of acceptance is filed. Minnesota Linseed Oil Co. v. Collier White Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635 (1876); Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387 (1897), disregarding McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278 (1822); Haas v. Myers, 111 Ill. 421, 53 Am. Rep. 634 (1884). Whether the use of the telegraph is impliedly authorized is a question of fact. Perry v. Mount Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902 (1886).

In Farmers' Produce Co. v. McAlester Storage & Commission Co., 48 Okl. 488, 150 Pac. 483, L. R. A. 1916A, 1297 (1915), the offer was by telegram from Wisconsin and the acceptance was by mail from Oklahoma on the same day. A few hours after mailing the acceptance a telegram of revocation of the offer was received. It was held that there was a contract; the court believing that the post was a contemplated means of communication.

society found that they could not withdraw from the offer to the plaintiff.

Between 12 and 1 o'clock on that day the secretary posted to the plaintiff, who resided in Birkenhead, the following letter:

"Please take notice that my letter to you of the 7th instant, giving you the option of purchasing the property, Flamank Street, Birkenhead, for £750, in fourteen days, is withdrawn, and the offer cancelled."

This letter, it appeared, was delivered at the plaintiff's address between 5 and 6 in the evening, but, as he was out, did not reach his hands till about 8 o'clock.

On the same July 8th the plaintiff's solicitor, by the plaintiff's direction, wrote to the secretary as follows:

"I am instructed by Mr. James Henthorn to write you, and accept your offer to sell the property, 1 to 17 Flamank Street, Birkenhead, at the price of £750. Kindly have contract prepared and forwarded to me."

This letter was addressed to the society's office, and was posted in Birkenhead at 3:50 p. m., was delivered at 8:30 p. m. after the closing of the office, and was received by the secretary on the following morning. The secretary replied, stating that the society's offer had been withdrawn.

The plaintiff brought this action in the Court of the County Palatine for specific performance. The Vice-Chancellor dismissed the action, and the plaintiff appealed.

Lord Herschell. [30] This is an action for the specific performance of a contract to sell to the plaintiff certain house property situate in Flamank Street, Birkenhead. The action was tried before the Vice-Chancellor of the County Palatine of Lancashire, who gave judgment for the defendants. * * *

If the acceptance by the plaintiff of the defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. This seems to me to be in accordance with the reasoning of the Court of King's Bench in the case of Adams v. Lindsell [1 B. & Ald. 681], which was approved by the Lord Chancellor in Dunlop v. Higgins [1 H. L. C. 381, 399], and also with the opinion of Lord Justice Mellish in Harris's Case [L. R. 7 Ch. 587]. The very point was decided in the case of Byrne v. Van Tienhoven [5 C. P. D. 344] by Lord Justice Lindley, and his decision was subsequently followed by Mr. Justice Lush. The grounds upon which it has been held

[30] Part of this opinion and the concurring opinions of Lindley and Kay, L. JJ., have been omitted.

that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in Dunlop v. Higgins in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the Household Fire and Carriage Accident Insurance Company v. Grant [4 Ex. D. 216], Lord Justice Baggallay said: "I think that the principle established in Dunlop v. Higgins is limited in its application to cases in which by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by

post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as posted.[31] It matters not in which way the proposition be stated, the present case is in either view within it. The learned Vice-Chancellor appears to have based his decision to some extent on the fact that before the acceptance was posted the defendants had sold the property to another person. The case of Dickinson v. Dodds [2 Ch. D. 463] was relied upon in support of that defence. In that case, however, the plaintiff knew of the subsequent sale before he accepted the offer, which, in my judgment, distinguishes it entirely from the present case. For the reasons I have given, I think the judgment must be reversed and the usual decree for specific performance made. The respondents must pay the costs of the appeal and of the action.

ELIASON et al. v. HENSHAW.

(Supreme Court of the United States, 1819. 4 Wheat. 225, 4 L. Ed. 556.)

Error to Circuit Court for the District of Columbia.

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of

[31] Quoted and followed in Farmers' Produce Co. v. McAlester Storage & Commission Co., 48 Okl. 488, 150 Pac. 483, L. R. A. 1916A, 1297 (1915).

wagon whether you accept our offer." This letter was sent from the house at which the writer then was about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at $9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledge the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown, some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that, if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of $9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in travelling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed. Cause remanded with directions to award a venire facias de novo.

SECTION 4.—ACCEPTANCE BY OVERT ACT

(But Not by Post)

ROGERS v. SNOW.

(In the King's Bench, 1578. Dalison, 94.)

In an action on the case between Daniel Rogers and Daniel Snow, the plaintiff alleged that whereas the brother of the defendant was indebted to the plaintiff in the sum of £303, in consideration that the plaintiff would taken the personal bond of the brother without surety and would not sue him until Michaelmas and would forbear to claim the money during that time, the defendant promised to pay it to the plaintiff. Issue was joined and verdict for plaintiff.

Gawdy, Jun., moved that the declaration was bad because the plaintiff did not allege that the consideration was performed on his part. Just as in case I promise a man 20s. if he will go to York for me, in an action on the case on this promise he must allege the performance on his own part.

THE COURT conceded this to be true and judgment was therefore arrested.[32]

MOTT v. JACKSON et al.

(Supreme Court of Alabama, 1911. 172 Ala. 448, 55 South. 528.)

Action by John D. Mott against M. R. Jackson and others. Judgment for defendants, and plaintiff appeals. Reversed, rendered, and remanded.

The complaint is as follows:

Count 1: "Plaintiff claims of the defendants the sum of $1,500 damages, for that, whereas, on, to wit, the 22d day of January, 1908, the said defendants were engaged in running a steamboat, viz., the Liberty, as a common carrier on the navigable waters of Alabama, and on or about such time promised and agreed as such carriers to and with plaintiff to receive for him for hire on the next down trip of the boat, and on said trip to carry for him, a lot of staves, to wit, 10,000 in number, from Davis' Bluff, a landing on the Tombigbee river, and deliver the same safely at the wharves or docks in the city of Mobile, in the state of Alabama, for a reward then and there to be paid by the said plaintiff; that plaintiff, in consideration of said promise on the part of the defendants to carry said staves, had the same placed on the margin of the river at the usual and customary place for loading that

[32] Of course, performance might be a condition precedent to the defendant's duty to pay even though it is not the required mode of acceptance. See Chapter IV, post.

kind of freight on said steamboat, the Liberty, and when the said boat arrived on the said down trip announced himself willing to load said staves on said boat, when defendants willfully, knowingly, and wrongly neglected and refused to take said staves. And plaintiff alleges that their refusal was without just cause or good excuse, and that before plaintiff had shipped said staves by any other carrier a freshet came in the river and washed said staves away, and they became entirely lost to plaintiff." * * *

The demurrers take the point that no consideration for the defendants' promise is alleged, and because the count does not allege that the plaintiff agreed and bound himself to ship some staves and pay the freight thereon, and others not necessary to be here set out.[33]

SIMPSON, J. This action is by the appellant against the appellees, as common carriers, by water, for damages for refusal to receive freight. Demurrers were sustained to the complaint, as amended, the plaintiff refused to amend, and the errors claimed are the action of the court in sustaining the demurrers to the several counts of the complaint.

The counts of the complaint (which will be set out by the reporter) are on the contract, and not ex delicto. Wilkinson v. Moseley, 18 Ala. 288, 290, et seq.; Mobile Life Ins. Co. v. Randall, 74 Ala. 170, 176; McDaniel v. Johnston, 110 Ala. 526, 532, 19 South. 35; Southern Railway Co. v. Rosenberg, 129 Ala. 287, 30 South. 32; W. U. Tel. Co. v. Littleton, 169 Ala. 99, 53 South. 97.

The insistence of the appellees is that the contract set out in the several counts of the complaint is unilateral, and does not allege any consideration for the promise or any acceptance of the offer. It is familiar contract law that where one party makes an offer, dependent upon some act of the other party, and the other party performs the act, that is an acceptance of the offer, and constitutes a sufficient consideration to support the contract. 6 Cyc. 429, and notes. It is true that a mere general offer by a carrier to receive and transport goods generally would be too indefinite, and would include nothing but its common-law liability, and under such an offer a failure to receive goods for shipment would be subject to the defenses applicable to an action on the common-law duty, such as that the vessel was already loaded to its full capacity; but when the carrier says to the shipper, "I will receive and carry your freight at a particular time [as on the next down trip of the boat] and at a particular place [as at Davis' Bluff]," it cannot mean anything except that "I will have the space and facilities, when the boat reaches said landing, to receive your goods, and if you will have them there at that time I will receive and transport them." It is true that, up to that time, the carrier's promise was but an offer, or a proposition; but, if it had desired to protect itself against the contingency of the shipper's not accepting the proposition, by having his goods ready for shipment, or of his receiving a boat load of freight

[33] Counts 2 and 3 and a part of the opinion are omitted.

before reaching said point, he should have required a specific acceptance of the proposal, or inserted a proviso as to space, etc.

The appellees insist that the offer should specify whether it is to be accepted by promise or by act. While a party making an offer has a right to specify how it shall be accepted, in order to complete the contract, yet, if he does not so specify, it is clear that anything which in law would be an acceptance, so long as the offer is left open, would be sufficient, and an acceptance by act is as effective as acceptance by words. In an early English case it was said: "If I say to another, 'If you will go to York, I will give you £100,' that is, in a certain sense, a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise." Gt. N. Ry. Co. v. Witham, 9 Law Rep. (C. C. P.) 12, 19. If the shipper had been standing on the river bank, and the captain of the boat had said, "I will take your staves and carry them to Mobile for a reasonable compensation," and the shipper, without saying a word, had immediately delivered the goods to the boat, or offered them to its employés, it cannot be doubted that that would have been a sufficient acceptance to close the contract. The offer, then, being still open and unrevoked, was necessarily a continuing one, and its acceptance at one time as effectual as at another. * * *

Reversed and demurrers overruled.[34]

HIGH WHEEL AUTO PARTS CO. v. JOURNAL CO. OF TROY.

(Appellate Court of Indiana. 1912. 50 Ind. App. 396, 98 N. E. 442.)

Action by the Journal Company of Troy against the High Wheel Auto Parts Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

ADAMS, J.[35] During the week of October 5–10, 1908, the appellee managed an automobile exhibit at Grand Central Palace, New York. The appellant was a manufacturer of automobiles, and desired to make a display at this exhibition. On August 8, 1908, the appellants sent the following order to appellee:

"Muncie, Ind., Aug. 8, 1908.

"Journal Company of Troy, Troy, N. Y.—Gentlemen: You will please reserve for us 234 square feet of space in 44th St., section main

[34] In Lamb v. Prettyman, 33 Pa. Super. Ct. 190 (1907) an agent sued for a commission: "The counsel for defendant contends that when Prettyman asked Lamb 'to get a deal,' Lamb did not agree to do so and therefore there was no contract. The answer to this is that it was not necessary for Lamb to say in words that he would act; he could make it a contract by performance, and there is evidence that he did procure a party to deal with the defendant. Where acceptance of a proposition is by a promise, it must presently follow the offer and notice of it be given to the other party. But where acceptance is by act, the mere performance of the act, without notice, concludes the contract."

[35] Parts of the opinion are omitted.

exhibit floor, as per diagram below, for which we agree to pay you at the rate of one dollar ($1.00) per square foot, total $234.00. Terms: 25 per cent. to accompany signed contract; balance on Saturday, August 1, 1908. The rules and regulations printed on the last page of this contract form a part thereof. 9 ft. front, 26" deep. High Wheel Auto Parts Co., H. L. Warner, Mgr."

This order is made a part of the complaint; and it is averred that upon receipt thereof the appellee at once set apart the space in the exhibition building numbered and described in the contract, and held the same for appellants, unoccupied and unused by any other exhibitor during the exhibition. It is also averred that 25 per cent. of the contract price accompanied the order, and that appellants have failed and refused to pay the balance, after demand, and that the sum of $177 is due and wholly unpaid. * * *

A demurrer to the complaint was overruled, and appellants filed three paragraphs of special answer, to which the court sustained a demurrer, and this ruling constitutes the error relied upon for reversal. These paragraphs of answer * * * also averred that on account of illness in the family of appellant Warner it was impossible for appellants to arrange to attend the exhibition and use the space subscribed for; that about the 21st of September, 1908, appellants notified appellee that, on account of such illness in the family of appellant Warner, defendants would not be able to attend and occupy the space subscribed for, and duly surrendered all claim to the same; that appellee "met such surrender by assuring the defendants that plaintiff would do its best to sell said space, stating that no man could do better than his best, and claiming that if it could not sell said space, it would hold defendants for the payment therefor." Appellants replied to appellee that they would lose what they had already paid, but would not pay for space which they would not use.

The points urged by appellant are (1) that the contract sued on is unilateral, and the complaint does not show an enforceable obligation: and (2) that the usage set up in the answers became a part of the contract, and proof of the same would defeat a recovery in this case.

A unilateral contract is a legal solecism. There is no such thing as a one-sided contract. The term, however, has found a place in the books, as expressing the idea of a contract lacking in mutuality. The order sued on in this action was primarily unilateral; but upon acceptance by appellee it became binding upon the parties, and upon performance either might enforce it. It is a rule so well settled as to be almost elemental that, where a contract or order is signed by one of the contracting parties and accepted by the other, and affirmative acts constituting the consideration done by the latter, the party signing cannot assert a want of mutuality in the instrument. * * *

Judgment affirmed.

TROUNSTINE et al. v. SELLERS.

(Supreme Court of Kansas, 1886. 35 Kan. 447, 11 Pac. 441.)

This was an action of replevin, brought by A. & J. Trounstine & Co. to recover from A. H. Sellers the possession of a stock of ready-made clothing of the alleged value of $2,085.20. To a judgment for the defendant, the plaintiffs excepted.[86]

JOHNSTON, J. The right of possession to the clothing in controversy depends upon whether the proposition made to the plaintiffs by Moore & Weaver, on November 16, 1884, was accepted and became a contract before the execution of the mortgages by Moore & Weaver to their creditors on the fifteenth day of December, 1884. It appears that the plaintiffs, who were engaged in the wholesale clothing business at Cincinnati, Ohio, sold on credit a stock of clothing, through one of their agents, to Moore & Weaver, at Ottawa, Kansas. The goods were sold and shipped in the early part of September, 1884, upon the terms that Moore & Weaver were to have a discount of 6 per cent. off the prices named not later than 10 days after January 1, 1885, and credit was given them until the expiration of that time for a discount. On November 10, 1884, Moore & Weaver wrote to the plaintiffs, claiming that if they did not choose to discount the bill within 10 days after January 1, 1885, they were entitled to a credit of four months from that time. The plaintiffs answered this letter on the fourteenth of November, 1884, insisting that the credit did not extend beyond 10 days after January 1, 1885. Moore & Weaver again wrote to the plaintiffs on November 16, 1884, insisting on the additional credit of four months from January 1st, and, in closing their letter stated: "If you think we are misrepresenting the facts in the case, we will return the goods which we have on hand, and pay for what we have sold out of them. Hoping to hear from you soon, we remain," etc. This letter was received by the usual course of mail, but was never answered. It seems that, soon after the plaintiffs received the letter of November 16th, Mr. Harper, one of their firm, started out from Cincinnati on a business trip, with the intention of attending to some important business matters of the firm in Indiana and Illinois which demanded immediate attention, and with a view of coming on to Ottawa as soon as those matters were disposed of. He reached Ottawa on the evening of December 16, 1884, one month after the proposition was made, when he demanded the possession of the goods from the defendant, Sellers, who was in charge of them under the mortgages executed the preceding day.

It is insisted by the plaintiffs that the court erred in not holding the conduct of the plaintiff in starting from Cincinnati as an acceptance of the proposal made by Moore & Weaver, and as a completion of

86 The statement of facts is abridged and part of the opinion is omitted.

the contract, which vested the title and right of possession of the goods in the plaintiffs. In our opinion, the conduct of the plaintiffs did not indicate a purpose to accept the proposal made by Moore & Weaver, and cannot be regarded as an acceptance. Although the proposition did not, within itself, limit the time or manner of acceptance, it cannot be regarded as a perpetual one, forever open to be accepted or rejected, at the will of the plaintiffs. In Mactier v. Frith, 6 Wend. 103, 21 Am. Dec. 262, the rule laid down with respect to a proposal made by letter is that the offer continues until the letter containing it is received, "and the party has had a fair opportunity to answer it." It has also been held that "a letter written would not be an acceptance so long as it remained in the possession or under the control of the writer. An offer, then, made through a letter, is not continued beyond the time that the party has a fair opportunity to answer it." Averill v. Hedge, 12 Conn. 424. Upon receipt of Moore & Weaver's letter the plaintiffs were bound "to accept in a reasonable time, and give notice thereof, or the defendant was no longer bound by the offer." Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240. See, also, Martin v. Black's Ex'rs, 21 Ala. 721; Moxley's Adm'rs v. Moxley, 2 Metc. (Ky.) 309; Minnesota Oil Co. v. Collier Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635; Judd v. Day, 50 Iowa, 247; Taylor v. Rennie, 35 Barb. (N. Y.) 272; Benj. Sales, 61, note 7.

The offer which was made was the result of correspondence through the mails, and, as the dates of the letters indicate, they had been promptly answered and responded to by both the parties. Besides, the letter containing the proposal, by its terms, enjoined an early reply. It closes with the words, "Hoping to hear from you soon," etc. While the mode of acceptance was not indicated in the letter making the offer, the nature of the negotiations, as well as the manner in which they were carried on, suggested, not only the desire and necessity for an early reply, but also that the parties making the offer would expect an answer through and by the usual course of the mails. It has been said that "where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return post, the offer can only endure for a limited time, and the making of it is accompanied by the implied stipulation that the answer will be sent by return post. If that stipulation is not satisfied, the person making the offer is released from it." Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Dunlop v. Higgins, 1 H. L. Cas. 387.

If the plaintiffs intended to accept the proposal, it was their duty to have signified their acceptance, either through the mails, or by some equally expeditious means. The plaintiffs say that they determined to accept the proposition as soon as the offer was received, and that Mr. Harper's act in starting to Ottawa was an overt act, amounting to an acceptance. Every overt act caused by a determination to accept a proposition does not constitute an acceptance. If it was the intention of the plaintiffs to accept the offer, they could, and most

likely would, have written Moore & Weaver a letter, which was the usual mode of communication between the parties, and which is the usual mode of accepting an offer made by letter. Instead of sending a letter or telegram announcing a determination to accept, one of them started on a business trip through the country, intending finally to come to Kansas, and take the goods, which trip consumed almost 30 days' time, during which time they were at liberty to change their purpose, and reject the proposition. The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. "The assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication." Benj. Sales, 54. Where parties are distant, and the contract is to be made by correspondence the writing of a letter or telegram containing a notice of acceptance is not, of itself, sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office, for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract, and not then, unless the offer is still standing. See authorities above cited. The action of the plaintiffs in sending a member of the firm, by a circuitous route, to Kansas, was no more than a mere mental assent, which, as we have seen, is insufficient. There was no act of acceptance until Harper arrived at Ottawa, and demanded the goods. This was not within a reasonable time, and, when the proposition was not met within a reasonable time, Moore & Weaver were at liberty to regard their proposition as rejected, and to make other disposition of their property, which they manifestly did do. * * *

Judgment affirmed.

DOOLITTLE v. CALLENDER.

(Supreme Court of Nebraska, 1911. 88 Neb. 747, 130 N. W. 436.)

FAWCETT, J.[87] Plaintiff brought suit to recover an unpaid balance upon the following contract:

"The Art League, Cut Makers, 656 Broadway, New York. No. 2,541. Book ———, A Series. Any arrangement made with representative must be specified plainly on this order.

"Gentlemen: Send one cut (about 2 in. by 2 in., your A series) and copy of reading matter per week to use in this city only, both such as you think best to advertise the grocery business, for one year and after that until further notice. I will pay you fifty-five cents for each cut, at the end of the quarter they are sent. In consideration of above, this exclusive right is given. The Art League agrees upon accepting

[87] Parts of the opinion are omitted.

this, not to send any of the cuts sent under this agreement to any one else in the city mentioned, during the time.

"Dated, The Art League, Nov. 10, 1905. Per Jos. F. Taylor.

"C. E. Callender. [Name.]

"York, Nebr. [Address.]"

Defendant prevailed, and plaintiff appeals.

Within a few days after the execution of the above contract, plaintiff began mailing, weekly, to the defendant the cuts and reading matter called for by the contract, and defendant continued to receive them without objection or complaint of any kind until February 6th following, when he wrote plaintiff, acknowledging receipt of a statement, and stating, "And before remitting for same would ask how much I must remit, and you discontinue after 10th this month. I do not need any more of them and shall not after that date. It is not necessary to say why, except that it is not to use something else instead." To this plaintiff replied February 15th, stating that he could not afford to cancel the contract for anything less than 10 per cent. from the contract price. Plaintiff continued to mail the cuts and defendant to receive them without objection until the 30th of March, when defendant again wrote plaintiff, stating, "I am now out of business and need no more cuts. Discontinue sending them. I have paid for them to April 1st." Plaintiff continued thereafter to mail the cuts and reading matter until the end of the year; defendant refusing to take them from the post office. * * *

We do not think the contract was void for lack of consideration, or for want of mutuality, as urged by defendant. The consideration on the part of plaintiff was that he would furnish one cut a week and copy of reading matter, both such as he might think best to advertise defendant's grocery business. For that defendant agreed to pay 55 cents for each cut at the end of the quarter in which they were sent. We think the promise of each was a sufficient consideration for the promise of the other, and that there was no lack of consideration on either side. The fact that the contract provided that both the design of the cut and the wording of the reading matter were to be such as plaintiff might think best did not render the contract void. Plaintiff was in the advertising business, making a specialty of furnishing this kind of cuts and of reading matter to accompany the same, and, if defendant saw fit to make a contract to take cuts and reading matter for a year and to leave the design of the cuts and the wording of the reading matter to plaintiff's judgment, that was defendant's own concern. It may have been a departure in advertising for a business man in the city of York. It may have been an experiment, so to speak, but many a business man has greatly improved his business by departing from the beaten path. Such departure has often led to fortune; and the fact that defendant saw fit to make such a departure in the present case cannot be imputed to plaintiff as fraud. The fact that, if plaintiff failed to send the cuts and reading matter as agreed, defendant might

have some difficulty in making proof of his damages sustained by reason thereof, will not avoid the contract.

Many such cases arise, but we are not aware that it has ever been held that for such a reason alone a contract will be held void. The contract is fair upon its face, was entered into by defendant without undue influence on plaintiff's part, was subsequently recognized by defendant for more than four months by the receipt of the cuts without complaint, and by payment therefor. Plaintiff was at all times ready to perform his part of the contract, and we are unable to discover from the record before us any good reason why defendant should not respond in damages for his refusal to perform his part. * * *

Plaintiff also testified that he received notice from the postal authorities about April 12, 1906, that defendant was refusing to take the cuts from the office, and that at that time he had expended all that was necessary to expend to fill the order for the entire year, except the sum of $3.60, and that therefore the difference between this $3.60 and the contract price for the full year would be the amount of plaintiff's damage for defendant's breach of the contract. This would seem to be a fair adjustment of the difference between the parties, and we think that, under the evidence in the record before us, plaintiff should have recovered that amount.

The judgment of the district court is therefore reversed, and the case remanded for further proceedings.

Reversed and remanded.

SECTION 5.—WHEN NOTICE OF ACCEPTANCE IS REQUIRED

ANONYMOUS.

(In the Court of Common Pleas, 1478. Y. B. 17 Edw. IV, 2.)

In trespass for entering the close and taking and carrying away grain, barley and grass.[38]

Catesby [for defendant]. No action lies, because a long time before the alleged trespass the plaintiff and the defendant bargained at a certain place in London, that the defendant should go to the place where, etc., and there look at the said grain, barley and grass and if he was pleased with what he saw that he should then take the said grain, barley, and grass, paying to the said plaintiff 3s. 4d. for each acre, one with another. And we say that we went there and looked at them as aforesaid, and were well content with the bargain, wherefore we took the goods, which is the alleged trespass. We therefore pray judgment, etc.

[38] Parts of the report are omitted.

Pigot [for plaintiff]. This is not a good plea for several reasons. One is that he has said that the place, etc. is 10 acres of grain, etc. Whereas he ought to have said 10 acres of land sown with grain, etc. Also he has confessed the taking and has not shown that he paid us the money according to the bargain, for I believe that it was not permitted to him to take the goods before making payment, for it would be very mischievous law that would let him have them without paying, etc. Also as to his having seen the grain, etc. he ought to have notified us whether or not he was pleased with it, so that we might know that he took it for that reason, for it could not be a completed bargain if it does not appear that each party is agreed, etc.

Catesby [for defendant]. The plea is good enough in spite of all the reasons he has given. As to the first matter, that we have said acres of grain, etc. and not of land, etc. this is in accordance with common usage (vulgariter). As to the second, that we have not alleged payment of the money, I believe that many bargains in this realm are void, if this be law. But I hold that it is lawful in the case of such a bargain for him to take the goods before making payment: there is no mischief in that, for the plaintiff would have an action of debt for the money, because we have received the thing, wherefore, etc. And to my mind in such bargains the law is that the one puts his trust in the other to have the thing for which they bargained, and so should the other also. And on the point that we ought to notify him of our agreement, this would be too inconvenient, to have to come back here to tell him that we are satisfied with the looks of the thing (which is perhaps in another country a long way from London). Also the bargain shows in itself that this is not necessary, in that he made his assent depend on our assent, i. e. that if we were satisfied on inspection of the goods we should have them, by reason of which he cannot be better notified than he is by our taking, etc.

LITTLETON, [J.] As to the payment, it seems to me that he should allege this or the plea is not good. E. g. if I go to a draper and ask him how much I must pay for a certain piece of cloth, and he replies a certain sum, and I say that I will take it; whereupon I take the cloth, but without paying him any cash in hand: he would have an action of trespass against me, and it would be no defense to say that I had bought it of him, without showing that I had paid him, etc. So here.

CHOKE, [J.] agreed, for a contract is not perfected without the agreement of each party, quia dicitur de con, quod est simul: for if you ask me in Smithfield how much you should give me for my horse, and I say so much, and you reply that you will take him but you do not pay the price, do you believe that it is my will that for this only you are to have the horse without paying over the price? I say no, and that I may still sell him to another, and you would have no remedy against me, for otherwise I should be compelled to keep the horse even against my will, if the property be in you, and you could come

and take him whenever you pleased, which would be unreasonable. So here.

BRIAN, [C. J.,] agreed, and it seems to me from the language of the bargain that he is not permitted to enter and take the grain, for it cannot be meant that he was willing that the defendant might have the grain without paying the price. But if he had said take the grain and pay when you please, or if he had specified a certain period of credit, then I think he might have taken the grain and that a plea like the present one would be good. * * * As to the other point, it seems to me the plea is not good without alleging that he had notified the other of his assent, for it is common knowledge that the mental assent of a man cannot be determined by evidence, for the devil himself does not know the mere thoughts of men. If, however, the agreement had been that if the bargain should please you then you should so express yourself to a certain third person, I grant you that you would not need to do more, for that would be a matter of fact [and capable of proof]. Suppose I am bound to you in a penal bond for the sum of £10 payable several days later, upon condition to be void in case you are pleased to take a certain horse of mine in satisfaction of a wrong that I have done you, etc., and you look at the horse but do not tell me whether he pleases you or not, for which reason I do not pay the £10, would the obligation be forfeit? I think not. Wherefore, etc.

Catesby [for defendant]. Sir, if he does not take the horse, so that his act indicates his assent, then you forfeit your obligation. And as to the statement that there is no duty to deliver the thing sold before payment of the price, it is equally true that there is no duty to pay the price before delivery of the thing sold. However, as I have said before, by both law and reason, each must put confidence in the other; and if payment be regarded as necessary, I believe that we should have seen decisions upon the point in our books, but I have never seen any. * * *

WHITE v. CORLIES.

(Court of Appeals of New York, 1871. 46 N. Y. 467.)

Appeal from First Judicial District.

The action was for an alleged breach of contract.

The plaintiff was a builder with his place of business in Fortieth street, New York City.

The defendants were merchants at 32 Dey street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff, for his assent under his estimate which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' bookkeeper wrote the plaintiff the following note:

"New York, September 29th. Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date you can begin at once. The writer will call again, probably between five and six this p. m. W. H. R., for J. W. Corlies & Co., 32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work. In my opinion it was not. He had a right to act upon this note and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows that there was any agreement between the parties before the written communication of the defendants of September 30 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event of the action. All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.[89]

CARLILL v. CARBOLIC SMOKE BALL CO.

(Court of Appeal, 1892. [1893] 1 Q. B. 256.)

Appeal from a decision of Hawkins, J. [1892] 2 Q. B. 484.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the Pall Mall Gazette of November 13, 1891, and in other newspapers, the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or

[89] In accord: Beckwith v. Cheever, 21 N. H. 41 (1850).

The sending of a notice is so generally looked upon as the final and operative act that votes and other acts prior to notice may not be operative. In Powell v. Lee, 99 L. T. 284 (1908), the plaintiff had applied for a position; the defendant school board voted to appoint him, but reconsidered the vote before any formal notice to him. It was held that there was no contract. In re London & Northern Bank, [1900] 1 Ch. 220, held that an applicant for shares could revoke his offer after the company had voted to allot the shares to him and had started a letter of notification by a messenger.

any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

LINDLEY, L. J.[40] * * * We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is "No," and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as a proof of his sincerity in the matter—that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions, is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is Williams v. Carwardine, 4 Barn. & Adol. 621, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is

[40] Parts of the opinions are omitted, and so, also, is the entire opinion of Smith, L. J.

made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required,—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of Brogden v. Railway Co., 2 App. Cas. 666, 691,—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance. * * *

I come now to the last point which I think requires attention: that is, the consideration. It has been argued that this is nudum pactum—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows: It is quite obvious that in view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise. * * *

Bowen, L. J. * * * Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an accepance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the

person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L. J., in Harris's Case, L. R. 7 Ch. 587, and the very instructive judgment of Lord Blackburn in Brogden v. Railway Co., 2 App. Cas. 666, 691, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer. * * *

Appeal dismissed.[41]

[41] In Weaver v. Wood, 9 Pa. 220 (1848), Gibson, C. J., said: "If a party promise another a definite or a reasonable reward if he will do a particular thing, the party promised is not bound to do it; yet if he does it without

HALLOCK v. COMMERCIAL INS. CO.

(Supreme Court of New Jersey, 1857. 26 N. J. Law, 268.)

VREDENBURGH, J.[42] G. W. Breck was the agent of the defendants at Bath, New York, to make surveys, receive proposals for insurance, and receive premiums on risks accepted by the company, but was not authorized to make insurances or issue policies. The proposals for insurance were sent by him to the company at Jersey City, and if accepted by them, the policies were to be sent to him to deliver.

On the 2d of March, 1855, the plaintiff applied to him to insure his building in Bath, for one year from the 10th of March, for $1,200. Breck made the survey, and told him what the premium would be. The plaintiff thereupon offered the premium to Breck, who said he would consider it as paid, but would leave it with the plaintiff, who was a banker, and with whom he kept his account, until the policy arrived, when he would call and get the money. The application was signed by the plaintiff, and with the survey attached, was sent by Breck to the company, on the 2d or 3d of March. The defendants deferred acting on the application until the secretary could procure a map of Bath, referred to by Breck.

On the 13th of March, between 10 and 12 a. m., the map having been received, a policy was filled up on said building, insuring it from the 10th of March for one year, signed by the proper officers, and mailed at Jersey City, directed to Breck at Bath, which by due course of mail would have reached him on the 14th March, but which, owing to the snow, did not until the 16th of March. At the same time that Breck received the policy he also received a telegraphic despatch, dated the 15th March, as follows: "Risk not taken when burnt. Return policy when received."

Accompanying the policy was also a letter from the secretary, of the tenor following:

"Office of the Commercial Insurance Company, No. 3.

"Montgomery St., Jersey City, March 13th, 1855.

"Messrs. Breck and Sawyer, Esq'rs, Bath, N. Y.

"Dear Sirs: Your application on G. W. Hallock's saloon has been held under advisement till we could procure a copy of the map, of which you speak in your letter. We do not look on it as a very desir-

more, he entitles himself to the reward. On the other hand, the promisor may retract before performance." See, also, Patton's Ex'r v. Hassinger, 69 Pa. 311 (1871), promise to pay any one who would take care of John; Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731 (1882), promise of reward for rescue of person from a fire.

Where an offer is made to buy goods on certain terms, to be shipped, the shipment, without more, may be a sufficient acceptance. Sturdivant v. Mt. Dixie Sanitarium, Land & Investment Co., 197 Ala. 280, 72 South. 502 (1916).

[42] The statement of facts, some portions of the opinion and the concurring opinion of Potts, J., have been omitted.

able risk, but nevertheless, as the rate seems a fair one, we enclose a policy, relying very much on your representation in regard to the good character of the occupant. Enclosed please find policy, No. 1054, for $1,200, premium $24.

"Respectfully, J. M. Chapman, Sec'y."

On the 16th of March, after the policy arrived, the plaintiff tendered the premium in gold to Breck, and demanded the policy. Breck accepted the money, because he had refused to accept it when the application was made, and considered it on deposit, meaning to put the plaintiff in the same situation as if he had received it on the 2d of March, but refused to deliver the policy, because so directed by the defendants.

The building insured was entirely consumed by fire on the 13th of March, at 8. a. m., about two hours before the risk was accepted or the policy signed. * * * The suit is on the policy, and the plea the general issue. * * *

Secondly. The defendants insist that the application, having been made on the 2d of March, and no action having been taken by the defendants until the 13th, we cannot consider the plaintiff as still continuing his offer to the defendants; that we are bound to consider it as withdrawn. But why so? There is no pretence of any express withdrawal. The question and the answer can never, in any case, be simultaneous; the question must always remain for some length of time with the one to whom it is put, and abide the answer. In every negotiation, whether by telegraph, by letter, or by word of mouth, the application and the answer can never be at the same precise instant. The application must wait upon the answer. If the application is considered to be withdrawn as soon as made, no two minds ever could meet upon any proposition. The aggregatio mentium never could take place. In all cases, the application is construed to stand until the contrary appears; until it is either withdrawn or answered. Pothier Traite du Contrat du vente, p. 1, § 2, art. 3, No. 32; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

But here the plaintiff avers the application to be still standing. The defendants treat it as still before them on the 13th of March, by accepting it, and making out the policy We must therefore treat it as the parties treat it, as still at noon on the 13th of March a standing and valid offer by the plaintiff to the defendants.[43]

Thirdly. The defendants contend that the policy never was delivered, so as to make it a living contract. But it appears, by the case, that the contract to insure was complete before they mailed the policy to Breck. Their telegraphic despatch, dated on the 15th of March, says "risk not taken when burnt; return policy when received." This necessarily implies that the risk was taken, but taken after the fire. Breck had no authority to insure. After the proposals were accepted by the

[43] As to this point, see post, p. 141, Duration of the Power of Acceptance.

company, they made out the policies, and sent them to Breck to deliver; so that it appears, by the case, that before they mailed the policy to Breck, they must have received the premium and accepted the risk, and thus completed the contract to insure. If the case had gone no further, and no policy had ever been made out, it is well settled that the plaintiff could have sued them upon this contract at law or forced from them a policy in equity. Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 660; Hamilton v. Lycoming Ins. Co., 5 Pa. 339; Angell on Fire Ins. §§ 34, 47; Union Mutual v. Commercial Mutual (March, 1856) 18 Law Rep. 610, Fed. Cas. No. 14,372.

Under these circumstances, a policy drawn up and signed by the proper officers wants no further delivery. It is a vital policy as soon as signed, becomes instantly the property of the insured, and is held by the insurer for his use. Ang. on Fire Ins. § 33, 31; Pim v. Reed, 6 Man. & Grang. 1; Kohne v. Insurance Co., 1 Wash. C. C. 93, Fed. Cas. No. 7,920.

But here were further acts of delivery of the policy. It was, on the 13th of March, mailed and sent to Breck, to deliver to the plaintiff. This was sending it to the plaintiff by Breck. Breck and the mail were only the vehicles to carry it to him. It was the same thing as if mailed or sent directly to the plaintiff. The defendants suggest, in answer, that Breck was their agent, and that, by sending it to him, they did not part with the possession of the policy, and that they only gave authority to Breck to deliver, which they could and did revoke before actual delivery. But when they mailed the policy to Breck to deliver, they did not constitute him their agent, to receive or keep it for them, nor to retain it as their agent. He was, in that regard, no agent of theirs; he had nothing further to do for them. By sending him the policy to deliver, they made Breck trustee for the plaintiff; they made it a deposit with Breck to the credit of the plaintiff. It was a delivery to Breck to deliver to the plaintiff, which was a good delivery to the plaintiff. Shep. Touch. 58. This is not a question of the authority or acts of an agent; but whether the defendants, by sending the policy to Breck to deliver, did an overt act intended to signify that the policy should have a present vitality. This certainly was such an act. Without any further interference on their part, it would have resulted in actual delivery to the plaintiff. It was intended to signify to the plaintiff not only that the policy was a present contract, but to effect an actual delivery of it to him.[44] Kentucky Mutual Ins. Co. v. Jenks, 5 Ind. 96; Hamilton v. Lycoming Ins. Co., 5 Pa. 339; Tayloe v. Merchants Fire Ins. Co., 9 How. 390, 13 L. Ed. 187.

Suppose the defendants had retained the policy, and had merely told Breck to tell the plaintiff that they held the policy subject to the plaintiff's order, would they not have been deemed as holding the policy for the plaintiff?

[44] As to what constitutes delivery of a sealed instrument, see post, p. 464.

The defendants next suggest that the plaintiff was ignorant of their acceptance of the risk, of their making out and mailing the policy to Breck until after they had countermanded its delivery, and that the aggregatio mentium could not take place until after the acceptance of the proposition by the defendants came to the plaintiff's knowledge, and that before that, the defendants had changed their own minds, so that in fact it never did take place, and that consequently there was no legal delivery of this policy.

This involves the more general question, does a contract arise when an overt act is done intended to signify the acceptance of a specific proposition, or not until that overt act comes to the knowledge of the proposer? This question may arise upon every mode of negotiating a contract, whether the parties be in each other's presence or not. First comes the mental resolve to accept the proposition; but the law can only recognize an overt act. Whether that act be a word spoken, a telegraphic sign, or a letter mailed, some interval of time, more or less appreciable, must intervene between the doing of the act and its coming to the knowledge of the party to whom it is addressed. In the mean time, what is the condition of affairs? Is it a contract or no contract? If the bidder does not see the auctioneer's hammer fall; if the article written for and sent never arrives; if the verbal answer, when the parties are in each other's presence, is in a foreign tongue, or by sudden noise or distraction is not heard; if the telegraphic circuit is broken; if the mail miscarries; if the word spoken or the letter sent is overtaken, and countermanded by the electric current, is there no contract? In the progress of the negotiation, at what precise point of time does mind meet mind, does the contract spring into life?

Upon this subject, with respect to negotiations conducted by written communications, there has been some variety of decision, but it appears to me that the weight of authority, as well as reason and necessity, admit of but one solution.

The meeting of two minds, the aggregatio mentium necessary to the constitution of every contract, must take place eo instanti with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be question of proof or of the binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the aggregatio mentium; at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegraph, his letter mailed, than he can his words of acceptance after they have issued from his lips on their

way to the hearer.[45] If the two minds do not meet eo instanti with the act signifying acceptance, when can they, in the nature of things, ever approach each other more closely? The defendants say, when the act of acceptance comes to the knowledge of the other party. But this knowledge would be a fact without any force, unless we suppose in the proposer a power still of electing not to accept the acceptance. But if we do this, it is apparent that the negotiation is yet precisely in the same stage of development it was in when the first proposition was waiting upon the first answer. The notion that there is no contract until the acceptance comes to the knowledge of the other party, proceeds upon the ground, in the first place, that the proposal has been withdrawn or lost its force, which is against the intent of the parties and the necessities of the case; and in the second place, upon the ground that the answer is conditional, whereas, we suppose it to be absolute. We suppose the acceptor to say not simply I agree, but to say I agree if you do, which requires an answer from the proposer; so that the minds do not meet till he answers. But in the mean time the acceptor may have changed his mind, and for the same reason as before, there is no bargain until this last answer comes to the knowledge of the other party; and so, upon this theory, it must go on ad infinitum without the possibility of the aggregatio mentium ever taking place. There is in fact no difference between the acceptance of a proposition by word of mouth and a letter stating an acceptance. In the one case it is articulate sounds carried by the air, in the other, written signs carried by the mail or by telegraph. The vital question is, was the intention manifested by any overt act, not by what kind of messenger it

45 The French courts say there is still a power to countermand. In S—— v. F——, Merlin, Rép. de Jur. (1813) tit. Vente, 1, art. III, No. XI bis, the court said: "A man has in his cabinet an acoustic vault, constructed in such a manner that, by reason of the various and extremely multiplied windings of the tubes which compose it, the words transmitted through one of the extremities do not reach the other till after a space of five minutes. I am in the presence of that man, and in his cabinet in question. There, after saying to me: Will you buy of me such a thing for such a sum? he adds: Answer me by my acoustic vault. Thereupon we take our places, I at one of the extremities of his vault, he at the other and I say to him by this speaking trumpet: I will. But a minute after I change my resolution; I run to him, and before he has been able to hear my answer, I say to him: I will not. Could he, after having heard the answer which I made to him at first by his acoustic vault, pretend that this answer having been transmitted to him by tubes of which he was proprietor, and having consequently become his property at the very instant that it left my mouth, I could not retract it before it had struck his ear? No, emphatically no; a hundred times no!" From Langdell's Cases on Contracts.

To the same effect is In re Bouton, Journal du Palais (1902), II, 174. But see Aubry et Rau (4th Ed.) t. 4, 294, 295, § 343; Baudry-Lacantinerie et Barde, Des Oblig. (2d Ed.) t. 1, n. 37.

The following rule appears to be reasonable and just, although not supported as to the second part by any judicial decisions: The offeror's power of revocation is extinguished as soon as the offeree has performed a requested or otherwise reasonable act of acceptance; the offeree has the power of revocation until, and only until, the offeror learns that the act of acceptance has been performed.

was sent. The bargain, if ever struck at all, must be eo instanti with such overt act. Mailing a letter containing an acceptance, or the instrument itself intended for the other party, is certainly such an act. Adams v. Lindsell, 1 B. & Ald. 681; Dunlop v. Higgins, 1 H. L. C. 381; Duncan v. Topham, 8 C. B. 225; Potter v. Saunders, 6 Hare, 1; Tayloe v. Merchants' Ins. Co., 9 How. 390, 13 L. Ed. 187; Hamilton v. Lycoming Ins. Co., 5 Pa. 339; Vassar v. Camp, 14 Barb. (N. Y.) 341; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Kentucky Mutual v. Jenks, 5 Ind. 96. This last case, in all its essential features is identical with the one before us.

The only English case sustaining the defendants in their view, that I have seen, is that of Cooke v. Oxley, 3 Term R. 653, which it will be perceived, by the above references, has been effectually overruled in their courts.

In the state of New York, the case of Frith v. Lawrence, 1 Paige, 434, was reversed in their Court of Errors by a very large vote. Mactier v. Frith, 6 Wend. 111, 21 Am. Dec. 262, and the doctrine sustained as contended for by the plaintiff.

The only other American case on this side of the question is that of McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278. This last is against the whole current of authorities both in England and in this country, and appears to me requires for the creation of a contract a fact without significance, or a condition that would render its creation impossible.

Let judgment be entered on the verdict for the plaintiff.

BISHOP v. EATON.

(Supreme Judicial Court of Massachusetts, 1894. 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437.)

Contract, on a guaranty. Writ dated February 2d, 1892. Trial in the Superior Court without a jury, before Braley, J., who found the following facts:

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7th, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia.

The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1st, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22d, 1891.

The defendant requested the judge to rule: 1. The letter of the defendant constituted in law no more than an offer of guaranty. 2. The defendant did not become bound by a contract of guaranty unless it appeared from a preponderance of the evidence that, within a reasonable time after his offer was accepted and acted upon, he had notice of such acceptance, and the giving of credit thereon. 3. The mere deposit in the mail of a letter accepting an offer of guaranty which has been made by mail, such letter being properly stamped and addressed to the party making the offer, and mailed within a reasonable time after the acceptance, does not in law constitute such notice to the latter as thereupon to bind him. 4. The defendant did not become bound by a contract of guaranty, if at all, unless he actually received such letter of acceptance. 5. A delay for two years and a half after accepting and acting upon an offer of guaranty to give notice to the person making the offer is an unreasonable delay. 7. If for a year and a half after the maturity of the note and the default of payment by the maker, the defendant had no notice of the default, he was discharged from his contract unless he subsequently waived his rights arising from the plaintiff's laches.

The judge declined so to rule, and ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.[46]

KNOWLTON, J. * * * The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be

[46] The statement of facts is abridged and parts of the opinion are omitted.

bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. Babcock v. Bryant, 12 Pick. 133; Whiting v. Stacy, 15 Gray, 270; Schlessinger v. Dickinson, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the

defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider. * * *

Exceptions sustained.[47]

[47] There are many apparently conflicting cases as to whether a guarantor is bound in the absence of any notice by the creditor. See Ames' Cases on Suretyship, p. 225 et seq.

Offer by Creditor.—If the offer is made by the creditor to the surety, the latter must usually give notice of his acceptance, because he is asked for a promise; but no further notice by the creditor is necessary. Stauffer v. Koch, 225 Mass. 525, 114 N. E. 750 (1917). It is often said that, when the guaranty is given at the creditor's request, the creditor need give no notice of acceptance. Peck v. Precision Mach. Co., 20 Ga. App. 429, 93 S. E. 106 (1917); Hibernia Bank & Trust Co. v. Succession of Cancienne, 140 La. 969, 74 South. 267, L. R. A. 1917D, 402 (1917). Contra: Evans v. McCormick, 167 Pa. 247, 31 Atl. 563 (1895).

Offer by Guarantor.—(1) *Promise for Act.* The offer by the guarantor must of necessity be an offer of a promise. He may request a non-promissory act in return. (a) This act may be the giving of credit to the principal debtor. The doing of this act (giving credit to M.) is the acceptance of the offer, and no notice should be required. Lennox v. Murphy, 171 Mass. 370, 50 N. E. 644 (1898), "there is no universal doctrine of the common law that acceptance of an offer must be communicated in order to make a valid simple contract"; Bishop v. Eaton, supra; Powers v. Bumcratz, 12 Ohio St. 273 (1861); Eddowes v. Niell, 4 Dall. (Pa.) 133, 1 L. Ed. 772 (1793); Siegel v. Baily, 252 Pa. 231, 97 Atl. 401 (1916). Contra: Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480 (1885); Great Western Mfg. Co. v. Porter, 103 Kan. 84, 172 Pac. 1018 (1918); Balfour v. Knight, 86 Or. 165, 167 Pac. 484 (1917); Birmingham News Co. v. Read, 200 Ala. 655, 77 South. 29 (1917); Northern Nat. Bank v. Douglas, 135 Minn. 81, 160 N. W. 193 (1916); Mozley v. Tinkler (Exch.) 1 Cr., M. & R. 692 (1835). The guarantor's duty to pay may still be subject to a constructive condition precedent that some notice be given. This may be notice that the requested credit has been given, or that the balance due is some specific amount, or that there has been default. See Bishop v. Eaton, supra; Black v. Grabow, 216 Mass. 516, 104 N. E. 346, 52 L. R. A. (N. S.) 569 (1914); Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480 (1885); Evans v. McCormick, 167 Pa. 247, 31 Atl. 563 (1895); De Cremer v. Anderson, 113 Mich. 578, 71 N. W. 1090 (1897). Even before this notice, however, it is too late for the guarantor to withdraw; he is bound by a conditional contract. (b) The act requested may be the payment of money to the guarantor. The performance of this act involves notice perhaps; certainly no other notice is required. Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686 (1881).

(2) *Promise under Seal.* The guaranty offered may be a sealed document. In such case it is binding as soon as delivered to the creditor or his representative. No notice is necessary, except possibly as a condition precedent to the secondary obligation, as explained above. See Davis v. Wells, supra; Powers v. Bumcratz, supra.

(3) *Promise for a Promise.* If the offer contemplates the undertaking of a return duty by the creditor, thus empowering the latter to make only a bilateral contract, a notice of acceptance will nearly always be necessary to the formation of a contract.

WHEELER v. McSTAY et al.

(Supreme Court of Iowa, 1913. 160 Iowa, 745, 141 N. W. 404, L. R. A. 1915B, 181.)

Action in equity to enforce performance of contract for conveyance of real estate. Petition dismissed, and plaintiff appeals. Reversed.

WEAVER, C. J.[48] The case made by the plaintiff is substantially as follows: Plaintiff being the owner of a quarter section of land in North Dakota and a house and lot in Waverly, Iowa, and the defendant F. E. McStay being the owner of certain other real estate in Waterloo, Iowa, said parties under date of January 25, 1911, at said city of Waterloo, entered into a written agreement for the exchange or mutual transfer of said properties on terms therein named, subject, however, to the following stipulations: "The party of the second part is to have 30 days from date in which to examine the properties described above as being owned by first party, and this contract is not to become binding upon said second party until the expiration of said 30 days unless such time is waived by said party. At the end of 30 days this contract is to become binding upon said party unless he sooner notifies first party, in writing, of his intention to abandon and cancel the same. In case this contract becomes binding upon both parties hereto in the manner above stated, then said parties are each to deliver to the other good and sufficient warranty deeds to their respective properties, and abstracts of title to the same showing clear and merchantable title thereto, except, of course, the mortgages above referred to, which are liens against the North Dakota property conveyed by first party and the Waterloo property conveyed by second party. Deeds and abstracts to be exchanged within a reasonable time after this contract becomes binding on both parties hereto."

The making of the alleged agreement is conceded, but the defendant contends that, within the time stipulated, he notified the plaintiff, in writing, of his election to abandon the deal, and that no enforceable contract was ever completed between them. The defendant as a witness testifies that late in the evening of February 24, 1911, at Waterloo, Iowa, he wrote a letter to the plaintiff informing him of his intention to abandon the contract, which letter he addressed to plaintiff at Waverly, Iowa, the place of his residence, and, having duly sealed and stamped the same, deposited it in a street or hotel letter box provided for such purposes by the United States. The letter itself, being produced, appears to bear the date of February 24, 1911, but the postmark stamped thereon is dated February 25, 9 a. m., 1911, while the Waverly postmark shows its receipt at that office February 25, 11:30 a. m., 1911. It was actually received by the plaintiff about 3 o'clock p. m. of the 25th. Upon the facts thus briefly stated, the trial court found plaintiff not entitled to the relief asked.

[48] The dissenting opinion of Evans, J., is omitted.

The first and principal question presented by the record is whether the defendant signified his election to abandon the contract in such time and in such manner as to relieve himself from obligation to perform the same. It appears that, while the terms of the exchange were agreed upon and reduced to writing, the defendant was given 30 days in which to examine and satisfy himself as to the Dakota property, with the option on his part to withdraw from the transaction at any time within 30 days from the date of the writing. As expressed by the instrument itself, it was not to become binding upon the defendant "until the expiration of said 30 days," unless such time was waived by him. It then provides that: "At the end of 30 days this contract is to become binding upon said second party unless he sooner notifies the first party in writing of his intention to abandon and cancel the same."

It is the theory of the appellee, and such is said by counsel to have been the view of the trial court, that when properly construed the contract gives to the defendant the full period of 30 days to examine the property, and that a notice of his refusal to proceed farther, given with reasonable promptness after the expiration of that period, would be timely and relieve him from liability. To reach this conclusion, we must ignore the provision by which at the "end of 30 days" the contract was to become binding upon the defendant, "unless he sooner notified first party, in writing, of his intention to abandon the same." But counsel say the writing also provides that defendant shall have 30 days from date in which to examine the property, and, as this privilege continues up to the last hour of the thirtieth day, it could not have been meant that he must exercise his option or election before that period expired. These provisions, it is argued, are so far repugnant or at least so obscure as to justify the construction by which notice within reasonable time after the expiration of the stated period may be held sufficient.

We are disposed to the view, however, that this reading requires too great a strain upon the court's power of construction. The language of the writing is not at all obscure. It provides, in fairly clear terms, for a period of 30 days in which the bargain or agreement shall remain tentative only. Within that time defendant was at liberty to satisfy himself concerning the property he was to receive in the exchange, and, unless he "sooner gave notice" of his withdrawal from the deal, the agreement was to become obligatory upon him "at the end of 30 days." In other words, to avoid the binding effect of the contract, he was required to reach his decision and to notify plaintiff thereof in writing, both before the expiration of 30 days. Notice given after that period had elapsed would be unavailing. Such also appears to have been the practical interpretation which defendant appears to have put upon his agreement. He says he had investigated the property and decided not to proceed with the exchange three days before the time

expired, but, because of other business engagements, he neglected to give the notice until late in the evening of the last day, when he endeavored to do so in the manner indicated.

But one other debatable proposition remains. Assuming that defendant mailed his letter of withdrawal, as he says he did, by depositing it in a mail box at 10 o'clock in the evening of February 24, 1911, and that such letter reached the hand of plaintiff at Waverly on the afternoon of the following day, does this constitute a notice within the 30-day period? Excluding the day on which the writing bears date, the period of 30 days would expire with the close of February 24, 1911. To hold such notice sufficient it must be on the theory that the deposit of the letter in the mail box is the legal equivalent of placing it in the hands of the plaintiff. That a contract may result from an offer by mail or telegraph and an acceptance communicated by similar means, and that the contract obligation dates from the time of mailing or dispatching the acceptance, is of course familiar doctrine. But where parties by agreement condition the acquirement or loss of contract rights upon the giving of a notice within the specified period, not prescribing the manner or means of the delivery thereof, we think there is no rule or precedent to the effect that the mailing of such notice operates as a delivery or service from the time of its deposit in the post office. For instance, if A. lets his house to B. under an agreement by which the latter is to vacate the premises upon a week's written notice from the former, no court would be disposed to hold, in the absence of an express or implied stipulation to that effect, that such notice, sent by mail, would be of any avail to terminate the tenancy until its actual receipt by the lessee.

The cases distinctly in point are not very numerous, but they are sufficient to show that the distinction between cases of this character and those where the question at issue is an acceptance of an offer of purchase or sale has received judicial recognition. See Burhans v. Corey, 17 Mich. 282, in which it is held that a person entitled to notice, where there is no stipulation or consent for its delivery by mail or other specially named means, is not bound by such notice until it is actually received. So also it has been held in Vermont that one who has undertaken to give notice within a specified number of days does not comply with his obligation by depositing notice in the post office at the close of the last day of the stipulated period, too late to be forwarded or delivered within the time named. Field v. Mann, 42 Vt. 68. This authority is quite in point upon the facts in the case at bar.

A similar holding is to be found in Society v. Reed, 42 Vt. 76. In Association v. Schauss, 148 Ill. 304, 35 N. E. 747, the court, speaking with reference to a contract requirement of notice, coupled with a provision that "notice sent to the last address given shall be considered legal notification," says: "As there is no provision in the Constitution to the effect that the service of notice shall date from the time of

mailing, it can only date from the time of its actual receipt by the member to whom it is addressed, or at least until sufficient time has elapsed to enable it to reach him in due course of mail." Upon the same subject it is said by the Massachusetts court that: "Ordinarily when the demand must be made or notice given merely posting the document or notice in the mail would not be a communication to the person addressed and would be ineffectual unless the same be received." Shea v. Association, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475. Any other rule would be unreasonable and productive of frequent unjust results. It follows that we must hold that there was a clear failure on the part of the defendant to give notice of his withdrawal from the contract within the time limited therefor, and that the contract became and is a binding and enforceable obligation.

For the reasons stated, the decree below must be reversed, and the cause remanded for the entry of a decree in accordance with the views here expressed.

Reversed.[49]

SECTION 6.—SILENCE AS ACCEPTANCE

ROYAL INS. CO. v. BEATTY.

(Supreme Court of Pennsylvania, 1888. 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622.)

Error to Court of Common Pleas, Philadelphia County.

This was an action by William Beatty against the Royal Insurance Company, on a policy of fire insurance, averring a renewal, and that it was in force at the time of the fire. There was a verdict and judgment for plaintiff. Defendant brings error. Reversed.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence which contributed to the establishment of the

[49] See, also, Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147 (1891); Mackey Wall Plaster Co. v. United States Gypsum Co. (D. C.) 244 Fed. 275 (1917); International Filter Co. v. La Grange Ice & Fuel Co., 22 Ga. App. 167, 95 S. E. 736 (1918).

relation. But, in any point of view, it is difficult to understand how a legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence.

Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk who took the two policies in question, along with other policies of another person, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Question. State what was said and done. Answer. I went into the office of the Royal Company, and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court. Who were the policies for? A. For Mr. Beatty. The Court. That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court. What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Question. Did you say anything about those policies [Robert Beatty's] at that time? Answer. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies, and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer; nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another, and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly, if not entirely, for the jury. But here the utterance was a question, and not an assertion; and there was no answer to the

question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how, then, can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court, and not for the jury; for, if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding, or doing the thing requested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies, and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an answer; for his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly, such silence is not an assent in any sense. There should be something done, or else something said, before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly, it was his duty to speak again, and to take further action, if he really intended to obtain the defendant's assent; for what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further.

And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. The other facts proved, and offered to be proved, but rejected, improperly as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request, and made no answer, an inference of assent should be made; for the hearing of a request, and not answering it, is as consistent, indeed more consistent with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present

case there is no evidence that defendant heard the plaintiff's request, and, without hearing, there was of course no duty of speech.

Judgment reversed.[50]

DAY v. CATON.

(Supreme Judicial Court of Massachusetts, 1876. 119 Mass. 513, 20 Am. Rep. 347.)

Contract to recover the value of one-half of a brick party wall built by the plaintiff.

The defendant requested the judge to rule that: "(1) The plaintiff can recover in this case only upon an express agreement. (2) If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

There was a verdict for the plaintiff. Defendant alleged exceptions.[51]

DEVENS, J. The ruling that a promise to pay for the wall would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall, and that the defendant used it, was substantially in accordance with the request of the defendant, and is conceded to have been correct. Chit. Cont. (11th Ed.) 86; Wells v. Ban-

[50] The silence of an offeree, unaccompanied by other circumstances, is not an acceptance. Carnahan Mfg. Co. v. Beebe-Bowles Co., 80 Or. 124, 156 Pac. 584 (1916): Grice v. Noble, 59 Mich. 515, 26 N. W. 688 (1886); Raysor v. Berkeley Ry. & Lumber Co., 26 S. C. 610, 2 S. E. 119 (1887); Clark v. Potts, 255 Ill. 183, 99 N. E. 364 (1912); Beach v. U. S., 226 U. S. 243, 33 Sup. Ct. 20, 57 L. Ed. 205 (1912). Indeed it has been held that silence does not operate as acceptance, even though the offeror prescribes it as the mode of acceptance and the offeree intends it as an acceptance. Prescott v. Jones, 69 N. H. 305, 41 Atl. 352 (1898); Felthouse v. Bindley, 11 C. B. N. S. 868 (1862).

Mere delay in passing on an application for insurance, even though the first premium is inclosed with the application, is not an acceptance by the insurer. Dorman v. Connecticut Fire Ins. Co., 41 Okl. 509, 139 Pac. 262, 51 L. R. A. (N. S.) 873 (1914); Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211 (1911); Van Arsdale & Osborne v. Young, 21 Okl. 151, 95 Pac. 778 (1908).

[51] The statement of facts is abridged.

ister, 4 Mass. 514; Knowlton v. Plantation No. 4, 14 Me. 20; Davis v. School Dist., 24 Me. 349.

The defendant, however, contends that the presiding judge incorrectly ruled that such promise might be inferred from the fact that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, the defendant having reason to know that the plaintiff was acting with that expectation, and allowed him thus to act without objection.

The fact that the plaintiff expected to be paid for the work would certainly not be sufficient of itself to establish the existence of a contract, when the question between the parties was whether one was made. Taft v. Dickinson, 6 Allen, 553. It must be shown that in some manner the party sought to be charged assented to it. If a party, however, voluntarily accepts and avails himself of valuable services rendered for his benefit, when he has the option whether to accept or reject them, even if there is no distinct proof that they were rendered by his authority or request, a promise to pay for them may be inferred. His knowledge that they were valuable, and his exercise of the option to avail himself of them, justify this inference. Abbot v. Hermon, 7 Greenl. (Me.) 118; Hayden v. Madison, 7 Greenl. (Me.) 76. And when one stands by in silence, and sees valuable services rendered upon his real estate by the erection of a structure (of which he must necessarily avail himself afterwards in his proper use thereof), such silence, accompanied with the knowledge on his part that the party rendering the services expects payment therefor, may fairly be treated as evidence of an acceptance of it, and as tending to show an agreement to pay for it.

The maxim, "Qui tacet consentire videtur," is to be construed indeed as applying only to those cases where the circumstances are such that a party is fairly called upon either to deny or admit his liability. But, if silence may be interpreted as assent where a proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. Lamb v. Bunce, 4 Maule & S. 275; Connor v. Hackley, 2 Metc. (Mass.) 613; Preston v. Linen Co., 119 Mass. 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity inure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing

valuable work for his benefit, and with the expectation of payment indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge.

Exceptions overruled.[52]

AUSTIN v. BURGE.

(Kansas City Court of Appeals. Missouri. 1911. 156 Mo. App. 286, 137 S. W. 618.)

Action by O. D. Austin against Charles Burge. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

ELLISON, J. This action was brought on an account for the subscription price of a newspaper. The judgment in the trial court was for the defendant. It appears that plaintiff was publisher of a newspaper in Butler, Mo., and that defendant's father-in-law subscribed for the paper, to be sent to defendant for two years, and that the father-in-law paid for it for that time. It was then continued to be sent to defendant, through the mail, for several years more. On two occasions defendant paid a bill presented for the subscription price, but each time directed it to be stopped. Plaintiff denies the order to stop, but for the purpose of the case we shall assume that defendant is correct. He testified that, notwithstanding the order to stop it, it was continued to be sent to him, and he continued to receive and read it, until finally he removed to another state.

We have not been cited to a case in this state involving the liability of a person who, though not having subscribed for a newspaper, continues to accept it by receiving it through the mail. There are, however, certain well-understood principles in the law of contracts that ought to solve the question. It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that relating to other things which have not been made the subject of an express agreement. Thus one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that, notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet plaintiff continued to send it, and he continued to take it from the post office to his home. This was an acceptance and use of the prop-

[52] Observe that in this and in the three succeeding cases the contract is unilateral, the only legal duty created being on the offeree, with the correlative right in the offeror. Such transactions are often described, somewhat inaccurately, as an offer of an act for a promise.

erty, and, there being no pretense that a gratuity was intended, an obligation arose to pay for it.

A case quite applicable to the facts here involved arose in Fogg v. Atheneum, 44 N. H. 115, 82 Am. Dec. 191. There the Independent Democrat newspaper was forwarded weekly by mail to the defendant from May 1, 1847, to May 1, 1849, when a bill was presented, which defendant objected to paying on the ground of not having subscribed. Payment was, however, finally made, and directions given to discontinue. The paper changed ownership, and the order to stop it was not known to the new proprietors for a year; but, after being notified of the order, they nevertheless continued to send it to defendant until 1860, a period of 11 years, and defendant continued to receive it through the post office. Payment was several times demanded during this time, but refused on the ground that there was no subscription. The court said that: "During this period of time the defendants were occasionally requested, by the plaintiff's agent, to pay their bill. The answer was, by the defendants, 'We are not subscribers to your newspaper.' But the evidence is the defendants used or kept the plaintiff's * * * newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office." The defendant was held to have accepted the papers, and to have become liable for the subscription price by implication of law.

In Ward v. Powell, 3 Har. (Del.) 379, it was decided that an implied agreement to pay for a newspaper or periodical arose by the continued taking and accepting the paper from the post office, and that "if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year, by refusing to take the papers from the post office, and returning them to the editor as notice of such determination." In Goodland v. Le Clair, 78 Wis. 176, 47 N. W. 268, it was held that if a person receives a paper from the post office for a year, without refusing or returning it, he was liable for the year's subscription. And a like obligation was held to arise in the case of Weatherby v. Bonham, 5 C. & P. 228.

The preparation and publication of a newspaper involves much mental and physical labor, as well as an outlay of money. One who accepts the paper, by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another's labor, and by such act he must be held liable for the subscription price. On the defendant's own evidence, plaintiff should have recovered.

The judgment will therefore be reversed, and the cause remanded. All concur.[53]

[53] Where the periodical sent is not read or used, there is no duty to pay. Realty Records Co. v. Pierson (Sup.) 116 N. Y. Supp. 547 (1909).

HOBBS v. MASSASOIT WHIP CO.

(Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 194, 33 N. E. 495.)

Contract, upon an account annexed for one hundred and eight dollars and fifty cents, for 2,350 eelskins sold by the plaintiff to the defendant. At the trial in the Superior Court, before Hammond, J., it appeared in evidence that the plaintiff lived in Saugus, and the defendant had its usual place of business in Westfield, and was engaged in the manufacture of whips.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.[54]

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense, of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to

[54] The statement of facts is abridged.

amount to an acceptance. See Bushel v. Wheeler, 15 Q. B. 442; Benjamin on Sales, §§ 162–164; Taylor v. Dexter Engine Co., 146 Mass. 613, 615, 16 N. E. 462. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. O'Donnell v. Clinton, 145 Mass. 461, 463, 14 N. E. 747; McCarthy v. Boston & Lowell Railroad, 148 Mass. 550, 552, 20 N. E. 182, 2 L. R. A. 608.

Exceptions overruled.[55]

F. O. EVANS PIANO CO. v. TULLY.

(Supreme Court of Mississippi, 1917. 116 Miss. 267, 76 South. 833, L. R. A. 1918B, 870.)

Suit by the F. O. Evans Piano Company against A. J. Tully. From a judgment for defendant, plaintiff appeals. Reversed, and judgment entered for plaintiff.

ETHRIDGE, J. Appellant, a piano dealer of Chicago, Ill., placed a piano with Tully, at Laurel, Miss., under a contract signed by Tully, which is substantially as follows:

"I accept your offer to try one of your Evans Artist Model Pianos. Without any obligation on my part to purchase, you may ship the piano ordered below. After testing the instrument for thirty days, if I decide to keep it, I will pay for it as stated below, and will sign your selling contract which is a part hereof. If I decide not to keep it, I will return the piano to the freight depot, subject to your order."

Then follows a description of the piano and the terms of sale, in which it was agreed to pay for the piano in monthly installments. The piano was shipped to Tully on this order. On December 31, Tully wrote that the music rolls had been received, but that the piano had not arrived, although he had phoned all the freight offices. On January 8, 1913, Tully wrote to the piano company that the piano had arrived that day in bad condition, there being some marks on the keys, and the player out of commission; that it seemed to have been roughly handled in transit. He also returned the freight bills and requested check to cover same, also requesting the piano company to have its agent call and look over the piano. On January 13th the piano company wrote Tully, acknowledging receipt of his letter of the 8th, and inclosing check for the freight bills, but returned the freight bills

[55] In Bohn Mfg. Co. v. Sawyer, 169 Mass. 477, 482, 48 N. E. 620 (1897) Allen, J., said: "From the defendant's silence in respect to the plaintiff's proposal to effect insurance at their joint expense, and from his subsequent letters and conduct in respect to the policies, the jury might well infer that he assented to that proposal; and if the jury found that such was the fair import of his correspondence and acts, or that the plaintiff believed and had reason to believe that he did assent to it, his secret intention not to do so was immaterial."

and asked that Tully have the agent mark on the freight bills that the piano was received in bad condition, so that damages could be collected from the carrier, and directed Tully to have the piano returned, if it could not be satisfactorily fixed, and another would be sent. It was also suggested that he get a piano tuner to look over the piano and see if it could be put in proper condition, and to send the bill to the piano company for payment. To this letter the appellee did not reply.

On February 28th the piano company again wrote Tully, asking him to have the piano fixed, and to have the freight bills marked by the agent so they could collect damages from the company. There was no reply to this letter, and on March 11th the piano company again wrote Tully along the same lines. No reply was made to this letter, and on March 19th the piano company wrote another letter along the same lines. On March 27th the company wrote another letter, to which no reply was received, and again on April 4th, 10th, 18th, and 28th, and May 6th. May 10th, Mrs. Tully, wife of appellee wrote the piano company, stating that they had been away from home for some time, and that the piano was in good hands while they were away, stating, also, that when the piano was received the player mechanism had dropped about 1½ inches and was resting on the keys or hammers, and that they had a tuner fix the same, who only had to straighten the bolts that supported the player, and which had been bent, for which there was no charge; that the piano needed tuning, but was otherwise all right, and stating that every one who saw the piano thought it was a beautiful instrument. On May 20th appellant replied to this letter and requested a signature to the contract and a remittance, but no answer was received to this letter. On June 29th appellant again wrote Tully, and again on August 12th. On August 14th Mrs. Tully wrote in reply to the letter of the 12th that she did not think the piano was what they wanted. On August 18th appellant replied to this letter, calling attention to its numerous letters in which appellee had been urged to either return the piano or sign the contract, and to have the freight bill marked by the agent, and stating that they could not take back the piano under the circumstances.

Appellee testifies, and also Evans of the piano company. Appellee contended in his testimony that the piano was not in good condition, and was not up to representations, etc. At the conclusion of the evidence, plaintiff requested a peremptory instruction, which was refused by the court. Appellant also requested an instruction that the defendant was under obligation to return the piano within a reasonable time after the 30-day trial period, to some common carrier or railroad for reshipment, and if the jury believed the defendant did not, within a reasonable time, return the piano, their verdict must be for the plaintiff, which was also refused.

We think that, under the contract, the appellee, defendant below, was under the duty to either accept the piano or return it to the depot of a

common carrier at the end of a 30-day trial period, and as the proof shows there was no effort whatever to return the piano, and that the defendant below did not respond to the numerous letters of the plaintiff between January 13th and May 8th, he must be treated in law as having accepted the piano. The peremptory instruction for the appellant should therefore have been given. The judgment of the court below is accordingly reversed, and judgment will be entered here for the appellant.

Reversed, and judgment here.[56]

STEVENS, J. (dissenting).[57] A reversal of this case is based upon the claimed right of the piano company to a peremptory instruction. This expression of my views will be directed solely to this point. As I construe the one and only contract executed by Mr. Tully, it is an agreement merely to permit the Evans Piano Company to place one of their musical instruments in Tully's home to be tried or tested without any obligation whatever on the part of Mr. Tully to buy. This is the express language of the contract itself. It says:

"I accept your offer to try one of your Evans Artist Model pianos. Without any obligation on my part to purchase, you may ship the piano ordered below."

The primary condition upon which Mr. Tully permitted the piano to be installed in his home was stated in the language, "without any obligation on my part to purchase." There is another significant statement in this contract, and that is when appellee had tested the instrument and had decided to keep it he would then for the first time execute a contract of purchase. The language is, "if I decide to keep it, I will pay for it as stated below, and will sign your selling contract, which is a part hereof." If he decides to keep it he will then "sign your selling contract." This so-called "selling contract" does not seem to be incorporated in the record, and I do not know what its proposed

[56] See, also, the following similar decisions: Emery v. Cobbey, 27 Neb. 621, 43 N. W. 410 (1889); Hanson & Parker v. Wittenberg, 205 Mass. 319, 91 N. E. 383 (1910); Wheeler v. Klaholt, 178 Mass. 141, 59 N. E. 756 (1901); Ostman v. Lee, 91 Conn. 731, 101 Atl. 23 (1917); Place v. McIlvain, 38 N. Y. 96, 97 Am. Dec. 777 (1868).

In Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S. W. 817, 7 A. L. R. 1683 (1919), the traveling agent of the defendant called on the plaintiff and there solicited and received an "order" for 50 barrels of meal, to be delivered at buyer's option at any time within four months. The written order expressly stated that it was not to be binding on defendant until its acceptance at the home office. No word was sent by the defendant to the plaintiff; and two months later the plaintiff asked that the meal be shipped. Meantime meal had advanced 50 per cent. in value. The defendant refused to ship, saying that it had never accepted the order. The court held that there was a contract, saying: "We think it is the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an unreasonable length of time will amount to an acceptance, if the offerer is relying upon him for the goods." See 29 Yale L. Jour. 441.

[57] Part of the dissenting opinion is omitted.

terms and provisions are. It was evidently a blank form or contract to be filled out later with the privilege to pay for the piano on the installment plan. It may also have made provision whereby the vendor retained title as security. The contract then which Tully signed was not a contract of purchase. The court now makes him take the piano, and compels him to assume the attitude of purchaser simply because Tully did not return the piano to the depot within such time as the court thinks reasonable.

The question of what was or was not a reasonable time was submitted to the jury under instructions from the court, and the jury by their verdict has found that Tully did not keep the piano an unreasonable length of time. There is indeed room to suspect that Mr. Tully did not act in the utmost good faith, or at least did not act diligently, but his testimony explains this. He says that when the piano arrived "it was in bad condition. It was badly torn up and broken in transit, and badly out of tune, too." He furthermore testifies that "it was not as represented. It was of very poor grade." This testimony on the part of the appellee is uncontradicted. It was offered to explain the necessity for having the piano repaired before a fair test could be made. Mr. Tully furthermore testifies that he notified the house of his dissatisfaction, and "asked twice for shipping instructions on it"; that they never gave any shipping instructions, but insisted upon his signing the contract of purchase, the very contract which the preliminary agreement contemplated. It is significant also that the tentative agreement nowhere states the terms of the trade, but leaves blank spaces unfilled. The purchaser had the right to pay cash within 30 days, and receive one kind of discount, or to pay cash in 60 days, and receive another and different discount, or the option to pay at $10 cash after 30 days and the balance at the rate of $10 a month.

The declaration here sues for the entire price, and it is nowhere intimated that Tully agreed to pay cash for the piano. There is, then, not only an absence of an agreement to buy at all, but especially an absence of any agreement to pay cash. As I see it, there is an absence of mutuality. It is shown that appellant had an agent in this territory, and that appellee requested that the agent call. Instead of the agent calling to see about the damage to the piano, and having the instrument tuned, the piano house was writing letters to Mr. Tully asking him to have this done, and at the same time asking that he sign the contract. The piano company at no time requested Tully to reship the piano, and at no time gave shipping instructions. They do not seem to have been interested in having the piano reshipped, but at all times were demanding an execution of the written contract of purchase. The contract which the correspondence asked Tully to sign gave him benefit of the monthly payment plan. This is sufficient to show that there was no definite agreement as to terms. The agreement, then, was simply an agreement to agree; an agreement to experiment with, to try or test. This being so, when Tully declined to execute any contract after the

expiration of the 30-day period for trial, he should not be compelled to pay for the piano, and cannot be compelled to do so except upon the doctrine of estoppel.

Of course, if Tully had, after the 30 days, signified an acceptance, or had, as in some cases of this kind, attempted to sell the property as his own, an acceptance would be conclusively presumed and the purchaser would be liable. But there is no showing that Tully exercised actual ownership over the property inconsistent with his expressions of dissatisfaction. There is no evidence whatever that he even used the piano after he decided it was not up to representations and what he wanted. He swears that he not only wrote letters to the house offering to return and asking for shipping instructions, but he also offered to return the piano to appellant's attorney, Mr. Welch, and he kept up this offer on the trial of the case. * * * The opinion of the court forces Tully to buy a piano and piano player against his will.

JENNESS v. MT. HOPE IRON CO.

(Supreme Judicial Court of Maine, 1864. 53 Me. 20.)

WALTON, J.[58] This is an action for an alleged breach of contract, and is before us on report. If so much of the plaintiff's evidence as is admissible, is sufficient, prima facie, to entitle him to damages, the case is to stand for trial; otherwise a nonsuit is to be entered.

The plaintiff says that the defendants bargained and sold to him three hundred and three kegs of nails, to be delivered at Bangor, before the close of navigation, in the fall of 1862.

The defendants do not deny that there was a negotiation for the sale of nails; but they deny that the negotiation ever ripened into a contract, by which the parties were bound; and the question is whether the evidence is sufficient, prima facie, to show such a contract; that is, a contract completed.

The negotiation was carried on by letter; and, omitting what is irrelevant and immaterial, amounts substantially to this:

Plaintiff, (Oct. 20, 1862:) "What will you sell me 450 kegs of nails for, delivered at Bangor, in the course of a month, cash down?"

Defendants, (Oct. 23, 1862:) "We will sell you 450 casks common assorted nails, delivered on the dock at Bangor, at $3.62 per keg of 100 lbs. each, cash."

Plaintiff, (Oct. 27, 1862:) "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as possible, 303 kegs, (naming the kinds,) and I will send you a check on Exchange Bank, Boston.

Plaintiff, (Nov. 11, 1862:) "Not having heard whether you have shipped the nails ordered, I thought I would write you as we shall have but a few weeks more of navigation."

[58] The statement of facts and part of the opinion are omitted.

Defendants, (Nov. 14, 1862:) "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it."

This is the whole substance of the written correspondence between these parties, and we look in vain to find in it evidence of a contract completed; a proposition by one party, accepted without modification, by the other.

The defendants offered to deliver four hundred and fifty casks at $3.62 per cask; but this offer was not accepted by the plaintiff; and his order for three hundred and three casks does not appear to have been accepted by the defendants.

We look in vain for a distinct proposition by either party, which is accepted without modification by the other.

To constitute a contract, there must be a proposition by one party, accepted by the other, without any modification whatever. If the acceptance modifies the proposition in any particular, however trifling, it amounts to no more than a counterproposition; it is not in law an acceptance which will complete the contract. The letters between these parties fail, therefore, to establish a prima facie case for the plaintiff.

The learned counsel for the plaintiff admit that the letters "do not probably of themselves constitute a contract;" but they insist that, under the circumstances, slight evidence would be sufficient to supply the defect, and show that in fact the plaintiff's modified order was accepted by the defendants. It is highly probable that when the defendants received the plaintiff's order of October 27, they intended to fill it; otherwise they should have notified him, and not by their silence left him to infer that the nails would be forwarded, when they had no intention of doing it. And if such an intention would be sufficient to complete the contract, and render it binding upon the parties, we might, perhaps, feel justified in inferring it from the defendant's silence, and other facts testified to by the plaintiff. But we are not satisfied that such an intention, locked up in the breast of a party, and not communicated to the other, is sufficient in any case to constitute such an acceptance of a proposition as to create a binding contract. We think it would not.

It would be unjust to the other party to hold him bound by such an acceptance; and, unless both parties would be bound by it, neither would be, for want of mutuality.[59] * * *

[59] Silence of the original offeror does not operate as an acceptance of a counter offer. Cincinnati Equipment Co. v. Big Muddy River Consol. Coal Co., 158 Ky. 247, 164 S. W. 704 (1914), unless expressly so agreed; Bowen v.

SECTION 7.—CONDITIONAL ACCEPTANCE AND REJECTION

BEAUMONT v. PRIETO et al.

(Supreme Court of the United States, 1919. 249 U. S. 554, 39 Sup. Ct. 383, 63 L. Ed. 770.)

Suit by Hartford Beaumont, assignee of W. Borck, against Mauro Prieto and others. Decree for plaintiff was reversed by the Supreme Court of the Philippine Islands, and plaintiff appeals and brings error. Affirmed.

Mr. Justice HOLMES. This is a suit for the specific performance of an alleged contract to sell land. The court of first instance made a decree for the plaintiff, but the decree was reversed by the Supreme Court of the Philippine Islands and the defendants were absolved from the complaint. There is a motion to dismiss, on the ground that the writ of error and citation were not made returnable in time. But without going into particulars, as the appellant had color of authority from the court and a judge of that court, it appears to us that justice will be better served by dealing with the merits of the case. See Southern Pine Co. v. Ward, 208 U. S. 126, 137, 28 Sup. Ct. 239, 52 L. Ed. 420.

On the merits the only question is whether the alleged contract was made. The first material step was the following offer, dated December 4, 1911:

"Mr. W. Borck, Real Estate Agent, Manila, P. I.—Sir: In compliance with your request I herewith give you an option for three months to buy the property of Mr. Benito Legarda, known as the Nagtahan hacienda, situated in the district of Sampaloc, Manila, and con-

McCarthy, 85 Mich. 26, 48 N. W. 155 (1891), "he had a right to disregard it [counter offer]; nor was it his duty to notify complainant.

In the case of a late acceptance, the power of acceptance having lapsed, it has been suggested that silence by the original offeror should complete a contract. Phillips v. Moor, 71 Me. 78 (1880). See, also, German Civil Code, § 149; Swiss Code Oblig. § 5; Jap. Civil Code, art. 522; Morrell v. Studd, [1913] 2 Ch. 648. But in the case of Maclay v. Harvey, 90 Ill. 525, 530, 32 Am. Rep. 35 (1878), where the plaintiff mailed her acceptance two days later than by return mail as requested, the court said: "Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so." In accord is Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752 (1884).

sisting of about 1,993,000 square meters of land, for the price of its assessed government valuation. B. Valdes."

There is no dispute that the assessed government valuation was 307,000 pesos, that Legarda owned the land and that Valdes had power to make the offer. On January 17, 1912, Borck wrote to Valdes:

"In reference to our negotiations regarding" the property in question, "I offer to purchase said property for the sum of three hundred and seven thousand (307,000.00) pesos, Ph. C., cash, net to you, payable the first day of May, 1912, or before and with delivery of a torrens title free of all encumbrances as taxes and other debts."

There was dispute about the admissibility of this letter and its being signed, but we see no occasion to disturb the opinion of the Supreme Court that it was a part of the transaction and was admissible. No answer was received, and on January 19 Borck wrote again, saying that he was ready to purchase the property at the price and that full payment would be made on or before March 3, provided all documents in connection with the hacienda were immediately placed at his disposal and found in good order. On January 23, Borck wrote again that he could improve the condition of payment and would pay ten days after the documents had been put at his disposal for inspection, etc., and finally, on February 28, wrote that the price was ready to be paid over and requesting notice when it was convenient to allow inspection of all papers. Before this last letter was written Valdes had indicated that he regarded compliance as an open question by saying in conversation that he wished to communicate with Mr. Legarda. Subsequently conveyance was refused.

The letter of January 17 plainly departed from the terms of the offer as to the time of payment and was, as it was expressed to be, a counter offer. In the language of a similar English case:

"The plaintiff made an offer of his own * * * and he thereby rejected the offer previously made by the defendant. * * * It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it." Hyde v. Wrench, 3 Beavan, 334; Langdell, Cont. § 18.

We do not find it necessary to go into the discussion of the later communications, which led the Supreme Court to the conclusion that they also would not have been sufficient. The right to hold the defendant to the proposed terms by a word of assent was gone, and after that all that the plaintiff could do was to make an offer in his turn. It would need a very much stronger case than this to induce us to reverse the decision of the court below. Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538.

Judgment affirmed.[60]

[60] In accord: Hyde v. Wrench, 3 Beav. 334 (1840); Egger v. Nesbitt, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596 (1894).

In Howard Smith & Co. v. Varawa (High Court of Australia) 5 C. L. R. 68 (1907), an offer was made by cable, on the part of the plaintiff; and

POEL et al. v. BRUNSWICK-BALKE-COLLENDER CO. OF NEW YORK.

(Court of Appeals of New York, 1915. 216 N. Y. 310, 110 N. E. 619.)

Action by Frans Poel and another, copartners doing business as Poel & Arnold, against the Brunswick-Balke-Collender Company of New York. From an order of the Appellate Division, First Department (144 N. Y. Supp. 725), and the judgment entered thereon, unanimously affirming a judgment rendered in favor of plaintiffs, defendant appeals. Reversed, and new trial granted.

SEABURY, J.[61] In this action the plaintiffs sued to recover damages from this defendant for the breach of an executory contract. * * * The theory of the action is that the defendant agreed to accept and pay for certain rubber which the plaintiffs agreed to sell to it, and that the refusal of the defendant to accept and pay for said rubber caused a breach of that contract. * * *

There are in this case four writings, and upon three of them this controversy must be determined. * * * The writings referred to are as follows: * * *

New York, April 4, 1910.

Brunswick-Balke-Collender Co., Long Island City, L. I.—Gentlemen: Inclosed, we beg to hand you contract for 12 tons Upriver Fine Para Rubber, as sold you to-day, with our thanks for the order.

Very truly yours. Poel & Arnold,
Per W. J. Kelly.

Inclosed with this letter was the following:

Apr. 4/10.

Brunswick-Balke-Collender Co., Long Island City, L. I.

Sold to You: For equal monthly shipments January to June, 1911, from Brazil and/or Liverpool, about twelve (12) tons Upriver Fine Para Rubber at two dollars and forty-two cents ($2.42) per pound; payable in U. S. gold or its equivalent, cash twenty (20) days from date of delivery here.

On April 6th Rogers [representing the defendant] sent the following order to the plaintiffs. It is partly printed and partly written. The part in writing is italicized: * * *

after various intervening cable messages, the defendant cabled a conditional acceptance and counter offer at 3:40 p. m. Twenty minutes later, at 4 p. m. the defendant cabled an unconditional acceptance. As to the effect of these messages the court said: "The telegram of 3:40 appears to have arrived at Manila at 5:30 p. m. There was no evidence to show when that of 4 p. m. arrived there. An interesting argument was addressed to us to the effect that the telegram of 3:40 operated from the time of its despatch, and had the effect of a refusal which could not be followed by an acceptance of the original offer, even if an acceptance of that offer were in fact received before it, and a fortiori if the acceptance were received after the refusal." The court found it unnecessary to pass upon the point.

[61] Parts of the opinion have been omitted.

Long Island City, *4/6, 1910.*

M. Poel and Arnold, 277 Broadway, N. Y. C. Please deliver at once the following, and send invoice with goods:

About 12 tons Upriver Fine Para Rubber at 2.42 per lb. Equal monthly shipments January to June, 1911.

Conditions on Which Above Order is Given.

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.

Terms: F. O. B.

Respectfully yours,

The Brunswick-Balke-Collender Co. of New York.

* * * * * * * * *

The fundamental question in this case is whether these writings constitute a contract between the parties. If they do not, no question as to whether these writings meet the requirements of the statute of frauds need be considered. An analysis of their provisions will show that they do not constitute a contract. It is not contended, and in face of the provisions of the plaintiffs' letter of April 4th it cannot be claimed, that that letter is in itself a contract. It is a mere offer or proposal by the plaintiffs that the defendant should accept the proposed contract inclosed which is said to embody an oral order that the defendant had that day given the plaintiffs. The object of this letter was to have the terms of the oral agreement reduced to writing so that there could be no uncertainty as to the terms of the contract. The letter of the defendant of April 6th did not accept this offer. If the intention of the defendant had been to accept the offer made in the plaintiffs' letter of April 4th, it would have been a simple matter for the defendant to have indorsed its acceptance upon the proposed contract which the plaintiffs' letter of April 4th had inclosed. Instead of adopting this simple and obvious method of indicating an intent to accept the contract proposed by the plaintiffs, the defendant submitted its own proposal and specified the terms and conditions upon which it should be accepted.

The defendant's letter of April 6th was not an acceptance of this offer made by the plaintiffs in their letter of April 4th. It was a counter offer or proposition for a contract. Its provisions make it perfectly clear that the defendant: (1) Asked the plaintiffs to deliver rubber of a certain quality and quantity at the price specified in designated shipments; (2) *it specified that the order therein given was conditional upon the receipt of its order being promptly acknowledged;* and (3) upon the further condition that the plaintiffs would guarantee delivery within the time specified. It may be urged that the condition

specified in defendant's order that the plaintiffs would guarantee the delivery of the goods within the time specified added nothing of substance to the agreement, because if the offer was accepted the acceptance itself would involve this obligation on the part of the plaintiffs. The other condition specified by the defendant cannot be disposed of in the same manner. That provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition that the defendant had the right to annex to its offer. The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth. When this assent was given and the acknowledgment made, this contract was then to come into existence and would be completely expressed in writing.

The plaintiffs did not acknowledge the receipt of this order and the proposal remained unaccepted. As the party making this offer deemed this provision material, and as the offer was made subject to compliance with it by the plaintiffs, it is not for the court to say that it is immaterial. When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract, or it could reject the offer. There was no middle course. If it did not accept the offer proposed it necessarily rejected it. A proposal to accept the offer it modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs. Mactier's Adm'rs v. Frith, 6 Wend. 103, 21 Am. Dec. 262; Vassar v. Camp, 11 N. Y. 441; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Sidney Glass Works v. Barnes & Co., 86 Hun, 374, 33 N. Y. Supp. 508; Mahar v. Compton, 18 App. Div. 536, 540, 45 N. Y. Supp. 1126; Nundy v. Matthews, 34 Hun, 74; Barrow Steamship Co. v. Mexican C. R. Co., 134 N. Y. 15, 31 N. E. 261, 17 L. R. A. 359. * * *

Judgment reversed.[62]

[62] In the following cases it was held that there was no contract, for the reason that the acceptance was conditional and not in accord with the terms of the offer: Minneapolis & St. L. R. Co. v. Columbus Rolling Mill, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376 (1886); Rushing v. Manhattan Life Ins. Co. of New York, 224 Fed. 74, 139 C. C. A. 520 (1915); McRae v. Ross, 170 Cal. 74, 148 Pac. 215 (1915); Weishut v. Layton, 5 Boyce (Del.) 364, 93 Atl. 1057 (1915); Goodridge v. Wood, 133 Ill. App. 483 (1907); Shane Bros. & Wilson Co. v. Barrett (Ind. App.) 124 N. E. 780 (1919), difference as to time of delivery; Hartford Life Ins. Co. v. Milet, 105 S. W. 144, 31 Ky. Law Rep. 1297 (1907); Jenness v. Mt. Hope Iron Co., 53 Me. 20 (1864), offer to sell 450 kegs nails is not accepted by ordering 303 kegs; Jordan Bros. Co. v. Walker, 154 Mich. 394, 117 N. W. 942 (1908); Kraus v. Hansen, 182 Mich. 52, 148 N. W. 373 (1914); Sterling & Son Co. v. Watson & Bennett Co., 193 Mich. 11, 159 N. W. 381 (1916), offer of 4,000 poles is not accepted, if offeree adds "more or less"; Lewis v. Johnson, 123 Minn. 409, 143 N. W. 1127, L. R. A. 1915D, 150 (1913); State v. Robertson (Mo.) 191 S. W. 989 (1917), insurance policy issued different from the one applied for; Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612 (1901); Hall v. Olson, 58 Or. 464, 114 Pac. 638 (1911), offer to sell 18,000 acres

BRUCE et al. v. PEARSON.

(Supreme Court of New York, 1808. 3 Johns. 534.)

This was an action of assumpsit, for goods sold and delivered. The cause was tried at the last sittings in New York, before Mr. Justice Van Ness.

On the 11th December, 1805, the defendant, who resides at Albany, wrote a letter to the plaintiffs, who are merchants in the city of New York, as follows:

"Albany, 11th December, 1805.

"Gent: Should you find it perfectly agreeable to yourselves, (not otherwise,) you can send me by any sloop, provided you think the river will keep open, the goods I have noted at foot, and payable the 15th May next. If you think the time too long, you need not send them."

The goods mentioned were: "6 hogsheads rum; 1 hogshead sugar; 1 pipe gin; 1 pipe brandy; 4 quarter-chests hyson-skin tea; 20 or 40 small boxes pipes, if low; 10 barrels of codfish."

The plaintiffs, on the 21st December, 1805, shipped on board of a sloop, for the defendant, "3 hogsheads rum; 1 pipe brandy; 2 chests tea; 1 hogshead sugar, and 1 pipe of gin." At the bottom of the bill were these words: "At three months; interest after, till paid."

They also wrote to the defendant, as follows:

"Dear sir: Your much esteemed favour of the 11th inst. we only received on the 19th. We were much at a loss to know how to act; we, however, have calculated to risk the getting up, and have reduced the order, and shipped per the Fair Play, as on the other side."

The vessel having the goods on board, (the river being much obstructed with ice,) was, during her passage, cast away, and part of the goods wholly lost. The master, on the 8th January, 1806, having left the vessel, went to Albany, and delivered the letter of the plaintiffs to the defendant, who, having read it, said that he did not consider the goods as his, as the plaintiffs had not sent all the goods ordered, nor on the terms proposed. On the same day, the defendant wrote to the plaintiffs, informing them, that the vessel was ashore, and that he did not consider the goods at his risk, and advising them to give di-

of land with warranty of 40 million feet of timber—acceptance, subject to a "cruise" showing warranty correct; Jordan v. Norton (Ex.) 4 M. & W. 153 (1838); Duke v. Andrews, 2 Ex. 290 (1848), application for shares not accepted by allotting "nontransferable" shares; Crossley v. Maycock, L. R. 18 Eq. Cas. 180 (1874); Carter v. Bingham, 32 Up. Can. 615 (1872).

Where the offer requires acceptance in a particular form, an acceptance in a different form is inoperative, even though the legal relations that would be created by it are identical with those that would be created by the required form. Phœnix Iron & Steel Co. v. Wilkoff Co., 253 Fed. 165, 165 C. C. A. 65, 1 A. L. R. 1497 (1918).

"An acceptance may be complete, though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of dissent, so that the whole thing be described as a 'grumbling assent.'" Pollock, Contracts; Johnson v. Federal Union Surety Co., 187 Mich. 454, 153 N. W. 788, 792 (1915).

rections for their preservation, offering, if the plaintiffs considered him as liable, to leave the question to be decided by arbitrators.

The goods were charged at the market price of goods, at three months credit.

The plaintiffs offered to prove, that the defendant had frequently, prior to the 11th December, 1804, sent orders to the plaintiffs for goods, which were executed only in part, and that the defendant had always received the goods sent, without making any objection; and that it was a general usage among merchants in the city of New York, to send to their customers in the country, a part only of the goods ordered; but this evidence was objected to, and overruled. The judge was about to order the plaintiffs to be called, when the counsel agreed that a verdict might be taken for the plaintiffs, subject to the opinion of the court on a case containing the facts above stated; and that, if the opinion of the court should be in favour of the defendant, a nonsuit should be entered.

PER CURIAM. The order sent by the defendant to the plaintiffs, was for 6 hogsheads of rum, and other articles, at a credit of six months; and the plaintiffs sent only 3 hogsheads, and omitted part of the other articles, charging those sent, at a credit of three months. This cannot amount to a contract. There is no agreement, no aggregatio mentium between the parties, as to the thing, or subject-matter of the contract. The defendant wished to have the whole of the goods; a part of them might be of no use; and until he assented to receive a part instead of the whole, he cannot be said to have contracted to pay for a part; and there can be no implied assumpsit to pay, as the goods sent never came to his hands.

Judgment of nonsuit.

GENERAL LITHOGRAPHING & PRINTING CO. v. WASHINGTON RUBBER CO., Inc.

(Supreme Court of Washington, 1909. 55 Wash. 461, 104 Pac. 650.)

Action by the General Lithographing & Printing Company against the Washington Rubber Company, Incorporated, for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

PARKER, J.[63] The facts in this cause as found by the court, the trial being by the court without a jury, are in substance as follows:

About June 24, 1907, the plaintiff and Mix Fire Apparatus Company entered into a contract, whereby the former agreed to perform the work and furnish material for the printing of 3,500 copies of a catalogue for the latter at the agreed price of $800. In pursuance of the terms of the contract, the plaintiff proceeded with the work, when the Mix Fire Apparatus Company requested plaintiff not to complete same until further orders, and thereupon plaintiff held the print-

[63] Part of the opinion is omitted.

ed forms for the work for a period of two months, for which it was entitled to $50 as a reasonable charge for the holding of the forms. On the 15th day of November, 1907, in consideration of the release and discharge by the plaintiff of said claim of $50 for holding the forms, and a continuation and completion of the contract as originally made, the defendant entered into a contract in writing whereby plaintiff was to complete the catalogue, and the defendant was to accept and pay for the same. In pursuance of this last contract, the plaintiff proceeded to perform the same and submitted proofs for correction to defendant preparatory to final printing, but defendant wholly failed and refused to correct and return said proof, and refused to allow the work to proceed or to fulfill the terms of the contract on its part. The reasonable value of the work and labor in and about the composition performed by plaintiff is $200. The reasonable value of labor incident to the furnishing of proof to defendant is $25. The depreciation in the value of paper purchased by plaintiff for the work, and left on hand is $100, and the profit plaintiff would have made upon the contract had it been allowed to complete the same is $200.

From these facts the court concluded as a matter of law that plaintiff was entitled to recover from defendant $525, and rendered judgment accordingly, from which defendant has appealed.

Appellant, having filed its exceptions to the court's findings, contends that there was no contract shown by the evidence to have been entered into between the parties, the breach of which would warrant a recovery. The contract referred to in the court's findings as being entered into between the appellant and respondent is evidenced by two letters as follows:

"Seattle, Wash., 11—6—07. General Lithographing & Printing Co., City—Gentlemen: Referring to the writer's conversation with your Mr. Graff about six weeks ago, at which time he proposed to him that the Washington Rubber Co. would be willing to assume the payment of $800.00 for the catalogue ordered from his Company by the Mix Fire Apparatus Co. on delivery of said catalogue in accordance with the contract, as placed, we herewith confirm said offer on condition that there will be no additional charges beyond the original contract price of Eight Hundred Dollars ($800.00). Kindly advise us what decision you have come to on this offer and oblige, Yours respectfully, The Washington Rubber Co., by Franz F. Richter, Pr."

"Nov. 15, 1907. Washington Rubber Co., 216 Jackson St., City—Gentlemen: In answer to your letter dated November 6th, 1907, we beg to accept your proposition with the understanding that we are to have $800.00 for the catalogue printed as originally agreed, and no changes to be made in your copy or corrections except at your expense. The job has been set and waiting for you at some time, ready to run. We believe there will be no changes necessary but in case there are, we will expect $1.25 per hour for composition changes. Yours truly, General Lithographing & Printing Co."

Counsel for appellant argue that the language of the second letter does not constitute an unconditional acceptance of the proposition contained in the first letter because of the words therein: "And no changes to be made in your copy or corrections except at your expense." There may be room for argument as to whether or not these words so qualify the acceptance as to make it conditional, and thereby prevent the meeting of the minds of the parties. We are not inclined to so regard it; but rather as a statement indicating that there would be extra charge for any extra work beyond the strict terms of the contract. The latter part of the letter lends support to this view. However, this involves only a question of construction, which we are relieved from solving if as a matter of fact the parties subsequently treated the contract as existing. Mr. Graff, the president of respondent company, referring to a time immediately following the exchange of the letters, testified: "We immediately took new proofs as requested. Mr. Richter told me to go ahead with the work and to furnish new proofs for Mr. Mix to correct, which we did." If this be true, and we think the trial court was warranted in so believing from the evidence, it at once becomes apparent that both parties regarded the contract as complete. * * *

The judgment is affirmed.

STEVENSON, JAQUES & CO. v. McLEAN.

(In the High Court of Justice, Queen's Bench Division, 1880. L. R. 5 Q. B. D. 346.)

LUSH, J. This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at 40s. per ton, net cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for £1900, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of damages. The question of law was argued before me on May 7th last.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron, which he had originally bought of the plaintiffs, wrote on September 24th to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at 39s., which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether the prices will be main-

tained or fall as suddenly as they have advanced. Sales are being made freely for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I shall probably be able to wire you something definite on Monday." This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:

"Referring to R. A. McLean's letter to you re warrants, I have seen him again to-day, and he considers 39s. too low for same. At 40s. he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram:

"Cannot make an offer to-day; warrants rather easier. Several sellers think might get 39s. 6d. if you could wire firm offer subject reply Tuesday noon."

In answer to this Fossick wrote on the same day: "Your telegram duly to hand re warrants. I have seen Mr. McLean, but he is not inclined to make a firm offer. I do not think he is likely to sell at 39s. 6d., but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the Liverpool letter of the 26th, wrote himself to the plaintiffs as follows:

"Mr. Fossick's clerk showed me a telegram from him yesterday mentioning 39s. for No. 3 as present price, 40s., for forward delivery. I instructed the clerk to wire you that I would now sell for 40s., net cash, open till Monday." No such telegram was sent by Fossick's clerk.

The plaintiffs were thus on the 28th (Sunday) in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for 40s., net cash, and would hold it open all Monday. This it was admitted must have been the meaning of "open till Monday."

On the Monday morning, at 9:42, the plaintiffs telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10:01 a. m., and was delivered at the defendant's office in the Old Jewry shortly afterward.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for 40s., net cash, and at 1:25 sent off a telegram to the plaintiffs: "Have sold all my warrants here for forty net to-day." This telegram reached Middlesborough at 1:46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1:34, the plaintiffs telegraphed to defendant: "Have secured your price for payment next Monday—write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2:06 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed: "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied: "Your two telegrams received, but your sale was too late; your sale was not per my instructions." And to this the plaintiffs rejoined: "Have sold your warrants on terms stated in your letter of 27th."

The iron was sold by plaintiffs to one Walker at 41s. 6d., and the contract note was signed before 1 o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on 40s.

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller. The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant: First, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again,

the form of the telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to Hyde v. Wrench [3 Beav. 334], where one party offered his estate for £1,000, and the other answered by offering £950. Lord Langdale, in that case, held that after the £950 had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which has been supposed to have been sanctioned by the Court of Queen's Bench in Cooke v. Oxley [3 T. R. 653], that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted; and that if, when an offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of Cooke v. Oxley does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till four in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver if the plaintiff would agree to purchase and give notice thereof before 4 o'clock. The court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till 4 o'clock, and that the alleged promise to wait was nudum pactum.

All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with Cooke v. Oxley. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end. See Routledge v. Grant [4 Bing. 653]. But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has had a reasonable time to answer it. Adams v. Lindsell [1 B. & Ald. 681]. "Common sense tells us," said Lord Cotten-

ham, in Dunlop v. Higgins [1 H. L. C. 381], "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. Cooke v. Oxley [3 T. R. 653], if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in Cooke v. Oxley, the doctrine of Pothier before adverted to, which is undoubtedly contrary to the spirit of English law, has never been affirmed in our courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not, until recently, been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted." Tayloe v. Merchants' Fire Insurance Co. [9 How. 390]; and in Byrne & Co. v. Leon Van Tienhoven & Co. [49 L. J. (C. P.) 316], my brother Lindley, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all.

It follows, that as no notice of withdrawal of his offer to sell at 40s., net cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for £1,900, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for £1,900. The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.[64]

[64] "A mere inquiry as to the terms of the proposal, or a request to modify or change the offer, does not have the effect of rejecting the offer, and, if the offer has not been revoked, a party may accept it, although he previously asked the proposer to modify it." Johnson v. Federal Union Surety Co., 187 Mich. 454, 153 N. W. 788 (1915).

See, also, in accord, Simpson v. Hughes, 66 L. J. Ch. 334 (1897); Dunlop v. Higgins, 1 H. L. C. 381 (1848).

PURRINGTON v. GRIMM.

(Supreme Court of Vermont, 1910. 83 Vt. 466, 76 Atl. 158.)

Action by Frank G. Purrington against Gustave H. Grimm. From a judgment for defendant, plaintiff brings exceptions. Reversed and remanded.

MUNSON, J.[65] The suit is to recover damages for the non-delivery of goods purchased. The defendant denies that there was a sale. The question is whether certain correspondence shows a contract.

The defendant was engaged in the manufacture and sale of sugar utensils and supplies. The plaintiff, wishing to fit up his sugar place for the making of maple sugar, applied to the defendant by letter for his catalogue of evaporators and sugaring utensils. The defendant replied, inclosing a price list of evaporators, and stating that he had mailed him a catalogue, and that if he would place an order by return mail and pay on delivery he would allow him a special discount of 10 per cent., or that he might purchase at regular price by paying one-half cash May 1st and the balance in one year. Plaintiff acknowledged receipt of the catalogue, and inquired the prices of evaporators of two specified sizes. Defendant replied, giving prices of such sized evaporators with arch complete, including chimney, grate bars, etc., and saying that if plaintiff would send cash with order he would allow him a discount of 5 per cent.: that his regular terms were one-half cash May 1st and balance in one year; and that if he bought on those terms the price would be net.

February 13th plaintiff wrote defendant proposing to buy an evaporator of a specified size and quality, an eight-barrel store tank of a certain description, 300 No. 4 spouts with hooks, and 300 galvanized iron buckets of $16 quality, if the defendant would give three years' time, first payment to be made May 1, 1907. February 16th defendant wrote plaintiff that he would accept his order and make out three notes of equal payments May 1, 1907, 1908, and 1909, but saying that he had no galvanized buckets of the $16 quality, and that the only thing he could give him was his best bucket, selling for $24 per 100, or I. C. Coke tin buckets, for $18 per 100. To this plaintiff replied under date of February 18th: "Would say of the buckets that you may send us 300 AAAA 14 bright charcoal tin buckets, also a 7/16-inch tapping bit and ½-inch reamer"—concluding with a request that he ship as soon as possible, and thanking him for the extra time allowed. Defendant did not ship the goods, and after repeated communications of inquiry wrote plaintiff, under date of March 19th, that he could not ship them because the information he had regarding plaintiff's financial standing was not satisfactory. It appears that the buckets mentioned in plaintiff's letter of February 18th were the same as the $18 bucket mentioned in the defendant's last preceding letter, and that the tapping

[65] Part of the opinion is omitted.

bit and reamer first mentioned in plaintiff's letter of February 18th together cost 75 cents. These facts, with the letters, make the case. The court directed a verdict for the defendant, on the ground that the plaintiff had not proved a contract.

It is argued in support of the judgment that the letters say nothing about the price of some of the articles ordered. It was not necessary that they should. It is evident from the correspondence that the parties were negotiating on the basis of a price list; the defendant offering a discount for cash, and the plaintiff seeking a longer time of credit at regular prices. When this was settled, the price list would determine the amount of the purchase. It is said that the giving of notes was first referred to in defendant's letter of February 16th, and that the plaintiff's letter of February 18th contains no agreement to give them. We think the plaintiff's agreement to the proposed change in the list ordered with thanks for the extra time allowed for payment, was an implied assent to the manner in which it was proposed that the terms of payment should be evidenced. It is said that the defendant nowhere proposed to sell plaintiff 300 buckets. His whole correspondence was an offer to supply the defendant, and his letter of February 16th plainly gave the plaintiff his choice between two kinds of buckets then in stock. It is said that in the plaintiff's letter regarding the buckets the other articles previously mentioned in the negotiation were entirely omitted. It was not necessary that the previous steps in the negotiation should be recited in each succeeding letter.[66] Plaintiff's letter of February 13th was a proposal to buy a specified list of goods if the defendant would give a certain period of credit. Defendant's letter of February 16th agreed to give the credit asked for, but proposed a substitution of one grade of goods for another as to a part of

[66] In C. W. Hull Co. v. Marquette Cement Mfg. Co., 208 Fed. 260, 264, 125 C. C. A. 460 (1913), the court said: "Counsel for appellant builds up an imposing argument in this way: He starts with the basic principle that in order to create a contract there must be a definite proposal on one side and an unconditional acceptance on the other. He then takes up the letters and shows that each offer was met by some new term and, applying his rule, lays aside each letter as a nullity because it failed to produce a complete agreement. Parties, however, have the right to reach their agreements in their own way. They may settle upon one term at a time, and, if it is reasonably clear that this has been their method, then, when the last term is agreed upon, their contract is just as complete and binding as if all its terms had been settled by a single act. Here the parties first agree upon territory, then upon quantity, then upon general features, such as terms of payment, return of sacks, etc., then upon the amount of the monthly deliveries, and finally upon the price. At every stage, as the negotiations advance, it seems clear to us that the parties carry forward the terms as to which they have already agreed." See, also, Kehlor Flour Mills Co. v. Linden, 230 Mass. 119, 119 N. E. 698 (1918).

In Dougherty v. Briggs, 231 Pa. 68, 75, 79 Atl. 924 (1911), the court said: "When it is sought to establish a contract by letters which pass between the parties, containing proposals, answers and counter proposals, it must be made to appear that at some point in the correspondence there was a definite and unqualified proposal by one party which was unconditionally and without qualification accepted by the other party."

the order. Plaintiff's letter of February 18th agreed to the proposed change. It is plain that these three letters resulted in an agreement, unless this was prevented by plaintiff's mention of the bit and reamer.

It is certain that an acceptance which varies from the offer will not conclude a contract. Davenport v. Newton, 71 Vt. 11, 21, 42 Atl. 1087. But the reply may go beyond the terms of the proposal without qualifying the acceptance. The addition may be such as fairly to import a request instead of a condition. In determining what one party intended, and the other ought to have understood, regard must be had to the situation and purpose of the parties, and the subject-matter and course of the negotiations. These parties had been negotiating regarding the substantial outfit of a sugar orchard, with proposals and counter-proposals induced by the condition of the defendant's stock and the plaintiff's desire to secure a longer term of credit. This negotiation was brought to an agreement by plaintiff's letter of February 18th, unless it was held open by the introduction of a new subject-matter—the tapping bit and reamer. The language of this letter is not so complete and exact as to leave no room for construction. If the meaning is that the defendant might make the proposed substitution of buckets provided he would add to the shipment a bit and a reamer, there was no contract. But we think the purport of the letter is the same as if the plaintiff had written: "You may also put in, if you have them on hand, a tapping bit and reamer." It seems clear that, if the defendant had shipped the goods without the bit and reamer, the plaintiff could not have refused to take them on the ground that those articles were omitted.

There are a few cases somewhat in point. In Culton v. Gilchrist, 92 Iowa, 718, 61 N. W. 384, plaintiff wrote defendant that he would lease to him for three or five years as he might choose. Defendant thereupon wrote plaintiff that he might make out a lease for five years; that his reason for wanting the place for five years was that he would like to put up a small cookroom; that he would like to do this himself, if the plaintiff would give him in the lease the privilege of removing the addition if he did not buy the place. It was held that the acceptance was complete; that the matter subsequently introduced was not a condition, but a request. * * *

Judgment reversed.[67]

[67] In accord: Simpson v. Emmons, 116 Me. 14, 99 Atl. 658 (1917), a request to "rush shipment" does not invalidate acceptance; Wilkins v. Vass Cotton Mills, 176 N. C. 73, 97 S. E. 151 (1918), "accept offer; make it 25,000 if can make sixteens," held valid; Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904 (1904), "respectfully request you to make delivery of deed in Morgantown"; Culton v. Gilchrist, 92 Iowa, 718, 61 N. W. 384 (1894), acceptance of lease, with request to build a small cook room; Portage Rubber Co. v. Fruin Drop Forge Co., 186 Ill. App. 11 (1914).

WHEATON BUILDING & LUMBER CO. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 218, 90 N. E. 598.)

Action by the Wheaton Building & Lumber Company against the City of Boston. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

RUGG, J.[68] The plaintiff in common with several others, in response to an advertisement issued by the schoolhouse commissioners of Boston, submitted a bid for the erection of a certain schoolhouse, transmitting with it a check to the order of defendant for $2,000. The city claims the right to hold this money upon these facts: The bid contained the provision that the plaintiff "proposes and agrees that if within 20 days after the day named below for leaving the proposal, notice that this proposal will be accepted for the city shall be mailed to him at the address given below or shall be delivered to him, he will at 11 o'clock a. m. of some day of the six week days next after such mailing or delivery * * * deliver * * * a contract and bond for doing the work properly executed in the form annexed, * * * and also agrees that the certified check payable to the city left herewith is the property of the city, and the amount thereof is the amount of damages which the city will sustain by failure to carry out the proposal, but if this proposal is not accepted or if notice is mailed and delivered and the undersigned executes and delivers said contract and bond the check or its amount is to be paid to him on receipt therefor."

The bid of the lowest bidder was accepted, but he declined to execute a contract, and the city forfeited his check. Thereupon, the proposal of the plaintiff, being the next lowest, was accepted by letter mailed within the time limited in the bid, and it refused to execute a contract. The proposal of the next lowest bidder was then accepted, but he refused to execute the contract, and his check was taken by the city. Between these three bids and the next lowest was a gap of about $24,000, and his proposal being accepted, he executed a contract. The plaintiff did not attempt to withdraw its proposal until after it had been accepted by the schoolhouse commission.

1. It is urged that the acceptance of one bid by the city constituted a rejection of all the other bids, and that hence the attempted acceptance of the plaintiff's bid was of no effect. Undoubtedly an advertisement and proposal might be so framed as to sustain such contention. But that is not the effect of the acts of the defendant and the statute under which they were performed. The terms of the proposal as to the time during which it was to remain open indicate that the city intended to reserve to itself time to make at least three attempts to hold bidders before its rights should have expired. St. 1890, p. 370, c. 418, required the execution of a formal written contract in addition to the acceptance of the proposal. The acceptance of the bid by the school-

[68] Part of the opinion is omitted.

house commissioners did not of itself constitute a formal contract. The city could not be bound under the statute until the formal contract was executed. Edge Moor Bridge Works v. Bristol, 170 Mass. 528, 49 N. E. 918. The only way in which the city could secure a binding agreement for the construction of its building was through such a written contract. But it is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city. St. 1890, c. 418, § 5, provides that "every proposal * * * shall be accompanied by a suitable bond, certified check or certificate of deposit for the faithful performance of such proposal. * * *" This section must be given a reasonable effect. It would be a nullity if it should be held that the bidder was at liberty to withdraw without any liability at any time before the formal contract, which alone could bind the city, should be executed. The reasonable construction is to hold that the bidder is bound to stand by his proposal, at least after its acceptance, and to the extent of his bond or deposit, but no further.

If the case was free from statutory regulation, and it did not appear that a more formal contract was contemplated, the mere acceptance of the proposal would constitute a contract, and neither party could refuse to carry it out without becoming liable to all the damage sustained. Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., 202 Mass. 177, 88 N. E. 924. The Legislature, perhaps in recognition of the hardship, which might follow requiring the bidder to be bound though the city was not, restricted the liability of the former to the extent of the deposit. From this interpretation of the statute it follows that an acceptance of the proposal of one bidder did not constitute a binding contract even on the part of the bidder to execute a formal contract, but only to forfeit his deposit if he failed to do so. The proposal stated that the bid should remain open a definite number of days, not until some one of the bids should be accepted. The acceptance of a bid was only one step toward the execution of the contract. The bidder first accepted might be unable to secure the required bond for the performance of the contract. The mayor might for some just reason refuse to approve the contract, or some other cause might intervene to prevent the execution of a final contract. The tenor of the proposal, which was upon a blank furnished by the defendant, read in the light of the statute, indicates an intent that the city reserves all its rights under all the bids until a contract shall have been formally executed and delivered, and to hold all the bidders to the terms of their proposals until it has either rejected all of them as provided in St. 1890, c. 418, § 4, or become bound by the execution of a contract with one, or the time limited for acceptance has expired. Hence the acceptance of a bid without the execution of a contract cannot be regarded as an unequivocal and definite determination on the part of the city to consider no other proposal. So long as the time limited for the deposit to remain had not expired and no formal con-

tract had been executed, the city was at liberty to accept any proposal, and require the bidder to respond either by signing the contract or sustaining the loss of the deposit. Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107.

2. It is next argued by the plaintiff that, the city's acceptance of the bid being made subject to the approval of the mayor, there was not an unconditional acceptance of the terms of the offer. An offer must be accepted in the terms in which it is made, in order to become binding, and a conditional acceptance or one that varies from the offer in any substantial respect is in effect a rejection and amounts to a new proposition. The phrase in the acceptance by the schoolhouse commissioners, which is relied on as rendering it conditional, was simply a reference to the statute under which the matter was proceeding. It was by implication a part of the invitation for proposal and also of the bid which the plaintiff had submitted. It added no new term to the proposal or to the contract. It did not vary in any respect the offer, and was therefore an unconditional and valid acceptance of it. * * *

5. The final contention of the plaintiff is that the deposit was a penalty, and hence cannot be enforced. The terms of the agreement indicate an intent to treat the deposit as liquidated damages, and this appears to be the purpose of the statute. The amount of the check must be regarded as liquidated damages. It was in fact much smaller than the loss sustained by the city, for by the failure of the plaintiff to take the contract it was awarded to another bidder for a sum about $24,000 larger. The plaintiff refused to sign the contract except for an additional price of $21,000. Therefore no reason appears why the intent of the parties as manifested by their written communication and the purpose of the statute should not be carried out. Guerin v. Stacy, 175 Mass. 595, 56 N. E. 892; Garcin v. Pennsylvania Furnace Co., 186 Mass. 405, 71 N. E. 793; Morrison v. Richardson, 194 Mass. 370, 80 N. E. 468.

Exceptions overruled.[69]

SECTION 8.—MEETING OF THE MINDS—MISTAKE

RAFFLES v. WICHELHAUS et al.

(In the Court of Exchequer, 1864. 2 Hurl. & C. 906.)

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to

[69] The amount deposited as a forfeit cannot be recovered by the bidder in case he withdraws his bid. City of Baltimore v. J. L. Robinson Const. Co., 123 Md. 660, 91 Atl. 682, L. R. A. 1915A, 225, Ann. Cas. 1916C, 425 (1914). And see note, Ann. Cas. 1916C, 427.

wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17¼*d.* per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C. B. It would be a question for the jury whether both parties meant the same ship called the Peerless.] That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name. [POLLOCK, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other Peerless. [MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract. He was then stopped by the Court.

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants.[70]

EMBRY v. HARGADINE-McKITTRICK DRY GOODS CO.

(St. Louis Court of Appeals. Missouri. 1907. 127 Mo. App. 383, 105 S. W. 777.)

Action by Charles R. Embry against the Hargadine-McKittrick Dry Goods Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

GOODE, J.[71] We dealt with this case on a former appeal (115 Mo. App. 130, 91 S. W. 170). It has been retried, and is again before us for the determination of questions not then reviewed. The appellant was an employé of the respondent company under a written contract to expire December 15, 1903, at a salary of $2,000 per annum. His duties were to attend to the sample department of respondent, of which he was given complete charge. It was his business to select samples for the traveling salesmen of the company, which is a wholesale dry goods concern, to use in selling goods to retail merchants.

Appellant contends that on December 23, 1903, he was re-engaged by respondent, through its president, Thos. H. McKittrick, for another year at the same compensation and for the same duties stipulated in his previous written contract. On March 1, 1904, he was discharged, having been notified in February that, on account of the necessity of retrenching expenses, his services and that of some other employés would no longer be required. The respondent company contends that its president never re-employed appellant after the termination of his written contract, and hence that it had a right to discharge him when it chose. The point with which we are concerned requires an epitome of the testimony of appellant and the counter testimony of McKittrick,

70 See, also, Neel v. Lang (Mass.) 127 N. E. 512 (1920), seller said $6,000; buyer understood $3,000; no negligence; Snoderly v. Bower, 30 Idaho, 484, 166 Pac. 265 (1917), hay to be measured according to "government rule," and there was no such rule; Rovegno v. Defferari, 40 Cal. 459 (1871); Rupley v. Daggett, 74 Ill. 351 (1874); Rowland v. New York, N. H. & H. R. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175 (1891); Greene v. Bateman, 10 Fed. Cas. 1126 (1846); Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560 (1869); Stong v. Lane, 66 Minn. 94, 68 N. W. 765 (1896); Sheldon v. Capron, 3 R. I. 171 (1855); Irwin v. Wilson, 45 Ohio St. 426, 15 N. E. 209 (1887).

71 Parts of the opinion are omitted.

the president of the company, in reference to the alleged re-employment.

Appellant testified: That several times prior to the termination of his written contract on December 15, 1903, he had endeavored to get an understanding with McKittrick for another year, but had been put off from time to time. That on December 23d, eight days after the expiration of said contract, he called on McKittrick, in the latter's office, and said to him that as appellant's written employment had lapsed eight days before, and as there were only a few days between then and the 1st of January in which to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year, or he would quit respondent's service then and there. That he had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry. That McKittrick asked him how he was getting along in his department, and appellant said he was very busy, as they were in the height of the season getting men out—had about 110 salesmen on the line and others in preparation. That McKittrick then said: "Go ahead, you're all right. Get your men out, and don't let that worry you." That appellant took McKittrick at his word and worked until February 15th without any question in his mind. It was on February 15th that he was notified his services would be discontinued on March 1st.

McKittrick denied this conversation as related by appellant, and said that, when accosted by the latter on December 23d, he (McKittrick) was working on his books in order to get out a report for a stockholders' meeting, and, when appellant said if he did not get a contract he would leave, that he (McKittrick) said: "Mr. Embry, I am just getting ready for the stockholders' meeting to-morrow. I have no time to take it up now. I have told you before I would not take it up until I had these matters out of the way. You will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road.' I may have asked him one or two other questions relative to the department, I don't remember. The whole conversation did not take more than a minute."

Embry also swore that, when he was notified he would be discharged, he complained to McKittrick about it, as being a violation of their contract, and McKittrick said it was due to the action of the board of directors, and not to any personal action of his, and that others would suffer by what the board had done as well as Embry. Appellant requested an instruction to the jury setting out, in substance, the conversation between him and McKittrick according to his version, and declaring that those facts, if found to be true, constituted a contract between the parties that defendant would pay plaintiff the sum of $2,000 for another year, provided the jury believed from the evidence that plaintiff commenced said work believing he was to have $2,000 for the year's work. This instruction was refused, but the court gave another embodying in substance appellant's version of the conversation,

and declaring it made a contract "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment for one year from and including December 23, 1903, at a salary of $2,000 per annum." Embry swore that, on several occasions when he spoke to McKittrick about employment for the ensuing year, he asked for a renewal of his former contract, and that on December 23d, the date of the alleged renewal, he went into Mr. McKittrick's office and told him his contract had expired, and he wanted to renew it for a year, having always worked under year contracts. Neither the refused instruction nor the one given by the court embodied facts quite as strong as appellant's testimony, because neither referred to appellant's alleged statement to McKittrick that unless he was reemployed he would stop work for respondent then and there.

It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occurred as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of $2,000. If it appeared from the record that there was a dispute between the parties as to the terms on which appellant wanted re-employment, there might have been sound reason for inserting this clause in the instruction; but no issue was made that they split on terms; the testimony of McKittrick tending to prove only that he refused to enter into a contract with appellant regarding another year's employment until the annual meeting of stockholders was out of the way. Indeed, as to the proposed terms McKittrick agrees with Embry, for the former swore as follows: "Mr. Embry said he wanted to know about the renewal of his contract. Said if he did not have the contract made he would leave." As the two witnesses coincided as to the terms of the proposed re-employment, there was no reason for inserting the above-mentioned clause in the instruction in order that it might be settled by the jury whether or not plaintiff, if employed for one year from December 23, 1903, was to be paid $2,000 a year. Therefore it remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry, was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely: Did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the

words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. * * *

In Smith v. Hughes, L. R. 6 Q. B. 597, 607, it was said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." And that doctrine was adopted in Phillip v. Gallant, 62 N. Y. 256. In 9 Cyc. 245, we find the following text: "The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed, state of his mind on the subject." Even more pointed was the language of Baron Bramwell in Brown v. Hare, 3 Hurlst. & N. *484, *495: "Intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."

In view of those authorities, we hold that, though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

[The court then held that Embry was quite reasonable in giving the construction that he did to McKittrick's words and acts. The judgment was reversed and the case remanded for a new trial.] [72]

[72] In Woburn Nat. Bank v. Woods, 77 N. H. 172, 175, 89 Atl. 491 (1914), the court said: "A contract involves what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter in hand. The standard by which their conduct is judged and their rights are limited is not internal, but external. In the absence of fraud or incapacity, the question is: What did the party say and do? 'The making of a contract does not depend upon the state of the parties' minds; it depends on their overt acts.'"

In accord, see Holmes, Com. Law, 307; Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544 (1888); Smith v. Hughes, L. R. 6 Q. B. 597 (1871); Delaware, L. & W. R. Co. v. Water Power & Supply Co., 227 Pa. 639, 76 Atl. 425 (1910); Northrup v. Colter, 150 Mo. App. 639, 131 S. W. 364 (1910); Carnegie Steel Co. v. Connelly, 89 N. J. Law, 1, 97 Atl. 774 (1916), telephone order for 50 tons, when only 10 tons intended; Grant Marble Co. v. Abbot, 142 Wis. 279, 124 S. W. 264 (1910); Taplin & Rowell v. Clark, 89 Vt. 226, 95 Atl. 491 (1915), sale of a lot of horses, seller including a particular horse by mistake; New York Central R. Co. v. Beaham, 242 U. S. 148, 37 Sup. Ct. 43, 61 L. Ed. 210 (1916), railway ticket plainly setting out terms of contract; Goldstein v.

AYER v. WESTERN UNION TEL. CO.

(Supreme Judicial Court of Maine, 1887. 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.)

EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800 M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800 M laths, delivered at your wharf, two net cash. July shipment. Answer quick." It will be seen that the important word "ten" in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterwards passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to-wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. Bartlett v. Telegraph Co., 62 Me. 221, 16 Am. Rep. 437.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference be-

D'Arcy, 201 Mass. 312, 87 N. E. 584 (1909), defendant wrote, "All you get above $2,000 per year you may have as your commission;" plaintiff got a tenant for 5 years at $2,200; held, he was entitled to $1,000; Gibbs v. Wallace, 58 Colo. 364, 147 Pac. 686 (1915); Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co., 28 Cal. App. 74, 151 Pac. 176 (1915); Inman Mfg. Co. v. American Cereal Co., 133 Iowa, 71, 110 N. W. 287, 8 L. R. A. (N. S.) 1140, 12 Ann. Cas. 387 (1907); S. F. Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429, Ann. Cas. 1912B, 357 (1910).

Mistakes are often made in sending code telegrams. Where an offeror used the code word meaning 30,000 bushels, when he intended to offer only 3,000, he was bound to deliver 30,000, unless the offeree knew of the mistake at time of acceptance. Cargill Commission Co. v. Mowery, 99 Kan. 389, 161 Pac. 634, 162 Pac. 313 (1916). But if the code message is so negligently worded as to be unintelligible, the offeree is equally negligent in giving it a meaning, and there is no contract. Falck v. Williams, [1900] A. C. 176.

tween the market price of the laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds. * * * [73]

2. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender, and intrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should through such error lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand, the receiver of the offer may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, that any other rule would now be impracticable.

[73] The court's discussion of one of these grounds is omitted.

Of course, the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In Durkee v. Railroad Co., 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In Saveland v. Green, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In Morgan v. People, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are dicta to the same effect in Wilson v. Railway Co., 31 Minn. 481, 18 N. W. 291, and Howley v. Whipple, 48 N. H. 488.

Telegraph Co. v. Shotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at 64. The receiver refused to pay more than 60. The sender accepted the 60, and sued the telegraph company for the difference between 60 and the market. It was urged, as here, that the sender was not bound to accept the 60, as that was not his offer. The court held, however, that there was a completed contract at 60, that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market price, as to laths. The evidence shows that the difference was 10 cents per M.

Judgment for plaintiff for $80, with interest from the date of the writ.[74]

[74] In accord: Butler v. Foley, 211 Mich. 668, 179 N. W. 34 (1920), counter offeror bound by telegram as erroneously delivered, even though the other party had himself first sent an offer by wire; Des Arc Oil Mill v. Western Union Tel. Co., 132 Ark. 335, 201 S. W. 273, 6 A. L. R. 1081 (1918); Western Union Tel. Co. v. Shotter, 71 Ga. 760 (1883); Haubelt Bros. & Page Mill v. Rea Co., 77 Mo. App. 672 (1898); Sherrerd v. Western Union Tel. Co., 146 Wis. 197, 131 N. W. 341 (1911); Durkee v. Vermont Cent. R. Co., 29 Vt. 127 (1856); Bowman & Bull Co. v. Postal Telegraph Cable Co., 290 Ill. 155, 124 N. E. 851 (1919) (semble). See, also, Penobscot Fish Co. v. Western Union Tel. Co., 91 Conn. 35, 98 Atl. 341 (1916); Postal Telegraph & Cable Co. v. Wells, 82 Miss. 733, 35 South. 190 (1903).

The English rule is contra, and so are several American cases. Henkel v.

STEINMEYER et al. v. SCHROEPPEL.

(Supreme Court of Illinois, 1907. 226 Ill. 9, 80 N. E. 564, 10 L. R. A. [N. S.] 114, 117 Am. St. Rep. 224.)

Action by Henry Steinmeyer and others against John Schroeppel, which was consolidated with a suit by Schroeppel against Henry Steinmeyer and others. From a decree of the Appellate Court, reversing a decree, canceling a contract between the parties, Henry Steinmeyer and others appeal. Affirmed.

CARTWRIGHT, J. Appellants are in the lumber business at Collinsville, Ill., and appellee is a building contractor at the same place. On June 10, 1905, appellee was about to erect a building for himself, and left at the office of appellants an itemized list of lumber, containing 34 items, on which he desired them to give him a price. Appellants' bookkeeper set down upon that list, opposite each item, the selling price, but did not add up the column. If correctly added, the column would have footed up $1,867. One of the appellants made the addition, and, by mistake, made the total $1,446. The bookkeeper copied the list on one of appellants' billheads without the prices opposite the different items, and wrote at the bottom, "Above for $1,446," and delivered the paper to appellee the same evening. Appellee received bids for the lumber from two other firms, which were in the neighborhood of $1,890. On June 16th appellee called at the office of appellants and accepted their offer. He did not bring the paper with him, but the bookkeeper made another copy and at the bottom of it wrote the same memorandum. "Above for $1,446." One of the appellants signed it, and a memorandum was then written below to the effect that if delivery was made within 30 days the appellants were to have $20 more than the estimate, but if delivery was made after 30 days appellee was to have a rebate of $20 from the estimate, and this was signed by both parties. The same evening one of the appellants, looking over the bill, found that he had not added the amounts correctly, and the next morning one of them notified appellee by telephone of the mistake, and refused to furnish the lumber for less than $1,867. Appellants also sent appellee a notice that they had found an error of $421, and the estimate should read $1,867 instead of $1,446. Appellants did not furnish the lumber, and

Pape, L. R. 6 Ex. 7 (1870); Pepper v. Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699 (1889); Shingleur v. Western Union Tel. Co., 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604 (1895); Strong v. Western Union Tel. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55 (1910); Mt. Gilead Cotton Oil Co. v. Western Union Tel. Co., 171 N. C. 705, 89 S. E. 21 (1916). The German Civil Code, §§ 120, 122, follows this rule but requires an indemnity, perhaps somewhat in the nature of a division of the loss.

If the offeree knew or ought to have known that there was an error, there is no contract. Germain Fruit Co. v. Western Union Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575 (1902). Cf. J. L. Price Brokerage Co. v. Chicago, B. & Q. R. R. Co. (Mo. App.) 199 S. W. 732 (1917), and comment in 27 Yale L. Jour. 932.

appellee purchased it at the next lowest bid from another firm, and sued appellants for the difference between what he paid for the lumber, and what they had agreed to furnish it for.

Appellants then filed a bill to enjoin the prosecution of the suit at law, and to have the contract canceled on account of the mistake. The suits were consolidated and tried together without a jury. The circuit court entered a decree, canceling the contract, and restraining appellee from prosecuting his suit at law. The Appellate Court for the Fourth District reversed the decree, and remanded the cause to the circuit court, with directions to dissolve the injunction and dismiss the bill for want of equity. Appellants applied to the Appellate Court for a certificate of importance, which was granted, and this appeal was prosecuted.

The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made. 2 Kent's Com. 477. If there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject-matter or terms from what was intended, equity will give to such party a remedy by cancellation where the parties can be placed in statu quo. The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract. 24 Am. & Eng. Ency. of Law (2d Ed.) 618. The fact concerning which the mistake was made must be material to the transaction and affect its substance, and the mistake must not result from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833.

In this case the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about $400 was placed somewhat to the right, and in adding the column the 4 was counted in the 10-column instead of the 100-column. If that was done, it does not account for the difference of $421. But if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of Board of School Com'rs v. Bender, 36 Ind. App. 164, 72 N. E. 154 (decided by the Appellate Court of Indiana, Division No. 2), relied on by appellants, differs from this in various respects, one of which is that Bender was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock;

that in ignorance of the fact and for want of time he was hurried in submitting his bid, and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract, and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into the contract. By the terms of the bid it was intended that if the bid was accepted a contract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault. In the case of Harran v. Foley, 62 Wis. 584, 22 N. W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for $161.50, but the defendant intended to state the price at $261.50. When the defendant was informed that the plaintiff understood the price to be $161.50 he refused to deliver the cattle and tendered back $20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such a character as to entitle the appellants to the relief prayed for.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.[75]

[75] When the terms of a contract have been reduced to a definite written document, the parties are bound by the terms as so written, in spite of ignorance or mistake of one of the parties as to such terms, provided the other party assented in good faith and without knowledge of the mistake. Eldridge v. Dexter & P. R. Co., 88 Me. 191, 33 Atl. 974 (1895); Hix v. Eastern S. S. Co., 107 Me. 357, 78 Atl. 379 (1910); Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131 (1868); Metzger v. Ætna Ins. Co., 227 N. Y. 411, 125 N. E. 814 (1920), citing many cases; Shulman v. Moser, 284 Ill. 434, 119 N. E.

ST. NICHOLAS CHURCH v. KROPP.

(Supreme Court of Minnesota, 1916. 135 Minn. 115, 160 N. W. 500, L. R. A. 1917D, 741.)

Action by the St. Nicholas Church against the Merchants' National Bank of St. Cloud, which interpleaded Carl Kropp. From a judgment for plaintiff and from an order denying new trial, the interpleaded defendant appeals. Order reversed, and cause remanded, with directions.

HOLT, J.[76] Plaintiff, a religious body, desired to erect a church. It advertised for bids. Carl Kropp and two others responded. Each bid was accompanied by a certified check in the sum of $1,000 to insure the entering of a contract by the successful bidder to build the church according to the plans and specifications upon which the bids were made. When the three bids were opened in the presence of the bidders, Kropp's, being for $30,973, was found to be the lowest, about $3,900 below the next highest. Thereupon the committee of plaintiff in charge of the building of the church voted to award the work to Kropp and notified him that his bid was accepted. The contract was not then drawn, owing to the illness of the architect. The same day Kropp, on his return home, discovered that through some oversight the item of the structural iron required in the building had not been included in his bid. The value of furnishing this in place was estimated at $2,350. The next day he notified the building committee of his mistake, and that he could not enter the contract unless he received at least $2,000 more than the bid. This the committee declined to give. Kropp refused to enter the contract and stopped payment of his certified check. The erection of the church building was awarded to one Lange for $32,775 on a belated bid received three or four days after the others had been opened.

936 (1918); American Water Softener Co. v. U. S., 50 Ct. Cl. 209 (1915); Hoshaw v. Cosgriff, 247 Fed. 22, 159 C. C. A. 240 (1917).

Where a voucher or ticket is delivered by one party to the other, in such manner that the latter ought to know that it contains the terms of the contract, his acceptance binds him in accordance with those terms. N. Y. Central R. Co. v. Beaham, 242 U. S. 148, 37 Sup. Ct. 43, 61 L. Ed. 210 (1916); Fonseca v. Cunard Steamship Co., 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660 (1891); Zimmer v. New York Cent. & H. R. R. Co., 137 N. Y. 460, 33 N. E. 642 (1893); Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113, 14 L. R. A. 433, 33 Am. St. Rep. 881 (1891); Parker v. Southeastern Ry., 2 C. P. D. 416 (1877). He is not so bound unless he has reasonable notice that the ticket contains the terms offered. The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039 (1897).

Where the words of a document are capable of two reasonable interpretations, they will be interpreted contra proferentem—i. e., against the party who chose the particular form of expression. Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460 (1901); Eyers v. Haddem (C. C.) 70 Fed. 648 (1895); Ardis v. Grand Rapids & I. R. Co., 200 Mich. 400, 167 N. W. 5 (1918); Star-Chronicle Pub. Co. v. New York Evening Post, 256 Fed. 435, 167 C. C. A. 563 (1919); Lieber, Hermeneutics, 121; Roman law, Dig. 45, 1, 99; Id. 2, 14, 39.

[76] Parts of the opinion are omitted.

This action was brought by plaintiff against the bank upon which the check was drawn. The bank answered, deposited the amount of the check in court, and asked the court to require Kropp to interplead. This was done. Kropp's answer was that he had made a mistake in his bid as above indicated; that he at once, upon discovery of the mistake notified plaintiff; that this was done before all the bids were received; that plaintiff knew of the mistake made by him; and that the bid was withdrawn before accepted. Appellant demanded a jury trial. This was denied, but the court submitted three issues to a jury which found thereon: That the building committee awarded the contract to Kropp on the day the bids were opened; that Kropp made an honest mistake in his bid without being negligent; and that the building committee had no knowledge of Kropp's mistake when it accepted his bid. The court made findings of fact, adopting therein the verdict of the jury, and conclusion of law that plaintiff was entitled to the fund. A new trial was denied, and Kropp appeals. * * *

The jury and court found that in his bid Kropp had made an honest mistake without negligence. The mistake amounted to more than $2,000. Does this entitle him to any relief when plaintiff was not to blame in any way for the mistake, and had no knowledge that Kropp had made it? We think the facts herein bring the case within this principle governing a unilateral mistake stated in section 138i, Story's Equity Jurisprudence:

"But where the mistake is of so fundamental a character that the minds of the parties have never, in fact, met, or where an unconscionable advantage has been gained, by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner making redress, and no intervening rights have accrued, and the parties may still be placed in statu quo, equity will interfere, in its discretion, to prevent intolerable injustice."

In Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395, it is said: "A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met, there is no contract, and hence none to be rectified."

The question here is whether a mistake of over $2,000 in the bid upon the construction of this church is merely incidental or fundamental. We think the amount is so large that it is unreasonable to suppose that Kropp would have made the bid he did make, if he had known that the structural iron work was not included therein. Here the finding is that it was an honest mistake made without negligence. Plaintiff was apprised of the error at once. No intervening rights accrued. The belated bid which plaintiff accepted was a trifle less than the one Kropp intended to make. There can be no question of not placing plaintiff in statu quo. It did nothing in reliance upon Kropp's bid, and did not change its position in the least between the time it notified him of the acceptance and the time it received notice of his mis-

take. This is said advisedly; for, although the checks of the other two bidders were returned to them, plaintiff accepted another bid obtained without any effort on its part, and in an amount very much lower than either of the two upon which the checks were returned.

In this situation, we think, the same principle which denied a specific performance in the case of a unilateral mistake in Buckley v. Patterson, 39 Minn. 250, 39 N. W. 490, should here interfere and cancel the bid of Kropp. In Benson v. Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816, the doctrine is recognized that a contract "may be rescinded or canceled for the mistake of one only of the parties. * * * Of course, this should not be done unless the parties can be replaced in their former position." The bid was, at most, but a step in the making of the contract. It was well understood that before Kropp would be permitted to begin the erection of the building he must execute a formal contract and give adequate bond. The contract was therefore wholly executory. * * *

In Scott v. Hall, 58 N. J. Eq. 42, 43 Atl. 50, where the vendor in a conditional sale contract agreed to transfer the chattels to the one in possession for $525 on the mistaken supposition that there was $650 due on the contract instead of $950, and the check for $525 was already in the hands of the vendor's agent when the mistake was discovered, the court rescinded the bargain, Vice Chancellor Pitney saying:

"Now it seems to me plain enough that, having agreed upon a sum based on $650 being due, when there was in fact $950 due, this court ought to relieve him from a contract made upon such a mistaken basis, unless before notice the other party has so acted upon it that it would be unjust to him to be compelled to submit to rescission. Now in this case notice was given immediately to defendant's counsel and while the affair was unfinished and not concluded in the manner in which the parties intended to conclude it; for it was their intention that there should be a written transfer of title."

So here there was to be a formal contract executed. That a mistake by one party as to price is material and ground for holding that the minds of the parties did not meet, see Rowland v. New York, N. Haven & H. Ry. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; De Voin v. De Voin, 76 Wis. 66, 44 N. W. 839; and Webster v. Cecil, 30 Beav. 62.

Steinmeyer v. Schroeppel, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224, is really not in favor of plaintiff on the findings here made; for it was there held that the error in the computation occurred through the negligence of the party who asserted the mistake. Moreover it is clear that in a case of that kind, where the lumber, the subject of the contract, had been used, it was impossible to place the parties in statu quo. However, the court therein recognized the existence of the rule we hold applicable to the facts in the case at bar. We think also, where the parties have entered to such an ex-

tent upon a performance of their contract that it becomes difficult to restore them to their former position, rescission will not be decreed. To this class belongs Tatum v. Coast Lumber Co., 16 Idaho, 471, 101 Pac. 957, and other authorities cited in the annotation to that case in 23 L. R. A. (N. S.) 1109.

Such also is the rule where a bid has been acted upon so that cancellation would be unjust or inequitable to the party having accepted it without knowledge of the other party's mistake. Young v. Springer, 113 Minn. 382, 129 N. W. 773. The case of Crilly v. Board of Education, 54 Ill. App. 371, is very similar to the instant case, except there it was found that the mistake was due to the negligence of the party making the mistake, while here the finding is to the contrary, and that very fact brings the case within the operation of the rule. So far as we are aware the only decision upon facts as here found, supporting plaintiff's position is Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255; but therein no reference is made to the well-established equitable principle permitting relief from unilateral mistakes, and we are not inclined to follow its lead.

Our conclusion is that the order denying a new trial should be reversed, and the cause remanded, with direction to the court below to amend the conclusion of law so as to rescind and cancel the bid and award the fund in court to Kropp.

So ordered.[77]

TYRA v. CHENEY.

(Supreme Court of Minnesota, 1915. 129 Minn. 428, 152 N. W. 835.)

Action by Joseph Tyra, etc., against Robert J. Cheney, etc. Verdict for plaintiff, and, from denial of alternative motion for judgment or new trial, defendant appeals. Affirmed.

Holt, J.[78] The defendant had the contract to add to and repair a school building in Minneapolis, Minn. Plaintiff did some work and furnished some material in the performance of the contract. This action was to recover the reasonable value thereof, less certain admitted payments. In defense an express contract was pleaded, and judgment tendered for $27, the unpaid balance. Verdict for plaintiff, and

[77] In the following cases equity granted relief to the bidder: Neill v. Midland R. Co., 20 L. T. N. S. 864 (1869), mistake discovered after part performance; Moffett, H. & C. Co. v. Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108 (1900), mistake discovered before executing written contract; Board of School Com'rs of City of Indianapolis v. Bender, 36 Ind. App. 164, 72 N. W. 154 (1905), same.

Equity refused relief to the bidder in the following cases: Crilly v. Board of Education of City of Chicago, 54 Ill. App. 371 (1894), on ground that plaintiff was negligent; Douglas v. Grant, 12 Ill. App. 273 (1883), contract partly performed before discovery of mistake; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255 (1902). See, also, Wheaton Bldg. & Lumber Co. v. City of Boston, 204 Mass. 218, 90 N. E. 598 (1910), ante, p. 110.

[78] Part of the opinion is omitted.

defendant appeals from the order denying his motion in the alternative for judgment or a new trial.

Plaintiff's contention, in brief, was: About the last of July, 1912, he offered to bid on the roofing and sheet metal work required in defendant's contract. Lacking time to put the bid, or estimate, in formal shape, he, on July 27th, gave to defendant's estimator the figures for the various items, namely, $963 for the new part of the building, $2,410 for the old part, $400 for registers, and $251 for metal covered doors; the total bid being about $4,025. On August 1st he was told the bid came too late, but, nevertheless, he could send it in in writing. Plaintiff undertook to do so on the 3d, but now claims the item of $963 for the new part of the building was left out through oversight. A few days thereafter, upon inquiring about his chance of securing the work, he was told that his bid was too high. However, he persisted in the attempt to induce defendant to use, instead of the specified metal doors, metal doors of plaintiff's make. He succeeded, and late in August, was awarded a separate contract for the doors for $295. Nothing further was heard from defendant until in September, when plaintiff was told to go ahead with the work. Defendant denies ever receiving any estimate, bid, or figures, except the written bid.

The court, in submitting the case, charged that the burden was upon plaintiff to show, by a fair preponderance of testimony, that when, in September, 1912, defendant gave plaintiff the direction to proceed with the work, it was done with knowledge of plaintiff's mistake of $963 in the written bid and of his resting under the belief that it conformed to the oral bid of $4,025, so that it might be truthfully found that defendant did not accept the written bid of $3,062 in good faith, then plaintiff could recover the reasonable value, otherwise the verdict must be limited to the amount tendered in the answer. We believe this theory sound. If cognizant of the mistake in plaintiff's bid, and that the latter was unaware of its occurrence, defendant had no right to claim that, when he told plaintiff to go ahead with the work, their minds met upon the price mistakenly stated in the bid. Nor should plaintiff be allowed to profit by his own mistake, so as to hold defendant to the oral bid. There was a failure to enter a binding contract. One cannot snap up an offer or bid knowing that it was made in mistake. Page on Contracts, § 86; Elliott on Contracts, § 107; Harran v. Foley, 62 Wis. 584, 22 N. W. 837; Everson & Co. v. International Granite Co., 65 Vt. 658, 27 Atl. 320; Singer v. Grand Rapids Match Co., 117 Ga. 86, 43 S. E. 755; Rowland v. N. Y., etc., Ry. Co., 61 Conn. 103, 23 Atl. 755, 29 Am. St. Rep. 175; Peerless Glass Co. v. Pacific Crockery & T. Co., 121 Cal. 641, 54 Pac. 101. This also disposes of alleged errors in admitting evidence of reasonable value. * * *

The order is affirmed.

JONES v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Nebraska, 1918. 102 Neb. 853, 170 N. W. 170.)

SEDGWICK, J.[79] The plaintiff brought this action in the district court for Lancaster county to recover the value of a carload of flour alleged to have been converted by the defendant. The flour was shipped by the Washburn-Crosby Company of Minneapolis, and a controversy arose between that company and the plaintiff as to the right to the flour. It was the duty of the defendant railroad company to deliver the flour to the true owner, and it was delivered to the Minneapolis company. The question, then, is whether the Minneapolis company or this plaintiff was the owner of the flour and entitled to the delivery thereof. The court instructed the jury to find a verdict for the defendant, which was done, and judgment entered thereon, and the plaintiff has appealed.

The Minneapolis company had contracted the flour to one Furman, of York, some time before the shipment. In the meantime the price of flour had advanced to nearly double the contract price to Furman. By mistake of the company, the Furman order had been entered as an order of this plaintiff, and it was by mistake shipped to Lincoln, consigned to the shipper's order, with instructions to notify the plaintiff. A draft for the price of the flour as contracted to Furman was attached to the bill of lading, and when this plaintiff was notified he paid the draft and demanded the flour. In the meantime the Minneapolis company had instructed the railroad company not to deliver the flour to the plaintiff, and to return the flour to the shipper at Omaha, which the railroad company did.

"Where a person contracts with another, believing him to be one with whom he intends to contract, while as a matter of fact it is another person, there is no agreement, as where * * * a person obtains goods by fraudulently impersonating a third person to whom the owner supposes he is selling, or by pretending to be the agent of a third person to whom the owner supposes he is selling." 35 Cyc. 60. It appears that the Minneapolis company supposed it had contracted this flour to this plaintiff, when, as a matter of fact, it had contracted to Furman, and did not ship the flour as an offer to sell to the plaintiff, and had no intention of making a contract of sale with the plaintiff. The minds of the parties, therefore, never met, so as to amount to a contract of sale. The plaintiff concedes that he had not ordered these goods, but testifies that he had instructed his son to order flour, and when he was notified of the shipment of this flour he supposed in good faith that it was in response to an order by his son. Thus it appears again that the

[79] Part of the opinion is omitted.

minds of these parties had never met in the making of a contract of sale. * * *

Affirmed.[80]

JACOB JOHNSON FISH CO. v. HAWLEY.

(Supreme Court of Wisconsin, 1912. 150 Wis. 578, 137 N. W. 773.)

Action by the Jacob Johnson Fish Company against John Hawley, administrator. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Action for damages on contract.

Plaintiff applied to defendant's intestate, Batt. Hawley, to engage the tug "Tramp" in the fishing industry on Lake Superior for the season, using these words: "If tug 'Tramp' is not engaged will pay $300 for season. Wire me answer please." Defendant promptly replied: "Tug not engaged. Go for three hundred for thirty days, you pay expenses one way. Wire answer." Plaintiff answered: "Terms accepted, engage Capt. Garland, writing." Also wrote inclosing duplicate forms for leases, and requesting execution thereof and return of one duplicate so that the matters might be regarded as settled, assuring defendant that the lessee would pay expenses one way and saying, "We wired you this morning that your terms were accepted and to engage Capt. Garland. And we will write him also and engage his services. We want no other man if we can get him. We expect to want the boat Nov. 15th unless we wire you otherwise, you may be here on that date. Please have lease signed before notary public."

Upon Mr. Hawley receiving the papers, he promptly complained by

80 Where one party is mistaken as to the identity of the other party, without negligence, there is no contract. School Sisters of Notre Dame v. Kusnitt, 125 Md. 323, 93 Atl. 928, L. R. A. 1916D, 792 (1915); Fay v. Hill, 249 Fed. 415, 161 C. C. A. 389 (1918); Brighton Packing Co. v. Butchers' Slaughter & Melting Ass'n, 211 Mass. 398, 97 N. E. 780 (1912), the owners and managers of a corporation reincorporated under the identical name in another state; Phelps v. McQuade, 158 App. Div. 528, 143 N. Y. Supp. 822 (1913); Cundy v. Lindsay, 3 App. Cas. 459 (1878); Morgan Munitions Supply Co. v. Studebaker Corporation of America, 226 N. Y. 94, 123 N. E. 146 (1919); Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9 (1877).

An offer made to a partnership cannot be accepted by a corporation of the same name later formed, even though its stockholders are identical with the members of the superseded partnership. Jordan, Marsh & Co. v. Beals, 201 Mass. 163, 87 N. E. 471 (1909).

A distinction has been drawn where a defrauder deals in person with the party he is defrauding, but assumes the name and credit of a third person. It is held that in such a case the defrauder gets the legal power to create a perfect legal and equitable title in an innocent purchaser of the goods obtained by the fraud. The reason given is that the defrauder is personally present and that the defrauded party intends to deal with him. Martin v. Green, 117 Me. 138, 102 Atl. 977 (1918); Edmunds v. Merchants' Despatch Transp. Co., 135 Mass. 283 (1883); Samuel v. Cheney, 135 Mass. 278, 46 Am. Rep. 467 (1883); but see contra Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324 (1896).

telephone that the terms specified therein were not according to the offer, and the condition, as to hiring Capt. Garland, was objectionable. Plaintiff acknowledged the error as to terms; but, does not appear to have withdrawn the condition, mentioned in the letter, as to hiring Captain Garland. However, plaintiff followed the telephone communication by a letter, using these words: "If there is anything about the contract we sent you for your signature that you do not like, draw up one and send it to us at once. A contract is, really, not necessary, as we have your acceptance; but, it is best, in cases of this kind, to have a thorough understanding so there will be no friction later. * * * We are sorry to hear that you do not approve of Capt. Garland as we consider him a good man for the business and we hope that you will decide to forget the past and let him come up with her." To that reply was promptly made that the tug had been leased to other parties. Plaintiff thereupon hired the tug "Brower" which went out of commission in a few days and then secured the tug "Arthur" for remainder of the season. Because of inferiority of the "Arthur" plaintiff was compelled to confine the fishing operations to a different district than could have been reached by the tug "Tramp." Only 50 tons of fish were secured during the season. The party who used the Tramp secured 122½ tons. The net profit on a ton of fish was $8.

At the close of the evidence, a motion in defendant's behalf for a directed verdict was denied, upon the ground that the response by Mr. Hawley to plaintiff's telegram, contained the words, "Close contract," "Terms accepted;" that the reference to Capt. Garland was merely advisory and that the letter which followed did not change the matter. The cause was submitted to the jury with directions to find for the plaintiff. * * *

The jury returned a verdict for $250, and judgment was rendered thereon.

MARSHALL, J.[81] * * * The trial court construed the occurrences between Mr. Hawley and respondent as having operated to close a contract for the use of the former's tug boat, irrespective of whether Capt. Garland was secured to command it, prior to receipt by Mr. Hawley of the letter of November 3, 1907. The reasoning by which such conclusion was reached appears in the record, is sufficiently mentioned in the statement and seems infirm in several particulars.

Much stress was placed upon the word sent by Mr. Hawley to respondent in reply to the latter's offer to pay $300 for the season's use of the tug. It is said in the judge's opinion, that these words were used: "Close contract" "Terms accepted." We do not find the words "Close contract" were used—only the words "Terms accepted. Engage Capt. Garland, writing." The only terms mentioned in the offer were in these words: "Go for three hundred for thirty days. You pay expenses one way." That was referred to in plaintiff's letter of No-

[81] The statement of facts is abridged and part of the opinion is omitted.

vember 3d as an acceptance which closed a contract; but it is plainly not that. It was only a counter offer to the one mentioned in the communication to Mr. Hawley, offering $300 for use of the tug for the season to depend on conditions. The counter offer covered both subjects. So up to this point there, certainly, had not been any meeting of minds. The reply to the counter offer accepted the terms as to price and expense; but, added the words "Engage Capt. Garland, writing." Such reply was quite ambiguous. The natural inference therefrom was that the terms mentioned by Mr. Hawley, as to compensation and length of the season, were accepted; but that Capt. Garland should be engaged to command the boat and an explanation would be made by letter. The words "Engage Capt. Garland" and the word "writing" were tied together and prettly plainly suggested that the contractual details were still to be settled and the signification of the words "Engage Capt. Garland, writing" would be made known in due course. Now what followed by letter does not appear to have been given due weight by the trial judge in coming to a conclusion, as to whether the reference to Capt. Garland was merely suggestive or matter of condition. Standing alone, it might fairly be construed to be the former. Mr. Hawley seems to have been somewhat uncertain and so made no immediate reply; but, waited for the letter. When that came it, doubtless, seemed quite plain to him that the actual closing of the contract was, in the judgment of respondent, to wait upon acceptance of its choice of a person to command the boat and execution of a written lease as to terms.

The letter stated with reference to the proposed lease, "Please sign one copy and return it to us at once so that we will know the matter is settled." That plainly indicated it was not to be understood a contract had been closed in advance of the writing being signed. The letter further, unmistakably, indicates that the lease, as written, was not intended to cover the entire matter. It made no reference to the condition contained in Mr. Hawley's letter as to respondent paying expenses one way, nor to the ambiguous language in the telegram: "Engage Capt. Garland." The former was covered in the letter thus: "We have not mentioned this matter in the lease; but we agree to pay expenses one way en route." The latter was covered thus: "We wired you this morning that your terms were accepted and to engage Capt. Garland, and we will write him also and engage his services. We want no other man if we can get him." Thus emphasizing the words of acceptance as referring only to the price for use of the boat and the term of service, and giving the reference to Capt. Garland the cast of a condition.

How could Mr. Hawley otherwise have understood the telegram than as suggested in connection with the matter? If it be true that respondent did not mean to convey such an idea; but used language leading Mr. Hawley, in the exercise of ordinary care, to suppose it did, it must bear the burden of its fault. He had a right to act upon the meaning which respondent's words conveyed to him, if such, rea-

sonably, might be the meaning an ordinary careful person would read out of such language under the same or similar circumstances. The letter not only declared that respondent wanted no other person to command the boat if he could be secured; but, took the matter of settling the question out of Mr. Hawley's hands, saying it would write Capt. Garland and engage him. Nothing occurred thereafter indicating that Mr. Hawley was agreeable to placing his boat in charge of Garland. On the contrary he made known, promptly, by telephone, that he would not accede to that, but stand by his choice which was Capt. McClain. It does not appear that respondent receded till the letter of November 3, 1909, was written. There the counter offer made by Mr. Hawley October 27th before, was referred to as an acceptance, —a very singular circumstance—showing a purpose to claim the existence of a contract by a misconstruction of Mr. Hawley's telegram. There was nothing in the nature of an acceptance until the telegram was sent by respondent in response to Mr. Hawley's counter offer. Note the peculiar language of respondent's letter: "On the day we received your wired acceptance of our offer we had almost concluded a deal for the 'Curry'; but were very glad that we did not have to engage her as she is altogether too slow. Now, however, we cannot, possibly, get along without your boat as all other boats suitable for herring fishing have been engaged." That was followed by language suggesting consent to Capt. McClain as commander of the boat; but still showing preference for Capt. Garland.

It seems clear that respondent did not recede from its demand until it found it could not obtain the use of the boat on the condition it had imposed and that there was no other boat obtainable. Before the November 3d letter was received Mr. Hawley had leased his boat to another party. Had the trial court given proper significance to the letter explaining the first reference to Garland, instead of leaving it entirely out of view, as is clearly indicated in the opinion was done on the motion to direct a verdict, and in some way viewed the case as if respondent's reply to Mr. Hawley's counter offer contained the words "close contract" when no such words were therein, it seems clear that the conclusion would not have been reached that by such telegram, the minds of the parties met and a contract was closed, irrespective of whether Capt. Garland was engaged to command the boat or not.

In view of the foregoing, it is considered that the motion to direct a verdict should have been granted.

The judgment is reversed and cause remanded with directions to render judgment in favor of the defendant dismissing the cause with costs.

MORSE v. KENNEY.

(Supreme Court of Vermont, 1914. 87 Vt. 445, 89 Atl. 865.)

Action by Cleo D. Morse against Patrick Kenney. Judgment for defendant, and plaintiff excepts. Judgment affirmed.

TAYLOR, J. This is an action of general assumpsit. Plea the general issue and trial by court. The plaintiff is a livery stable keeper and seeks to recover for the board and care of a certain horse. One Badlam was the owner of the horse in question which was being kept for him by the plaintiff. On May 25, 1911, the defendant, a farmer, went to the plaintiff's stable to purchase a horse for use on his farm. The plaintiff being absent, his servant, one Spaulding, who was in charge of the stable, told the defendant that the Badlam horse was for sale; that it was a good work horse, suitable for defendant's use on his farm; that it was able to draw reasonable loads; and that it was worth $50. Spaulding called Badlam by telephone and had some talk with him (the nature of which and whether in the hearing of the defendant does not appear from the findings), upon which he sold the horse to the defendant for $50. The defendant paid the purchase price to Spaulding for Badlam and took the horse home.

The defendant had not had much experience in dealing in horses and was not much acquainted with their value. He relied wholly upon Spaulding's representations, believing them to be true. The next day he attempted to use the horse and found it "weak in its hind quarters," unable to draw a small load, and unfit to perform ordinary farm work. The defendant at once returned the horse to the plaintiff's stable, found Spaulding there, claimed the horse was not as represented, and asked to leave the horse where he got it; but Spaulding refused to accept the horse back and would not allow the defendant to put it in the stable. The defendant hitched the horse to a ring just outside the stable and went immediately to Badlam's place of business, where he demanded the return of his money, which Badlam refused. On plaintiff's return later the same day he found the horse hitched outside; knowing that the defendant had left it there for Badlam he put it in the stable, fed and cared for it, and on the same day wrote the defendant: "Your mare is here and it is 25¢ a feed." Upon receiving this letter the defendant replied: "The mare you refer to is not mine. Therefore don't look to me for any pay for her feed." Plaintiff kept the horse until July 12th, when this suit was brought for its board and care.

Can the plaintiff recover in general assumpsit on the foregoing facts? If so, it must be upon the theory of an implied promise to pay for the board and care of the horse.

There are two kinds of implied contracts, as the term is ordinarily used in the books: (1) Where the minds of the parties meet and their meeting results in an unexpressed agreement; (2) where there is no

meeting of minds. Harley v. United States, 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029. The former class embraces true contracts which are implied in the sense that the fact of the meeting of minds is inferred. Such contracts are more accurately defined as resting upon an implied promise in fact. The latter class embraces contractual obligations implied by the law where none in fact exist.

In many cases where there is no contract, the law upon equitable grounds imposes an obligation often called quasi contractual. Harriman on Con. § 20. Such obligations are not contracts in the proper sense, since they are created by law and not by the parties. Clark on Con. 14, 27. In such so-called contracts the law creates a fictitious promise for the purpose of allowing the remedy by action of assumpsit. Though created by law and clothed with the semblance of a contract, the obligation is not a contract at all. The proper term for such obligations is "quasi contracts," a term borrowed from the Roman law. Clark on Con. 752. They are called "quasi contracts" because, as the term implies, they are not contracts at all, but have a semblance of contract in that they may be enforced by an action of assumpsit. Keener, Quasi Con. 3. Much of the apparent confusion in the cases arises from a failure to distinguish clearly between implied contracts in fact and contracts implied in law, or constructive contracts.

The plaintiff cannot maintain this action as upon an implied promise in fact, for such a promise is implied from the understanding of the parties, inferred as a question of fact from their conduct and the surrounding circumstances; such facts and circumstances as show, according to the ordinary course of dealing and the common understanding of men, a mutual intent to contract. Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 C. C. A. 507. It is never inferred against the express understanding of the parties. Lunay v. Vantyne, 40 Vt. 501. The defendant's assent is necessary to such a promise. Mathie v. Hancock, 78 Vt. 414, 63 Atl. 143.

The source of the obligation, as in express contracts, is the intention of the parties. Bliss v. Hoyt's Estate, 70 Vt. 534, 41 Atl. 1026. It is implied only when the facts warrant the inference of mutual expectation; the defendant expecting to pay for the service and the plaintiff performing it relying upon that understanding. Parkhurst v. Krellinger, 69 Vt. 375, 38 Atl. 67. It is implied only in this: It is inferred from the conduct of the parties instead of from their spoken words; or, in other words, the contract is evidenced by conduct instead of by words.

Unless the party benefited has conducted himself in such a manner that his assent may fairly be inferred therefrom, he is not bound to pay. Johnson v. B. & M. R. Co., 69 Vt. 521, 38 Atl. 267; Bliss v. Hoyt's Estate, supra. Here the services sued for were performed in face of the express and emphatic denial of liability by the defendant.

Do the facts found bring the plaintiff within the other class of implied contracts? In case of constructive or quasi contracts, the law

infers the promise without reference to the intention of the party, and often against his express dissent, when he is under legal obligation, paramount to his will, to perform some duty. It was such an implied promise that is referred to in Penniman et al. v. Patchin, 5 Vt. 346, 353, cited by the plaintiff, wherein it was said: "The law does in many cases imply a promise against the express dissent of the party." An implied promise of this kind rests upon the equitable doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another. Keener, Quasi Con. 19. The application of this principle is illustrated by the action of assumpsit for money had and received, which lies when one has the money of another which he has no right to retain, but which, ex æquo et bono, he should pay over to the other. In such case no promise need be proved, because from such relation between the parties, the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were on a contract, quasi ex contractu, and upon this debt founds the requisite undertaking to pay. Clark on Con. 757. Such is the case of one receiving money paid him by mistake, or of one obtaining money fraudulently. Bliss v. Hoyt's Estate, supra.

In Wojahn v. Nat. Bank of Oshkosh, 144 Wis. 646, 129 N. W. 1068, it is said: "A 'quasi contract' arises where there is a legal duty to respond in money, which by legal fiction may be enforced as on an implied promise; but in such case there is no element of contract so called, but there is only the duty to which the law affixes a legal obligation of performance, as in case of a promise between the parties." To the same effect is a recent case in Illinois: "A quasi or implied contract is one where liability exists from implication of law arising from facts and circumstances, independent of agreement or presumed intention, based on the doctrine of unjust enrichment; the implied agreement being one defining the duty of the defendant rather than his intention." Board of Com'rs v. Bloomington, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471. The latter case contains a lucid discussion of the subject. The same doctrine is recognized in Mathie v. Hancock, 78 Vt. 414, 417, 63 Atl. 143. The distinction has been tersely stated in these words: "In the case of contracts, the agreement defines the duty, while in case of quasi contracts the duty defines the contract." Hertzog v. Hertzog, 29 Pa. 465. See, also, C. H. V. & T. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152.

Applying these principles to the facts in this case, it is evident that plaintiff cannot recover. The same result is reached whether the attempt by the defendant to rescind the sale is regarded as effectual or ineffectual. If effectual, then the horse was no longer his, and confessedly no principle of equity and good conscience would demand that the law imply a contract for its keeping against his express dissent. If ineffectual, and for that reason the horse remained his, when the plaintiff, knowing the circumstances under which the horse was left by the defendant outside his stable, saw fit to take charge of and care for it, he

acted as a volunteer. It cannot be said that the horse was left in the plaintiff's possession so that a duty to care for it was cast upon him. Mathie v. Hancock, supra. To be sure the defendant had asked Spaulding to receive the horse back, but this request was coupled with a demand for the return of the purchase money, and his request was denied.

The fact that the property is a live animal, in the absence of special circumstances raising a duty to care for it, does not change the situation. The plaintiff cannot be held liable on an implied contract to pay for that which he expressly declines to have done on his account, unless the law imposes upon him an obligation to do something which he declines to do, and which must be done to meet the legal requirement. There is no such obligation upon one to retain and preserve his property, whether it be live animals or anything else. He may abandon or destroy it, if he pleases (Keith v. De Bussigney et al., 179 Mass. 255, 60 N. E. 614), subject of course to prohibitions of the statute against cruelty to animals. The facts of this case do not disclose such necessity for the plaintiff's interference, on grounds of humanity or otherwise, as would authorize him to care for the horse at the defendant's expense against his protest. The general rule is as was said in State v. St. Johnsbury, 59 Vt. 332, 342, 10 Atl. 531, 535: "One cannot thrust himself upon me and make me his debtor whether I will or not." The plaintiff fails to bring himself within the exceptions to this rule. This being so, he must be taken at the best to be a mere volunteer and so precluded from recovering. Keener, Quasi Con. 349; Johnson v. B. & M. R. Co., supra.

Judgment affirmed.

ROBERTS v. JAMES.

(Court of Errors and Appeals of New Jersey, 1912. 83 N. J. Law, 492, 85 Atl. 244, Ann. Cas. 1914B, 859.)

Action by William T. B. Roberts against Benjamin F. James. Judgment for plaintiff, and defendant brings error. Reversed, and venire de novo awarded.

Action by vendor against purchaser to recover purchase price of lots. The written agreement of sale requires the payment of the purchase price in monthly installments, and provides that, upon default in payment, the vendor may treat the whole purchase money remaining unpaid as immediately due and payable. The deed is to be delivered upon payment of the whole purchase money, and the purchaser, it is provided, shall have no right of possession until the deed is delivered. No installment of purchase money has been paid. The defendant (the purchaser) has never had possession. He defended upon the ground that the contract was induced by fraudulent representations of the plaintiff's agent, Sands, by whom alone the contract on the part of the plain-

tiff was made. The lots were in a great field, and there was evidence that Sands represented that there was going to be a hotel near by at a spot pointed out by him, and that there was to be a railway station, cement walks, a park with swings; that Roberts was back of the enterprise; that he was going to build 100 houses; that 25 were then contracted for; that, when there were 50, they would get a railway station. The houses had not been built. There seems to be no railway station. The hotel was partly built, but sold by the sheriff, torn down, and the lumber sold at auction. There was no proof of rescission of the contract by the defendant, other than the fact that he defended this suit on the ground of fraud. A verdict was directed in favor of the plaintiff for the balance due upon the ground as stated by the trial judge that there was no proof to go to the jury of a legal rescission, and that the alleged representations were mere promises.

SWAYZE, J.[82] (after stating the facts as above). It is settled that, where a party seeks to be relieved from a contract upon the ground that it was induced by fraud, he must, except so far as he has some legal excuse for failure, restore his adversary to the position he was in at the time of the contract, and that there can be no rescission as long as he retains anything received under the contract, which he might have returned, and the withholding of which might be injurious to the other party. This statement of the rule is taken from the opinion of the Supreme Court in Byard v. Holmes, 33 N. J. Law, 119, 127. It has been approved by this court. Crosby v. Wells, 73 N. J. Law, 790, 801, 67 Atl. 295. The reason upon which it rests is the injustice of permitting a man to retain a benefit under a contract which he on his part repudiates. By its terms the rule requires only the return of what has been received. It is applicable only to a contract that has been partly executed, and not to a contract that still remains wholly executory on the part of the alleged fraud doer. In such a case the party who undertakes to rescind has received no advantage, he has nothing to return, and all he can do is to deny his obligation under the contract. If he does so in a reasonable time, he has rescinded the contract. Even where he has in fact received something under the contract, he is not always bound to return it. The rule, "like other rules of justice, must be so applied in the practical administration of justice as shall best subserve, in each particular case, the undoing of wrong, and the vindication of the right." Pidcock v. Swift, 51 N. J. Eq. 405, 408, 27 Atl. 470; Guild, Ex'r, v. Parker, Receiver, 43 N. J. Law, 430; Doughten v. Camden Building & Loan Ass'n, 41 N. J. Eq. 556, 7 Atl. 479.

It is also settled that one who desires to rescind a contract must act within a reasonable time. Dennis v. Jones, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; Clampitt v. Doyle, 73 N. J. Eq. 678, 70 Atl. 129. What is a reasonable time necessarily depends on the circum-

[82] Part of the opinion is omitted. No attempt is made in this volume to develop the subject of fraud, but it was thought that one case dealing with the subject might be useful for purposes of legal analysis.

stances of each particular case. It is settled in the English courts that, unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. Clough v. London & Northwestern Railway (1871) L. R. 7 Ex. 26, 41 L. J. Exch. 17; Morrison v. Universal Marine Ins. Co. (1873) L. R. 8 Ex. 205, 42 L. J. Exch. 115; United Shoe Machinery Co. of Canada v. Brunet, [1909] A. C. 330. He may even wait until action is brought against him (Clough v. London & Northwestern Railway, ubi supra), and a plea setting up the fraud amounts to a rescission of the contract (Lawton v. Elmore, 27 L. J. Ex. 141; Dawes v. Harness, L. R. 10 C. P. 166, 44 L. J. C. P. 194; Aaron's Reefs v. Twiss, [1896] A. C. 273, 65 L. J. P. C. 54). The case last cited was an action by a company against a shareholder for calls upon his stock. In such cases the right of creditors and other stockholders to have the stock paid for requires a prompt disaffirmance of the subscription to stock; but, inasmuch as in the case before the court the rights of creditors and other stockholders were not involved, it was held enough to set up the fraud by way of defense when action was brought. Lord Watson put the case very neatly. He said: "The respondent is not seeking to rescind the contract. He is merely resisting its enforcement by the party guilty of the fraud."

We have approved the same principle in a case where the vendor of chattels sought to rescind and reclaim his property because of the fraud of the vendee. Williamson v. N. J. Southern R. Co., 29 N. J. Eq. 311, 319. We there said: "The vendor may rescind the contract of sale and reclaim the property until, with a knowledge of the fraud, he elects to ratify and confirm the sale, or third persons, acting on the apparent ownership of the property by the fraudulent vendee, acquire rights therein bona fide and for a valuable consideration. Delay in exercising the power of rescission is evidence of an election to treat the sale as valid, of more or less weight, according to the circumstances of the case, but of itself does not operate as an estoppel, unless in the meantime superior rights of third persons have intervened." In a case like that then before us, rescission strictly so called is required, since the contract has been executed by a delivery of the property. In the case of an executory contract a refusal to perform any obligation thereunder and the defense of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and, unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action. The failure of the vendee to disaffirm the contract might sometimes prevent the vendor from selling to another and a different question would arise from that now before us.

Here there is no proof that the plaintiff, the vendor, was in any way prejudiced, except by his failure to receive the purchase money, and to that he was not entitled, if the contract was induced by fraud. The

defendant repudiated his obligation at the very start by failing to pay any installment of the price, and, if the plaintiff did not know the position taken by the defendant, he could easily have ascertained it. The existence of the written contract, however, is an important circumstance, since the plaintiff is entitled to be rid of his obligation thereunder if he cannot enforce that of the defendant. Whether the contract is recorded does not appear, but, whether recorded or not, it may possibly affect the plaintiff's title. A recent illustration of the difficulty that may arise is afforded by the case of Cornwall v. Henson (1900) 2 Ch. 298. We think, however, that the record of this suit, in which the defendant disaffirms the contract, is sufficient to protect the plaintiff against future claim. Upon the judgment herein, the contract will be either established as valid or annulled as void, and the question of liability thereon will become res adjudicata. It is upon this basis that the vendee is allowed to rescind at law by setting up fraud as a defense to an action for the purchase price without being compelled to go into equity—a right so well recognized that it is hardly necessary to cite authority. Cases are collected in 39 Cyc. 1417, and 1916, note 59. We think, therefore, that the defendant was entitled to defend on the ground that the contract was induced by fraud.

We are unable to agree with the learned trial judge that there was no evidence of fraud to go to the jury, because the false representations relied on by the defendant were mere promises. The representations that there were 25 houses contracted, and that the plaintiff was back of the enterprise, were representations that such were the existing facts. The representation as to the intention to build a railway station and cement walks stands on a somewhat different footing. It is, however, settled that a representation of an intention as existing may if false avoid a contract induced thereby. Where directors of a company procured a loan by representing that its object was to buy property and develop the business, when, in fact, the object was to pay off pressing liabilities, they were held in an action for deceit. "There must be," said Lord Bowen, "a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It may be difficult to prove the state of a man's mind at a particular time, but, if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact." Edgington v. Fitzmaurice, L. R. 29 C. D. 483, 55 L. J. Ch. 650. The most familiar illustration perhaps is the fraudulent purchase of goods by one who does not intend to pay for them—a case in which there is usually no express representation of intention, but merely the representation of an intent to pay implied from the fact of purchase. Leake on Contracts, 294, 295. The New York Court of Appeals has recently held that a statement by the grantee that he intends to erect a dwelling house on the tract conveyed while in fact he intends to erect a garage is a statement of a material

existing fact justifying the setting aside of the deed. Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670. * * *

It was error to direct a verdict for the plaintiff, and the judgment must be reversed, and a venire de novo awarded.

SECTION 9.—LAPSE OF OFFER—POWER OF REVOCATION

STARKWEATHER v. GLEASON.

(Supreme Judicial Court of Massachusetts, 1915. 221 Mass. 552, 109 N. E. 635.)

Actions by Helen Burr Starkweather and by William G. Starkweather against Frederick J. Gleason. There was a verdict for defendant, and the case was reported to the Supreme Judicial Court. Judgment ordered on the verdict.

BRALEY, J. The correspondence between the parties would have warranted the jury in finding that the plaintiffs invested in the preferred and common shares of the Walpole Rubber & Tire Company in reliance on the advice and judgment of the defendant, its vice president and general superintendent. And having called his attention to the decline in market value of the stock, he wrote them from the company's office, on March 26, 1913:

If "at any time you feel really worried why come out and you can get your money to the value you paid for the stock from me."

To which they replied, March 27, 1913:

"For the present * * * we will not take advantage of your willingness to protect us, but will wait to see if the value of the preferred drops any further, for if this continues we would not care to retain our small holdings."

If this had been an unconditional acceptance the transaction would have been closed and the plaintiffs, upon delivery of the certificates, properly indorsed, would have been entitled to the amount invested. It was not, however, until August 26, 1913, after a receiver for the company had been appointed, that they accepted the offer and notified the defendant of their readiness to deliver the stock, but he refused performance. While the offer to buy was evidently for the purpose of protecting them from loss on the investment, and was not intended by the defendant as a purely business transaction, the words, "at any time," do not cover an unlimited period to be measured by the alternating hopes or fears of the plaintiffs, but must be construed as limited to a reasonable time. Holland v. Cheshire R. R., 151 Mass. 231, 236, 24 N. E. 206. And the facts not being in dispute this was a question of law for the court. Holbrook v. Burt, 22 Pick. 546, 555. The plain-

tiffs, with knowledge of the fluctuating financial condition of the company, and the corresponding decline in the market price of the stock, having remained inactive for five months, we are of opinion that under these circumstances the presiding judge correctly ruled that the option had expired. Park v. Whitney, 148 Mass. 278, 19 N. E. 161. We find nothing in the remaining contents of these letters that calls for discussion. By the terms of the report, judgment on the verdict is to be entered for the defendant.

So ordered.

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

(United States Circuit Court, D. Minnesota, 1876. 4 Dill. 431, Fed. Cas. No. 9,635.)

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of $2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m.,

and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am. Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511.

The reason for this rule is well stated in Adams v. Lindsell, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said:

"That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on ad infinitum." See, also, Hamilton v. Lycoming Mut. Ins. Co., 5 Pa. 339, Vassar v. Camp, 11 N. Y. 441; Mactier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Abbott v.

Shepard, 48 N. H. 14; 8 C. B. 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars. Cont. 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, and acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the

defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.[88]

MACTIER'S ADM'RS v. FRITH.

(Court of Errors of New York, 1830. 6 Wend. 103, 21 Am. Dec. 262.)

Appeal from chancery.

At New York, in the autumn of 1822, the respondent and Henry Mactier the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to N. Y., to be consigned to Mactier, who was to ship to the respondent at Jacmel in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France in French vessels, and the parties were to share equally in result of the speculation all around. In pursuance of this arrangement, Frith, Sept. 5, 1822, wrote Firebrace, Davidson & Co., a mercantile house at Havre, to ship 200 pipes of brandy to N. Y. to the consignment of Mactier. Dec. 24, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson & Co.'s letters regarding the brandy order. By-the-bye, as your brother before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely to your own account, holding the value to cover the transaction to my account in New York."

[88] When no limit is specified, the power of acceptance lasts only a reasonable time, this varying with the circumstances. Averill v. Hedge, 12 Conn. 424 (1838), offer made, and after two weeks' delay renewed on the 18th; acceptance mailed on 20th held too late; Caldwell v. E. F. Spears & Sons, 186 Ky. 64, 216 S. W. 83 (1919); Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35 (1878); Traylor, Spencer & Co. v. Brimbery, 2 Ga. App. 84, 58 S. E. 371 (1907); Ortman v. Weaver (C. C.) 11 Fed. 358 (1882); Stone v. Harmon, 31 Minn. 512, 19 N. W. 88 (1884); Baker v. Holt, 56 Wis. 100, 14 N. W. 8 (1882). As to when an offer of a reward would lapse, see Loring v. City of Boston, 7 Metc. (Mass.) 409 (1844); Mitchell v. Abbott, 86 Me. 338, 29 Atl. 1118, 25 L. R. A. 503, 41 Am. St. Rep. 559 (1894); Matter of Kelly, 39 Conn. 159 (1872). Where a reward is offered for information, the power of acceptance lapses as soon as the information is given by the first informer. Lancaster v. Walsh (Exch.) 4 M. & W. 16 (1838).

Where there is a time limit specified, the power ends instantly at the expiration of this time. This is equally true in the case of irrevocable powers, called option contracts. Berg Co. v. Thomas & Son Co., 256 Pa. 584, 100 Atl. 951 (1917); Mackey Wall Plaster Co. v. United States Gypsum Co. (D. C.) 244 Fed. 275 (1917).

Jan. 17, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about Dec. 1 then past; and adds: "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation; as you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination till I again hear from you. The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti to be invested in coffee for France, in which case I will at once decide to take the adventure to my own account. Our London accounts, down to the fifth of December, speak confidently of a war between France and Spain, a measure which, if carried into effect, would operate to your disadvantage." Also: "The next arrival from Europe will probably decide the question of peace or war, and I will lose no time in communicating the same to you;" and also, "let what will happen, I trust you will in no way be a sufferer."

March 7, 1823, Frith wrote Mactier, making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, and note their respective contents." March 12, 1823, the ship La Claire arrived at N. Y., laden with the brandy in question, and was at the wharf on the morning of March 13.

A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said he should take it to himself. A merchant of N. Y. also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. March 17, Mactier entered the brandy at the custom-house as owner, and not as consignee, took the usual oath, and gave bond for the duties. March 22, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier.

March 25, Mactier wrote a letter, directed to Frith at Jacmel, in which he said, "I have now to advise the arrival of French ship La Claire with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with

the wish expressed in your regarded favor of the 24th December and my answer thereto of the 17th January last, I have decided to take this adventure to my own account. I, therefore, credit you with the amount of the invoice," amounting to $14,254.57. To this letter was attached a postscript, dated March 31.

March 28, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these last two letters at their respective places of direction, Mactier was dead, he having departed this life April 10, 1823. April 21, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of March 25, says he has noted its contents, and requests Mactier to charter on his account a staunch first-class vessel, and send out to Jacmel by her 400 barrels of flour and other goods. Meantime, Mactier having died, his administrator obtained the rest of the brandy from the custom house and sold it at auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a pro rata distribution, filed his bill in the court of chancery, on April 1, 1824, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof. He admits having offered to sell the brandy to Mactier, but declares that he regarded his offer as declined by the letter of Jan. 17. He sets forth a letter written by Mactier on March 13, 1823, in which he writes of the brandy as follows: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay, I fear, will operate to our disadvantage. War between France and Spain may now be considered inevitable; France has recalled her minister, and 100,000 Frenchmen have been ordered to march into Spain." He alleges that the letter of Mactier to him of March 25 was not received until several days after the death of Mactier, and that his letter to Mactier of April 21 was written in ignorance of the death of Mactier, and that he did not intend thereby, and he conceives he did not finally consummate the sale as claimed.

The bill concludes by praying an account of the sales of the brandy, and a decree directing the defendants to retain in their hands sufficient of the funds belonging to the estate of Mactier to pay and satisfy the respondent when his accounts shall be settled and adjudged upon by the court.

The defendants put in their answer, insisting that the brandy, on its arrival at the port of New York, was the sole and exclusive property of Mactier, and that the portion thereof which came to their hands at his decease, and the proceeds of that part thereof which was sold by him in his lifetime, and which came to their hands, rightfully belonged to

his estate, and was subject to be disposed of in a due course of administration.

On March 1, Mactier had effected an insurance on his commissions as consignee of the brandy, to the amount of $1,500; but on March 17, he had entered the brandy in the custom house as his own, using an invoice stating that the brandy was shipped "to the address and for the account of Henry Mactier." On the date of such entry, a clerk had charged a small custom house fee to "John A. Frith's sales of brandy" on Mactier's books; but later Mactier directed the account to be made out to himself, and on March 28 Frith was credited on the books with the invoice price of the brandy.

On May 20, 1825, Chancellor Sanford made an order referring the case to a master to examine witnesses and report. The master reported on Oct. 10, 1825, that the sale had been consummated and that Frith had no lien on the brandy and no rights other than those of a general creditor. The complainant excepted to this report, and the Chancellor subsequently sustained the exceptions and decreed that Frith was entitled to the specific proceeds of the sale of the brandy. From this decree the defendants appealed.[84]

MARCY, J. The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came to their possession after his death, and the amount of such notes taken on the sale of the 150 pipes, March 22, 1823, as were uncollected and undisposed of at the death of Mactier, or, at least, so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them are, of course, substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. Pow. Cont. 4. In testing the validity of contracts, many things are to be considered. The contract that the appellant sets up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred.

[The learned judge here discussed the question whether an act performed after Mactier's death might not be operative by the doctrine of "relation back" as if performed prior to his death.]

[84] The statement of facts has been rewritten in part, the opinion of Marcy, J., has been abbreviated, and several opinions of other judges have been omitted.

My conclusion, in regard to this objection to the alleged contract, is, that if any act was required to be done, even by Frith, to complete the sale when Mactier died, that act could not be subsequently performed.

I am now to consider whether there was a contract, before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary all agree, but what shall constitute it in a given case may admit of much diversity of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. Poth. Cont. de Vente, pl. 1, § 2, art. 3, No. 31. Delvincourt, another eminent French writer on the Civil Code of France, says, that although it is impossible that there should be a contract without the consent of all parties, it is not indispensable that the wills of the parties should concur at the same instant, provided the will of the one that did not concur at first, is declared before the will of the other is revoked. 5 Cours de Code Civil, 93. Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed. Poth. Cont. de Vente p. 1, § 2, art. 3, No. 31. What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it carried into effect; either can enforce it against the other, or recover damages for the nonfulfillment of it: but if there be conditions expressed or implied to be performed by the purchaser, he cannot compel the delivery until they are performed. If the price is to be immediately paid or security given, he cannot have the property until payment made, or security given, or a tender thereof. Touch. 204, 205; Noy, Max. c. 42; 2 Bl. Comm. 447.

Where the negotiation between the contracting parties residing at a distance from each other is conducted, as it usually is by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify his acceptance of the proposition. This Pothier holds to be the legal presumption unless the contrary appears. His language is: "Cette volonté est présumée tant qu'il ne paraît rien de contraire." This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless storehouse of jurisprudence: it is found in the common law; indeed, it

exists, of necessity, wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; 3 Starkie, Ev. 1252. The case of Adams v. Lindsell, 1 Barn. & Ald. 681, proceeds upon and affirms the principle that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "The defendants must be considered in law as making during every instant of time their letter was traveling the same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter."

Against the authority of the case of Adams v. Lindsell, we have urged on us a decision of a court of the highest respectability in one of our sister states. The case of McCulloch v. Insurance Co., 1 Pick. (Mass.) 278, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have, therefore, deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which would distinguish between a contract for insurance, and one for the sale of goods in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve courts in a still more distressing embarrassment. Distinctions, which are not founded on a difference in the nature of things, are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules appealing to factitious reasons for their support, consequently difficult to be acquired, and often of uncertain application. The two cases referred to should have had applied to them the same rule of law, and we are required to say what that rule is in deciding the case now under consideration.

The principle of the decision of the King's Bench is simply that the acceptance of an offer made, through the medium of a letter, binds the bargain if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the supreme court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The chancellor in deciding this case gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact." The decision of the court of Massachusetts makes knowl-

edge by the party tendering the offer of the other's acceptance essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the chancellor, viz.: the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not, therefore, arise from a knowledge of the present concurrence of the wills of the contracting parties.

All the authorities state a contract or an agreement (which is the same thing) to be aggregatio mentium. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind it means such as have been made manifest by overt acts; when it speaks of the meeting of minds it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective although the parties who may claim the benefit of or be bound by a contract thus made, may for a season remain ignorant of its being made.

Testing the rules of the law laid down in the two cases to which I have referred by the authority of reason, and the practical results that are likely to flow from them, it does appear to me, that we are not left at liberty to hesitate about the choice. If we are inclined from the force of abstract reason, to prefer the rule laid down by the Court of King's Bench, that inclination will be greatly strengthened by a recurrence to the opinions of courts and jurists. The Common Pleas in Eng-

land seem to me to have given their approval to the decision of Adams v. Lindsell. Routledge v. Grant, 4 Bing. 653. Judge Washington, in delivering the opinion of the court, in Eliason v. Henshaw, 4 Wheat. 228, 4 L. Ed. 556, said, "Until the terms of the agreement have received the assent of both parties the negotiation is open and imposes no obligation on either." The inference from this proposition is that the assent of the parties to the terms of the agreement and not their knowledge of it, completes the contract. It was decided in the circuit court of the United States, for Pennsylvania, that contracts are formed by the offer on the one hand, and an acceptance on the other. After acceptance, the contract is obligatory on both. Coxe, Dig. 192. In this case, knowledge of the acceptance is not brought into view as necessary to constitute the obligation. Both the Roman law and the French Civil Code, as we have seen by the references already made, contain a doctrine in accordance with the principle of these cases. I think I am. therefore, warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, providing the offer is standing at the time of the acceptance.

What shall constitute an acceptance will depend, in a great measure. upon circumstances. The mere determination of the mind, unacted on can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An acceptance is the distinct act of one party to the contract as much as the offer is of the other; the knowledge by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of Dec. 24 was received at New York and Mactier had a fair opportunity to answer it. If the answer of Jan. 17 had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted; there was a promise to accept upon a contingency, for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is in case of such a war, "I will at once decide to take the adventure to

my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: "Verbum imperfecti temporis rem adhuc imperfectam significat." There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If in this case the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do, to effect an acceptance, was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before March 17. The insurance that he effected on his commissions March 1 disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place March 17. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; March 17, when that event was considered as settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th with a postscript of March 31, he accepted the offer. This letter was immediately transmitted to Frith, and as soon as March

28, entries were made in his books showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance, to be transmitted after that mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until March 31; if Frith intended it should stand on, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. March 7, he acknowledges Mactier's letter of Jan. 17, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated. * * *

Reversed.

TINN v. HOFFMANN & CO.

(In the Exchequer Chamber, 1873. 29 Law T. R. [N. S.] 271.)

This was an action brought by the plaintiff against the defendants to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B., dated May 30th, 1872, the facts were stated for the opinion of the Court of Exchequer in the following special case:

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffmann & Co., is an iron merchant, carrying on business at Middlesbro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth:

The plaintiff to the defendant:

"November 22, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: Please quote your lowest price for 800 tons No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.

"Yours truly, J. Tinn."

3. The defendants' reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,
"November 24, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible), at 69s. per ton delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.

"We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear sir, yours truly, A. Hoffmann & Co."

4. The plaintiff to the defendant:

"Bristol, November 27, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: The price you ask is high. If I made the quantity 1200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige J. Tinn."

5. The defendant to the plaintiff in reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,
"November 28, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge Middlesbro' pig iron, 200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

"Our to-day's market was very firm again, and we feel assured we shall see a further rise ere long.

"Kindly let us have your reply by return of post as to whether you accept our offers of together 1200 tons and oblige yours truly,

"A. Hoffmann & Co."

6. The plaintiff to the defendant:

"Bristol, November 28, 1871.

"Messrs. Hoffmann & Co.:

"No. 4 Pig iron.

"Dear Sirs: You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton. Yours faithfully, Joseph Tinn."

7. The defendants' reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,
"November 29, 1871.

"Joseph Tinn, Esq.:

"Dear Sir: We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1200 tons No. 4 forge at a lower price than that offered to you by us of yesterday—viz., 69s., and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

"A. Hoffmann & Co."

8. On December 1st, 1871, the plaintiff sent a telegram to the defendant, of which the following is a copy:

"From Tinn, Ashton.

"To Hoffmann & Co., Middlesbro'-on-Tees.

"Book other 400 tons pig iron for me, same terms and conditions as before."

And on the same day the plaintiff sent a letter to the defendant, of which the following is a copy:

"December 1, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: I have your favor of the 29th ult. Please enter the remaining 400 tons No. 4 Forge Pig at 69s. ex-ship Portishead, delivery to commence January, 1872, payment by four months' acceptance against delivery. Kindly send me sold note for the 800 and 400 tons, and oblige, yours truly, J. Tinn."

9. The following correspondence then took place between the plaintiff and the defendants' clerk, duly authorized in that behalf.

The defendants' clerk to the plaintiff:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"December 1, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: We have your telegram of this day, 'Book other 400 tons Pig iron, same terms and conditions as before,' which we note and shall lay before our Mr. Hoffmann on his return next week. Yours truly, for A. Hoffmann & Co. C. Jerveland."

10. Memorandum.

"December 2, 1871.

"From A. Hoffmann & Co., Middlesbro'-on-Tees.

"To Joseph Tinn, Esq., Bristol:

"The contents of your yesterday's favor is noted, and we shall lay same before our principal on his return next week."

11. The defendants to the plaintiff:

"The Queen's Hotel, Manchester, December 4, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: I am in receipt of telegram 'Book other 400 tons, same terms and conditions as before,' and favor of 1st inst. addressed to my firm, in reply to which I very much regret to state that I am not able to book the 1200 tons in question, as your reply to ours of November 28th and 29th did not reach us within the stipulated time; and as I had other offers for the same lot, I disposed of the latter previous to my leaving Middlesbro' and receiving your decision.

"Trusting to be more fortunate in future, I remain, dear sir, yours truly, A. Hoffmann & Co."

12. The plaintiff to the defendant:

"December 5, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: I regret you cannot enter me the 400 tons No. 4 Forge Pig on the same terms as the 800 tons. Please send me sold note for 800 tons per return. Yours truly, J. Tinn."

13. The reply of the defendants:

"Royal Exchange Buildings, Middlesbro'-on-Tees,
"December 6, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: Your favor of yesterday to hand, in reply to which we have to state that we cannot send you contract for pig iron, having sold you none.

"The quotation for 1200 tons in our respect of 29th ult. was for your acceptance by 12 o'clock the 30th; and failing to receive such we disposed of the iron, being under other offers, as already intimated to you by our Mr. Hoffmann, and it is now utterly impossible for us to book you the quantity you require, or you may rest assured that we willingly would do so. We are, dear sir, yours truly,

"Pro A. Hoffmann & Co. C. Jerveland."

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

16. The plaintiff contends that he has a binding contract with the defendant whereby the defendants are bound to deliver to him 800 tons of iron. The defendants, on the other hand, contend that there is no such contract, and refuse to deliver any of the said iron.

The questions for the opinion of the Court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity and on what terms and conditions.

[The Court of Exchequer (BRAMWELL, CHANNELL, and PIGOTT, BB.) gave judgment for the defendant; the Lord Chief Baron (KELLY) dissenting in the belief that there was a contract for 800 tons. The plaintiff brought error to this Court.]

HONYMAN, J. I am of opinion that the judgment of the Court below was wrong, and that judgment ought to be entered for the plaintiff in respect of 800 tons. The question depends entirely on the construction and effect of the defendants' letter of the 24th and the two letters of November 28th, 1871, one written by the plaintiff and the other by the defendants. The plaintiff had been inquiring at what price the defendants would let him have 800 tons of iron, and by their letter of November 24th they named 69s. per ton as the price for the 800 tons, to be delivered at the rate of 200 tons per month, in the four months of March, April, May, and June, 1872; and that letter concluded thus, "waiting your reply by return." Mr. King-

don, on the part of the plaintiff, admitted, and I think very properly, that the meaning of that was, we offer you that price, provided you accept it by return. Inasmuch as it was not accepted by return, as it stood, I presume had it stopped there, there would have been no contract. The plaintiff not only did not accept by return, but, on the contrary, he objected to the price, for on November 27th he wrote saying that the price was too high, and asking whether if he increased the quantity to 1200 tons, to be deliverable 200 tons per month—that is to say, in addition to the quantity he had already proposed for, to be delivered in March, April, May, and June, 1872, 400 tons more, to be delivered 200 tons in January and 200 in February, 1872, that would make the price lower. Upon that, on November 28th, the defendants wrote the following letter, on the construction of which I believe the difference of opinion among the members of the Court mainly arises [Reads letter of that date.] What is the meaning of that letter? It amounts to this: On November 24 we offered you 800 tons for delivery at 69s.; we now repeat to you that offer, and in addition to that, we make a further offer of 400 tons more—that is, we renew the offer of November 24th, and we make you a further offer of 400 tons, provided you accept those offers "by return of post." That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message, or by any means not later than a letter written and sent by return of post would reach us. If that is so, then comes the plaintiff's letter, written on the same day, November 28th, which crosses the defendants' letter of the same date, in which the plaintiff said, "You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton, ex ship Portishead."

I cannot agree in the opinion said to have been expressed by my Brothers Pigott and Channell in the Court below. As I understand, my Brother Pigott certainly says this is not a clean offer, or a clean acceptance of 800 tons, but that it is 800 tons on the condition or hope or trust that they would lower the price of the other 400 tons. I cannot accede to that view of the case. I assume that it plainly amounts to this, "I will take your 800 tons on the terms and conditions mentioned in the letter of the 24th inst., but I hope you will let me have the other lot at 68s. per ton; if you choose to do that, well and good." I cannot understand how it can be said that that is not an absolute acceptance of the 800 tons, supposing it was competent to the plaintiff to accept that quantity. In the Court below it seems to have been treated as if the offer of November 28th was one offer of 1200 tons. I do not think so. I think it is a repetition of the offer of 800 tons coupled with a further offer of 400 tons, and that it was competent to the plaintiff to accept one and not accept the other. My Brother Bramwell appears to have thought that it was not material

to consider whether it was two separate offers of 400 tons and 800 tons, or an offer of 1200 tons, because in either view of the case, the plaintiff could not accept the one and reject the other. If it is to be construed as strictly one offer of 1200 tons, I can understand it, and then of course he could not accept the one and reject the other. But I do not think it is one offer of 1200 tons, nor two offers one of 400, and the other of 800 tons, but that it is a repetition of the offer of 800 tons, with a further offer of further 400 tons. To say that he could not accept the 400 tons without the 800 tons seems, in my view of the matter, to throw no light on the question whether he might accept the 800 tons without the 400 tons. That being so, it being in my judgment a separate offer of 800 tons, and 400 tons in addition, I should have thought, had the plaintiff's letter of the 28th been written on November 29th, that nobody, but for the opinions which have been expressed here to-day, could have entertained a doubt that it would have been an acceptance. What, then, is the effect when the two letters are written on the same day and crossed each other in the post? Does that make any difference?

On this part of the case, as far as I can gather from the notes that have been given us of the judgments below, my Brother Bramwell is of the same opinion as I am, because I understand him to say that, if he had thought that these were two offers, and that the two offers were capable of being accepted the one without the other, then the fact of the acceptance crossing the offer would have been no bar to the contract. After the plaintiff had written the letter of November 28th mentioning the 800 tons, it could not be said that he would not have been bound by the defendants' letter of the same date, if it had been written on November 29th. I do not see how it can be contended that there would not then have been a valid contract for 800 tons, except with regard to the question of whether it were one offer, or two offers. Of course, if it is one offer, that is one thing; but if it be two offers, then, if the defendants' letter of November 28th had been written on the 29th, after he had received the plaintiff's letter of the 28th, it could not be said that that did not make a good contract for 800 tons. I cannot see why the fact of the letters crossing each other should prevent their making a good contract. If I say I am willing to buy a man's house on certain terms, and he at the same moment says that he is willing to sell it, and these two letters are posted so that they are irrevocable with respect to the writers, why should not that constitute a good contract? The parties are ad idem at one and the same moment. On these grounds it appears to me that the judgment of the Court below was wrong, and ought to be reversed. I speak with some hesitation in this case when I find that the opinion of the majority of my Brothers is against me, and also when the question turns entirely on the construction of a somewhat ambiguously written letter.

BRETT, J. The question is, whether upon a true construction of this

correspondence, there is a binding contract between the plaintiff and the defendants for the 800 tons of iron at 69s. It is argued on the one side that such a contract is disclosed because it is said that the defendants' letter of November 24th is an offer for the sale of 800 tons of iron, and this letter of November 28th leaves open the time for accepting that offer of November 24th, and makes a new offer with regard to another 400 tons; and that the defendants' offer of November 24th being thus opened by their letter of the 28th, the plaintiff's letter of the 28th is an acceptance of the defendants' offer of the 24th. On the other side it is argued that the defendants' letter of November 28th is not an opening of their offer of the 24th, but that it is an offer with regard to 1200 tons; and that even if it were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it reopens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer, with regard to 400 tons; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of November 28th was not in answer to that offer, but was a letter crossing it. Now with regard to the construction of the defendants' letter of November 28th, it seems to me that we must consider that the defendant's letter of November 24th is in answer to a request of the plaintiffs of November 22d for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left it open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words, "Your reply by return of post" fixes the time for acceptance, and not the manner of accepting. But that time elapsed; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of November 27th rejects that offer; it rejects it on the ground the the price is higher than the plaintiff is willing to give. That offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1200 tons, and the letter of November 28th is a letter written "In reply to your favor of yesterday," that is, In reply to your request for an offer with regard to 1200 tons. "I now make you this offer." That seems to me to show that the letter of November 28th of the defendants is an offer with regard to 1200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1200 tons is made is this: "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons, I offer you to deliver them at the same price, but at different periods of delivery."

I think that the defendants' letter of November 28th, being a letter in answer to a request with regard to 1200 tons, is an offer with

regard to 1200 tons, and that no such offer was ever accepted; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it reopened the offer of November 24th. That offer was dead, and was no longer binding upon the defendants at all, and therefore it seems to me to be a wrong phrase to say that it reopened the offer of November 24th. The only legal way of construing it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate offer with regard to 400 tons, but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted, by the fact of the plaintiff's letter of November 28th crossing it. If the defendants' letter of November 28th is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of November 28th could only be considered as a cross offer. Put it thus: If I write to a person and say, "If you can give me £6000 for my house, I will sell it to you," and on the same day, and before that letter reaches him, he writes to me, saying, "If you will sell me your house for £6000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other, therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post, those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the Court below was right.

Judgment of the Court below affirmed.[85]

[85] The dissenting opinion of Quain, J., and the opinions of Archibald, Blackburn, Grove, and Keating, JJ., concurring with Brett, J., have been omitted. In the course of his opinion, Blackburn, J., said: "When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. There is, I believe, a total absence of authority on the point. I do not think, though I am not sure, that the question has ever been raised before. The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other. Either of the parties may write and say, "I accept your offer, and, as you perceive, I have already made a similar offer to you," and then people would know what they were about; I think either side might revoke."

HURFORD v. PILE.

(In the King's Bench, 1615. Cro. Jac. 483.)

Assumpsit. Whereas J. S. being in execution for forty pounds, the defendant said, "Deliver J. S. out of execution, and what it cost you I will repay;" wherefore J. S. was discharged by the plaintiff. The defendant for plea saith, that after the assumpsit, and before the plaintiff had done any thing in that business, he forbade him to meddle therein, and that he would not stand to his promise. The plaintiff demurred; and it was adjudged for the plaintiff.

HOUGHTON, Justice, said, that a man may discharge an assumpsit made to himself, but he cannot discharge an assumpsit made by himself: but, at another day, the defendant's counsel moved, that it was a good plea, and that as long as nothing was done, it was but an executory promise.

DODERIDGE. If I promise to J. S. that if he build an house upon my land before Michaelmas, I will pay him a hundred pounds, and I countermand it before he hath done any thing concerning the house, it is a good countermand.

HOUGHTON è contra; but he said, that may be considered in damages. Et adjournatur.

Afterwards, in Trinity term, judgment was given for the plaintiff.

PAYNE v. CAVE.

(In the King's Bench, 1789. 3 Term R. 148.)

This was an action, tried at the sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c. of all which premises the defendant afterwards, to wit, &c. had notice; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake, and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, &c. undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, &c. And the plaintiff avers, that the conditions of sale, herein after mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defend-

ant became the purchaser of the lot in question for £40, and was requested to pay the usual deposit which he refused, &c. At the trial, the plaintiff's counsel opened the case thus;—The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid £40; the auctioneer dwelt on the bidding, on which the defendant said "why do you dwell, you will not get more;" the auctioneer said that he was informed the worm weighed at least 1,300 cwt., and was worth more than £40; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for £30 to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last: and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last out-bid would have given for them. The case of Simon v. Motivos, 3 Burrows, 1921, which was mentioned at the trial, does not apply. That turned on the statute of frauds.

THE COURT thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called locus pœnitentiæ. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.[86]

[86] In accord: Anderson v. Wisconsin Cent. R. Co., 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379 (1909). In Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344 (1834), the defendant agreed to trade horses with plaintiff and pay $50 cash, if after plaintiff rode defendant's horse 10 miles he should be pleased with him. Then defendant ran after plaintiff and withdrew.

Bids on public contracts are sometimes made irrevocable by statute. See City of Baltimore v. J. L. Robinson Const. Co., 123 Md. 660, 91 Atl. 682, L.

COOKE v. OXLEY.

(In the King's Bench, 1790. 3 Term R. 653.)

This was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, etc., a certain discourse was had, etc., concerning the buying of 266 hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant to deliver to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, etc.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise.

Erskine and Wood now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before 4 o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not delivering the tobacco, and not for not selling it.

Lord Kenyon, C. J. (stopping Bearcroft, who was to have argued in support of the rule). Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore nudum pactum.

Buller, J. It is impossible to support this declaration in any point

R. A. 1915A, 225, Ann. Cas. 1916C, 425 (1914). For similar provisions as to all offers, see Swiss Code of Oblig. § 3; German Civil Code, §§ 145, 658; Jap. Civil Code, art. 521; Civil Code Ga. 1895, § 3645.

The vote of an official board to accept a bid is not operative, unless officially communicated. Benton v. Springfield Young Men's Christian Ass'n, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320 (1898); Edge Moor Bridge Works v. County of Bristol, 170 Mass. 528, 49 N. E. 918 (1898); Peek v. Detroit Novelty Works, 29 Mich. 313 (1874); Powell v. Lee, 99 L. T. 284 (1908); In re London & Northern Bank, [1900] 1 Ch. 220.

An alteration in the terms of an offer by the offeror operates as a revocation. Travis v. Nederland Life Ins. Co., 104 Fed. 486, 43 C. C. A. 653 (1900).

of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at 4 o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before 4 o'clock; and it is not stated that the parties came to any subsequent agreement; there is therefore no consideration for the promise.

Rule absolute.

BOSTON & MAINE R. R. v. BARTLETT et al.

(Supreme Judicial Court of Massachusetts, 1849. 3 Cush. 224.)

This was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants on April 1, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing dated April 1, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land, for the sum of $20,000, if the said corporation would take the same within thirty days from that date;" that afterward and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," etc., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on May 29, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

FLETCHER, J. In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agree-

ment on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill—namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constituting a contract at the time it was made. The decision of the Court in Maine in the case of Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-

books. The case of Cooke v. Oxley, 3 T. R. 653, in which a different doctrine was held, has occasioned considerable discussion, and in one or two instances has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But however that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore in the present case the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all of which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.[87]

BYRNE & CO. v. VAN TIENHOVEN & CO.

(In the High Court of Justice, Common Pleas Division, 1880. L. R. 5 C. P. Div. 344.)

LINDLEY, J.[88] This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on October 1st, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on October 11th and 15th respectively. [The letter of October 1st, 1879, from the defendants to the plaintiffs contained a reference to the price of tinplates, and made an "offer of 1000 boxes of this brand 14x20 at 15s. 6d. per box f..o. b. here with 1 per cent. for our commission; terms, four months' banker's acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The plaintiffs accepted by cable sent on October 11th, 1879, and confirmed it by letter sent October 15th, 1879. On October 8th the defendants mailed to the plaintiffs a letter with-

87 In Ellis' Adm'r v. Durkee, 79 Vt. 341, 65 Atl. 94 (1906), the court said: "The only importance of inquiring whether or not an offer is supported by a consideration is to determine whether it can be withdrawn by the party making it before it is accepted by the party to whom it is made. If it is based upon a consideration, the power of revocation is not attached to it. But, though it be without consideration, it may be accepted so as to make a binding contract if not sooner revoked, but it may be revoked at any time before it is accepted—and this is so though it states a certain time during which it is to remain open."

88 The statement of facts has been abbreviated, and part of the opinion is omitted.

drawing their offer of the 1st. This letter was received by the plaintiffs on October 20th. The plaintiffs refused to recognize the revocation, demanded performance by both cable and mail, and later brought this action.] * * *

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not—Routledge v. Grant [4 Bing. 653]. For the decision of the present case, however, it is necessary to consider two other questions—viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. See Tayloe v. Merchants' Fire Insurance Co. [9 How. 390, 13 L. Ed. 187] cited in Benjamin on Sales, pp. 56–58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on Principles of Contract, 2d. ed., p. 10, and by Mr. Leake in his Digest of the Law of Contracts, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question—viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on October 1st, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (Harris's Case, L. R. 7 Ch. 587; Dunlop v. Higgins, 1 H. L. C. 381) even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it.

But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence

of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of October 8th is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on October 8th of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties. * * *

Judgment for plaintiffs.[89]

THOMSON et al. v. JAMES.

(In the Court of Session of Scotland, 1855. 18 Sc. Sess. Cas. [Dunlop] 1.)

The LORD PRESIDENT[90] [in the course of his opinion, said:] I hold that a simple unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted by post; but I hold that the mere posting of a letter of recall does not make that letter effectual as a recall, so as from the moment of posting to prevent the completion of the contract by acceptance. An offer is nothing until it is communicated to the party to whom it is made, and who is to decide whether he will or will not accept the offer. In like manner I think the recall or withdrawal of an offer that has been communicated can have no effect until the recall or withdrawal has been communicated, or may be assumed to have been commu-

[89] In accord: Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790 (1893).

In some of the attempts at codifying the law of contracts there is a provision that a revocation of an offer is operative just as soon as it is put in the course of transmission through the post. See Watters v. Lincoln, 29 S. D. 98, 135 N. W. 712 (1912); also a criticism of the California Code provision, by Lewinsohn, "Mutual Assent in California" (1914) 2 Cal. L. Rev. 341.

[90] The statement and parts of the opinions of the Lord President and of Lord Curriehill and all of the opinions of Lords Deas and Ivory are omitted.

nicated, to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer, until by the lapse of a reasonable time he has lost the right [power], or until the party who has made the offer gives notice,—that is, makes known that he withdraws it. The purpose of the recall is to prevent the party to whom the offer was made from acting upon the offer by accepting it. This necessarily implies precommunication to the party who is to be so prevented.

The argument for the defender upon this branch of the case was rested upon what I cannot help regarding as a strained application of a rule or maxim, sufficiently sound in general application, but which cannot be applied in the most strictly literal sense that the words admit of. It was contended, that as the offerer had changed his mind, and had posted a letter announcing that change before the offeree had declared his mind by posting his acceptance, the intention or consent to purchase cannot be held to have continued until the consent to sell was declared, and consequently that at no one moment of time was there in idem placitum consensus atque conventio, which is said to be essential to a paction. It was argued, upon a rigid application of that definition, that the completion of the contract was interrupted by change of mind, though not yet communicated, just as it would have been by the death or insanity of the offerer, and that all these three events are classed together by some writers as being alike revocations of the offer. Death or insanity may prevent the completion of the contract as effectually as the most complete revocation, but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract,—that is, the making of the contract,—because a contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted; and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him.[91] You cannot, by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him, whether his death or insanity be or be not known to you. In such a case there is no revocation, in the correct use of the word, but there is an interruption—an effectual obstacle to the completion of the contract, equivalent in result

[91] The death of the offeror extinguishes the power of acceptance, even though (it appears) the offeree has no notice thereof. Jordan v. Dobbins, 122 Mass. 168, 23 Am. Rep. 305 (1877); National Eagle Bank v. Hunt, 16 R. I. 148, 13 Atl. 115 (1888); Vantassel v. Hathaway, 53 Me. 18 (1864); Union Sawmill Co. v. Mitchell, 122 La. 900, 48 South. 317 (1909); Pratt v. Trustees of Baptist Soc. of Elgin, 93 Ill. 475, 34 Am. Rep. 187 (1879); Twenty-Third Street Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807 (1890); Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829 (1885); In re Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449 (1875). So also insanity. Beach v. First Methodist Episcopal Church, 96 Ill. 177 (1880).

to a revocation, though operating by very different facts and very different principles. Revocation or recall is an act of the offerer, by which he communicates his change of purpose, and withdraws from the offeree the right [power] he had given him to complete the contract by acceptance. Having communicated his purpose to purchase, the offeree is entitled to regard that purpose as unchanged until a change is communicated. He has acquired a right [power], which he retains until it is withdrawn from him by a communication from the party who conferred it. If he exercises the right [power] by a completed act of acceptance of the offer before notice has reached him, or ought in ordinary course to have reached him, the contract will be binding, although a change of mind on the part of the offerer had taken place, and although he had taken a step towards communicating that change of mind by writing a letter, or even putting it into the post-office. In a great many cases the maxim that there must be a concurrence of will at the moment of completion of the contract cannot be rigidly or literally applied. The very opposite may be the fact. Although one cannot, by accepting an offer, bind a dead or insane person, he may bind an unwilling person, one who has altogether changed his mind. Such cases are not unfrequent. If an offer bears that it is to be binding for a certain number of days or hours, the offerer may repent before the lapse of the given time, and yet at the end of it may find himself unwillingly bound; or if an offerer changes his mind, but does not take the proper steps to have his change of mind conveyed to the offeree,—either writes no letter, or writes a letter which he omits to send, or sends it by mistake to a wrong place,—he may find himself unwillingly bound. Other cases may be figured. Mere change of mind on the part of the offeree will not prevent an effectual acceptance,—not even although that change of mind should be evinced by having been communicated to a third party, or recorded in a formal writing, as for instance in a notarial instrument. In all these cases a binding contract may be made between the parties without that consensus or concursus which a rigidly literal reading of the maxim or rule would require.

Upon the grounds now indicated, I hold that the mere putting of the letter of recall into a distant post-office before the acceptance was sent off did not put an end to the offer and exclude the power of the offeree, to bind the offerer by accepting the offer. I hold that a letter of recall has no effect till the recall has become known to the offeree, or should in due course have become known to him. In the present case the letter of recall reached its destination on 2d December, and on that day became known to the pursuers. The letter of acceptance had been posted on the preceding day, the 1st of December; but it is averred that it had not reached its destination when the recall was received on the morning of the 2d. I hold that, in the circumstances averred, the delivery and receipt of the letter of recall did not

interrupt or prevent the completion of the contract. I do not think that the principle to which I have referred, as that applicable to the recall of an offer, applies equally to the acceptance of an offer; or that everything which must be done, in order to effectuate the recall of an offer, must, in like manner, be done in order to give effect to the acceptance of an offer. The two things are in their nature different. The one consists in effectually undoing something that the party himself has already done, and which binds him unless it is effectually undone; the other consists in merely acceding to a proposal made. What it is that the acceptor must do in order to make his acceptance effectual, and to put it out of the power of the offerer to recall his offer, depends on circumstances. Some things he must do. He must make his acceptance in writing, and he must send forth or give up that writing to or for behoof of the offerer. It is not enough that he commits his acceptance to writing and locks it in his own repositories; and, on the other hand, it is not necessary that he shall deliver it personally to the offerer. When an offer is made by letter from a distance through the medium of the post, the offerer selecting that medium of transmission authorizes and invites the offeree to communicate his acceptance through the same medium. If the offeree avails himself of that medium of communication, and transmits his acceptance, properly addressed through the post-office, and if the acceptance reaches its destination in the due and regular course of that medium of transmission, I am of opinion that the act of acceptance was completed by the putting of the letter into the post-office; and that a letter of recall, which did not arrive till after that act, cannot be held to have interrupted the completion of the contract. By putting the letter of acceptance into the post-office, the offeree did just what he was invited to do, and all that it was incumbent on him or possible for him to do in the way of acceptance, by the mode of communication which he was authorized, if not invited, by the offerer to adopt. * * *

Lord CURRIEHILL, [in a dissenting opinion, said:] But the defender's offer to the pursuers, although it did not create a binding obligation on him so long as nothing followed upon it, had then the twofold effect of conferring one power upon the pursuers, and of reserving another power to the defender himself. On the one hand, the power which was thereby conferred upon the pursuers was to accept the offer at any moment, within a reasonable period, so as to bind themselves to perform the counterpart of the proposed contract of sale. That was an implied condition of the offer, and there was placed in the pursuers the option of purifying that condition by accepting the offer within due time. As the period of time which was allowed for acceptance, is not stated in the offer, it might have been a question of some nicety how long it was to endure; but that question is not raised in the present case.

On the other hand, the power which the defender reserved to himself was to retract that offer, and thereby put an end to it at any moment, so long as the pursuers did not exercise their power by accepting of the offer to the effect above mentioned.[92] * * *

DICKINSON v. DODDS.

(In the Court of Appeal, Chancery Division, 1876. 2 Ch. Div. 463.)

On Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows:

"I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

"£800. [Signed] John Dodds."

"P. S.—This offer to be left over until Friday, 9 o'clock a. m. J. D. (the twelfth), 12th June, 1874. [Signed] J. Dodds."

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 a. m., within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800. and that the plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9. a. m. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying: "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the

[92] The opinions of the judges and arguments of the advocates are printed at length in Langdell's Cases on Contracts.

defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice Chancellor Bacon on the 25th of January 1876. [It was his opinion that Dodds could withdraw only by giving notice to Dickinson, in spite of Cooke v. Oxley, 3 T. R. 653, and that the contract took effect by the doctrine of relation back as of the time of the offer and hence was prior to the sale to Allan. He therefore decreed specific performance in favor of the plaintiff. From the decision both of the defendants appealed.]

James, L. J., after referring to the document of the 10th of June, 1874, continued:

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: "This offer to be left over until Friday, 9 o'clock a. m. 12th June, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound

in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind him: "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, 'You are too late,' and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L. J. I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the statute of frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock a. m." Well, then, this being only an offer, and the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not

so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and before that offer is accepted the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead; and parting with the property has very much the same effect as the death of the owner, for it makes the perform-

ance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson; and, even if there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J. A. I entirely concur in the judgments which have been pronounced.

JAMES, L. J. The bill will be dismissed, with costs.[98]

SHUEY v. UNITED STATES.

(Supreme Court of the United States, 1875. 92 U. S. 73, 23 L. Ed. 697.)

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of $15,000, being the balance alleged to be due him of the reward of $25,000 offered by the Secretary of War, on April 20th, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The Court below found the facts as follows:

1. On April 20th, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," $25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices;" and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On November 24th, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal Government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King, the American Minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in

[98] In accord: Cartwright v. Hoogstoel, 105 L. T. 628 (1911); Coleman v. Applegarth, 68 Md. 21, 21 Atl. 284, 6 Am. St. Rep. 417 (1887); Frank v. Stratford-Handcock, 13 Wyo. 37, 77 Pac. 134, 67 L. R. A. 571, 110 Am. St. Rep. 963 (1904); Watters v. Lincoln, 29 S. D. 98, 135 N. W. 712 (1912). And see Threlkeld v. Inglett, 289 Ill. 90, 124 N. E. 368 (1919).

the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American Minister, over Surratt. Thereupon certain diplomatic correspondence passed between the Government of the United States and the Papal Government relative to the arrest and extradition of Surratt; and on November 6th, 1866, the Papal Government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal Government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American Minister at Rome, being informed of the escape by the Papal Government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American Government to the United States; but the American Minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American Minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American Minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the Act of July 27th, 1868 (15 Stat. 234, § 3), the sum of $10,000. Such payment was made by a draft on the Treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the Act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly, whereupon an appeal was taken to this Court.

Ste. Marie having died pendente lite, his executor was substituted in his stead.

STRONG, J. We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John H. Surratt, for which the War Department had offered a reward of $25,000, but giving information that conduced to the arrest. These are

quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.[94]

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on November 24th, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.[95]

[94] McClaughry v. King, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216 and note 8 Ann. Cas. 856 (1906), "a reward offered for the arrest of a criminal is not earned by giving the information that leads to his arrest." Cf. Choice v. Dallas, ante, p. 24; Stone v. Dysert, 20 Kan. 123 (1878); Hall v. State, 102 Wash. 519, 173 Pac. 429 (1918); Elkins v. Board of Com'rs of Wyandotte County, 91 Kan. 518, 138 Pac. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915D, 257 (1914); Id., 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662 (1912).

[95] See, also, Sears v. Eastern R. Co., 14 Allen (Mass.) 433, 92 Am. Dec. 780 (1867), railroad can change time-table by giving proper published notice, even though tickets have been bought. The same rule is adopted in the German Civil Code, § 658, and in the Jap. Civil Code, art. 530.

OFFORD v. DAVIES et al.

(In the Court of Common Pleas, 1862. 12 C. B. N. S. 748.)

This was an action upon a guarantee.

The first count of the declaration stated that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following—that is to say: "We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee for the space of twelve calendar months the due payment of all such bills of exchange, to the extent of £600. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys." Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co, of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, etc.; yet that the defendants broke their said promise, and did not pay to the plaintiff or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys if the said bills had been duly paid at maturity.

Fourth plea to the first count—so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange and the said sums so advanced—that, after

the making of the said guarantee, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the fourth plea offers no defence to that part of the declaration to which it is pleaded, for that a party giving a guarantee [for a definite period] has no power to countermand it without the assent of the person to whom it is given." Joinder.

Prentice (with whom was Brandt), in support of the demurrer. A guarantee like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [BYLES, J. What consideration have these defendants received?] For anything disclosed by the plea the plaintiff might have altered his position in consequence of the guarantee, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. * * * Here, the defendants have stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [BYLES, J. Suppose a man gives an open guarantee, with a stipulation that he will not withdraw it,—what is there to bind him to that?] If acted upon by the other party, it is submitted that that would be a binding contract. * * *

E. James, Q. C. (with whom was T. Jones), contra. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. * * * Suppose Davies & Co., of Newtown had become notoriously insolvent, would the defendants continue bound by their guarantee if the plaintiffs, with notice of that fact, chose to go on discounting for them? [WILLIAMS, J. Suppose I guarantee the price of a carriage to be built for a third party who, before the carriage is finished and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guarantee?] Not after the coach-builder has commenced the carriage. [ERLE, C. J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] * * * [ERLE, C. J. What meaning do you attribute to the words "at our request" in this guarantee?] As and when we request. The notice operated a retractation of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

Brandt in reply. The Court of Exchequer have decided in this term, in a case of Bradbury v. Morgan, 31 Law J. Exch. 462 (1 H. & C. 249), that the death of the surety does not operate a revocation of a continuing guarantee. If that be so, it is plain that the guarantee is not a mere mandatum, but a contract. * * * The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. (T. Jones. The fact undoubtedly is so.) Cur. adv. vult.[96]

Erle, C. J., now delivered the judgment of the Court.

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defendants discount bills for Davies & Co., not exceeding £600, the defendants promised to guarantee the repayment of such discounts for twelve months, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.[97]

[96] Parts of the report are omitted.

[97] In Christie, Lowe & Heyworth v. Patton, 148 Ala. 324, 42 South. 614 (1906), defendant wrote: "We will put on our work any number of teams you care to furnish * * * and will pay * * * three dollars." After plaintiff had furnished a varying number of teams, he was notified to send no more. This was no breach of legal duty. Cf. also, Great Northern Ry. v. Witham, post, p. 298.

CONSOLIDATED PORTRAIT & FRAME CO. v. BARNETT et al.

(Supreme Court of Alabama, 1910. 165 Ala. 655, 51 South. 936.)

Action by the Consolidated Portrait & Frame Company against M. P. Barnett and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The letter of credit referred to is in the following language: "Letter of Credit. Town of Goodwater, State of Alabama, May 28, 1907. Consolidated Portrait & Frame Co.—Gentlemen: Should T. W. Adair order goods of you at one or more times within the next twelve months from the date of this letter of credit, we jointly and severally request that you ship said goods to his order, allowing credit of thirty days from date of shipment; and if the said T. W. Adair shall fail to pay for such goods within thirty days after date of shipment, we agree to pay for said goods at the price you charged him for same, provided our responsibility shall not exceed $200.00. We waive all notice to us of shipment made to said T. W. Adair on the faith of this letter of credit, as well as notice that he failed to pay for such goods; and in case the collection of the amount due to you by virtue of the credit you extend the said T. W. Adair by virtue of this letter of credit is forced by suit, we agree to pay ali court costs, attorney's fees, and the attorney's fees may be included in the judgment [and the plaintiff claims $10 attorney's fee for bringing this suit]. For the purpose of enabling T. W. Adair to obtain credit from your house, we represent that we are worth not less than $1,000.00 over and above exemptions, liabilities, and obligations of all kinds which we now have. M. P. Barnett & Bros. J. U. Bridges."

Plea 3 is as follows: "The defendants M. P. Barnett and J. U. Bridges signed said letter of credit without any consideration money to them, same being purely an accommodation paper so far as they were concerned, and on or about the 21st of September, 1907, said defendants J. U. Bridges and M. P. Barnett demanded back said letter of credit, and at that time the said T. W. Adair was not indebted to the plaintiff in any sum which said letter of credit was given to secure; and, if defendant T. W. Adair is indebted to plaintiffs in any sum, it is an indebtedness created after said demand by said defendants for said letter of credit."

SIMPSON, J.[98] * * * A consideration is necessary to the binding efficacy of a contract, and a contract in which one party offers to do something or to pay money when the other party does something else, and does not contain any promise or obligation of the other party to do or pay anything, is unilateral, without mutuality, and subject to revocation at any time before the party to whom it is addressed does or performs any act on the faith of said proposition. 9 Cyc. 327 et seq.;

[98] Part of the opinion is omitted.

Chambliss v. Smith, 30 Ala. 367; Borst v. Simpson, 90 Ala. 373, 376, 7 South. 814.

There was no error in overruling the demurrers to the plea. The judgment of the court is affirmed.

Affirmed.

HOPKINS v. RACINE MALLEABLE & WROUGHT IRON CO.

(Supreme Court of Wisconsin, 1909. 137 Wis. 583, 119 N. W. 301.)

Action by Floyd Hopkins against the Racine Malleable & Wrought Iron Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions to dismiss.

The plaintiff having secured a patent upon a certain farm gate and having had some undisclosed negotiations with the defendant, a manufacturer of malleable irons, the latter on March 10, 1905, mailed to him the following writing: "Hopkins' Gate Contract. The Racine Malleable & Wrought Iron Company of the city of Racine, state of Wisconsin, hereby agrees with Floyd Hopkins of the town of Belvidere, county of Boone, state of Illinois, to furnish, at any time hereafter during the life of the patent, castings for the patent improved farm gate of said Hopkins, known as the Hopkins' gate, patented January 3, 1905, as follows, to wit: * * * We agree to furnish the above-named castings for forty cents per set at our shops to be shipped to any point of the United States or Canada, the price aforesaid to be for cash at Racine, Wis. * * * There was no reply, but from time to time, up to July, 1906, the plaintiff ordered castings in quantities from 50 to 150 sets, and they were supplied by the defendant, who seems to have manufactured a quantity in order to be able to furnish them as ordered.

On April 30, 1906, defendant wrote plaintiff that by reason of reorganization of its business it was a question whether it could continue to make or furnish the gate castings, and that it wrote in order to give plaintiff an opportunity to find some other place to have them made; that, while it still had some irons on hand, it did not care to carry on the business in the old way by carrying stock and shipping all over the country when wanted; that it had no room for storage nor facilities for packing and shipping. Again, on October 29, 1906, the defendant wrote him that it had approximately 400 sets of castings on hand, but was unwilling to continue the business after that stock was exhausted by carrying other stock, saying that the plaintiff would have to make arrangements to carry the stock elsewhere, and also stating: "We do not object to making your castings for you, but after the goods are made, they must be shipped out of here. We cannot carry a stock. * * * Orders that are placed after the stock on hand now is exhausted will be billed at revised prices." December 14th it wrote again: "The time is drawing near when we can no longer accept such con-

tracts. * * * What stock we have made up, which is about 350 sets, we will close out, but we can no longer make these castings and carry them in stock for you, and have you draw them from this stock. You will have to make arrangements to carry the stock elsewhere."

On December 27, 1906, plaintiff mailed to the defendant, what is called an order, the following letter: "I wish one thousand sets of Farmer Hopkins' gate castings patented January 3, 1905, manufactured and ready for delivery May 1, 1907. Will give you shipping directions later." To which the defendant replied January 30th: "It is not possible for us to make the thousand set of Farmer Hopkins' gate castings at the present time"—asserting as a reason the quantity of other work. * * * Plaintiff, on April 9, 1907, entered into a contract with another manufacturer to manufacture a thousand sets of castings for the same purpose, at a price of 55 cents per set. Plaintiff brought suit for damages for defendant's refusal to comply with the order of December 27, 1906, and judgment was rendered by the court, without a jury, for damages at the rate of 15 cents per set, or $150, from which the defendant appeals.[99]

Dodge, J. (after stating the facts as above). No principle is more elementary in the law of contracts than that consideration is essential to their validity, and that a wholly executory contract for mutual acts is of no binding force upon one party unless and until the other has become bound thereby. In such a contract mutuality is an essential of validity. Dodge v. Hopkins, 14 Wis. 636; Moulton v. Kershaw, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982. That rule has received modification to the extent that an executory promise by one party may be construed to evince his intention to make a continuing offer of such performance which, when accepted, in whole or in part, by the other party, becomes a contract pro tanto to the extent of the acceptance. Such offers are very common in the mercantile world and are a basis on which mercantile business is largely transacted. Being in a sense a departure from the fundamental principle of the necessity for consideration, in the form of mutuality or otherwise, the exception is carried no further than to bind the offerer so long as he sees fit to keep the offer open.

In the present case, the promise of the defendant to furnish castings was wholly executory and upon condition that the plaintiff should do acts in the future. There is not the slightest suggestion that the plaintiff ever, even in the most informal manner, bound himself to the conditions expressed in that offer. With him it was entirely optional at all times to purchase his supplies of irons wherever he chose. True, as he from time to time ordered a shipment from the defendant, he became bound to pay for such shipment according to the terms of the offer, and then, for the first time, did defendant become bound to fill his order. This is the vital and fundamental distinction between the present

[99] The statement has been shortened.

case and the authorities from this and other courts cited by the respondent. In each of those cases there were express words on the part of the purchaser binding him to performance upon his part to the full extent responsive to the offer made, albeit the promise was in some of the cases ambiguous. Shadbolt v. Topliff, 85 Wis. 513, 55 N. W. 854; Walsh v. Myers, 92 Wis. 397, 66 N. W. 250; McCall v. Icks, 107 Wis. 232, 83 N. W. 300; Excelsior Wrapper Co. v. Messinger, 116 Wis. 554, 93 N. W. 459; Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918; Eastern Ry. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067; Minn. L. Co. v. Whitebreast Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Lima, etc., Co. v. Natl. Steel, etc., Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713. In each of these cases were promises by the purchaser to be bound by the contract either by acceptance or otherwise.

This element of consideration in the form of mutuality being wholly lacking in the instant case, it is unnecessary to consider many other objections urged to the validity of a contract resulting from defendant's letter of March 10, 1905. We deem it clear that that letter at most constituted a continuing offer to furnish castings upon payment of the specified price, and might be revoked at any time by the defendant, except as to orders thereunder prior to the revocation. The letters referred to in the statement of facts of April, October, and December, 1906, are open to no construction but that of revocation of the offer, except to the extent of the irons then manufactured and on hand, so that the plaintiff could not by an order on December 27th impose upon the defendant any duty to manufacture for him other castings at the price named in the offer of March 10, 1905, and therefore is entitled to no damages for refusal so to do.

Judgment reversed, and cause remanded, with directions to dismiss the action.

CHALLENGE WIND & FEED MILL CO. v. KERR.

(Supreme Court of Michigan, 1892. 93 Mich. 328, 53 N. W. 555.)

Assumpsit by the Challenge Wind & Feed Mill Company against Thomas Kerr to recover the price of a windmill. Judgment for plaintiff, and defendant brings error. Reversed.

LONG, J. The defendant gave an order to the plaintiff for a windmill, at the price of $125. The order was in writing, signed by the defendant, and delivered to the plaintiff's agent at Millington, this state, and by the agent forwarded to the plaintiff at Batavia, Ill. The order was dated May 16, 1890, and contained the following clause: "This order is not subject to countermand. No verbal understanding of agents to affect this order, all conditions under which same is given being specified herein; all orders subject to the approval of Challenge Wind & Feed Mill Company." This order was forwarded to the plain-

tiff, and the word "Accepted" written upon it, together with the words, "Will ship to-day, May 28, 1890," and signed by the company. About a week after the order was given defendant notified the company that he would not accept the mill. The mill was subsequently shipped to Vassar, this state. Defendant refused to receive it, and so notified the plaintiff, and returned the mill to the company. The mill was reshipped to Vassar by the plaintiff, and subsequently an arrangement was made between the defendant and plaintiff's agent, by which the mill was to be erected upon defendant's premises under a verbal warranty made by the agent. The suit was brought to recover the value of the mill. On the trial plaintiff had judgment for the value.

The defense was that the mill did not comply with the warranty made by the agent at the time defendant agreed to take it. Defendant's proofs tended strongly to show that the mill did not comply with the warranty, and that, though the plaintiff's agent attempted upon several occasions to make it do the work intended, he was unsuccessful. The court below, however, was of the opinion that it was immaterial whether or not the agent made the warranties, for the reason that, under the written contract first made, the agent had no authority to make a contract which would bind the plaintiff, and of which the defendant had notice, and so charged the jury. This was error. The written order given by the defendant to the agent, and forwarded to the plaintiff, was countermanded before acceptance by the plaintiff, and before the plaintiff had taken any steps whatever towards filling the order. The defendant had a right during that time to countermand it. The order was one which the plaintiff could accept or not, as it pleased. This right was expressly reserved in the order, and until acceptance the contract was unilateral. Wilcox v. Cline, 70 Mich. 517, 38 N. W. 555. Up to the time of acceptance, or up to the time the plaintiff had signified its intention to accept, it was not bound by the order; and during this time the defendant had the right to countermand, as no period was fixed within which the plaintiff might accept defendant's terms. This contract, therefore, was not binding between the parties, and defendant was under no obligation to accept the mill upon its arrival at Vassar, and plaintiff shipped it at its own risk of having the mill received by the defendant. The defendant refused absolutely to receive it, and it was reshipped. No other written order was made, and the plaintiff sent the mill to its agent at Vassar. Whatever arrangement was thereafter made by its agent with the defendant would be binding upon the plaintiff. What these arrangements and representations made by the agent were, and whether they were fulfilled, were questions of fact for the jury. The defendant had a right to have his case submitted to the jury upon his theory, and, if the mill did not fulfill the warranties, defendant would be under no obligation to keep and pay for it.

The judgment below is set aside, with costs, and a new trial ordered. The other justices concurred.

LOS ANGELES TRACTION CO. v. WILSHIRE et al.

(Supreme Court of California, 1902. 135 Cal. 654, 67 Pac. 1086.)

Action by the Los Angeles Traction Company against W. B. Wilshire and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

GRAY, C.[1] The action is based on a written instrument signed by appellants and reading as follows: "$2,000. Los Angeles, Cal., July 19th, 1895. Thirty days after the completion of the double track street railway of the Los Angeles Traction Company to the intersection of Seventh and Hoover streets, for value received, I promise to pay to the order of the Los Angeles Traction Company, the sum of two thousand (2,000) dollars, negotiable and payable at Citizens' Bank, with interest at the rate of eight per cent. per annum, payable after maturity. I further promise and agree to pay a reasonable attorney's fee if suit should be instituted for the collection of this note." The above instrument was placed in the hands of the Citizens' Bank, together with a duly signed written escrow agreement as follows:

"To the Citizens' Bank, Los Angeles, Cal.: Herewith is handed you by the undersigned the following named notes, to be held in escrow upon the terms and conditions herein stated: You are requested to hold said notes in escrow until the completion of the line of railroad of the Los Angeles Traction Company, now being constructed in the city of Los Angeles. * * * Upon completion and operation of the same with electric power, you are instructed to deliver said notes to said Los Angeles Traction Company. In case a franchise for such street car line to said Hoover street is not obtained by said Traction Company within —— months from the date hereof, then, in that event, said notes shall be returned to their respective makers upon demand, to be canceled. Said notes are made by the following named persons, and in the sums set opposite their names." Then follow the names of the parties giving the notes, including the names of these appellants, who also signed the said agreement.

The findings show that, on the faith of the foregoing instruments and other instruments of like character executed by other parties, who, like defendants, were the owners of property that would be made valuable by the construction of the proposed road, the plaintiff in November, 1895, less than four months from the execution of said instrument, bid and paid to the city of Los Angeles $1,505 for a franchise to construct the road over that part of the course agreed upon and within the city limits Before the 28th of April, 1896, the plaintiff commenced work upon said railway, but said work was not performed with the intention of prosecuting the construction of said railway continuously and with diligence to completion, and the plaintiff did not so

[1] Parts of the opinion are omitted.

commence work upon said railway with said purpose until after the 1st day of July, 1897. On July 1, 1897, defendants served upon plaintiff a written notice to the effect that they did not recognize any liability on account of the foregoing written contracts, for the reason that the road had not been completed within the time agreed upon. Soon after the service of this notice the plaintiff actively engaged in the construction of the road, and completed it, and commenced operating the same to the intersection of Seventh and Hoover streets, as provided for in said instruments, before the expiration of the year 1897. Thereafter, and on May 17, 1898, plaintiff completed its railway to First and Virgil streets. Upon these facts plaintiff had judgment for $2,000 besides interest and attorney's fees. Defendants appeal from this judgment and from an order denying them a new trial. * * *

3. The contract at the date of its making was unilateral, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of $1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently by the court, there was no time agreed upon. Again, it came too late, after the obligations of the parties had become fixed. * * *

Judgment affirmed.[2]

[2] Cases in accord are: Halff Co. v. Waugh (Tex. Civ. App.) 183 S. W. 839 (1916), sale of a truck to be paid for out of earnings, buyer having partly performed, although not bound; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N. W. 769, 44 L. R. A. (N. S.) 1214, Ann. Cas. 1914A, 793 (1912), see 26 Harv. L. Rev. 274; A. B. Dick Co. v. Fuller (D. C.) 213 Fed. 98 (1914), promise to pay for invention of stencil by an employee, irrevocable when latter "began work in reliance upon it"; Louisville & N. R. Co. v. Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80 (1874); Louisville & N. R. Co. v. Coyle, 123 Ky. 854, 97 S. W. 772, 99 S. W. 237, 8 L. R. A. (N. S.) 433, 124 Am. St. Rep. 384 (1907); American Publishing & Engraving Co. v. Walker, 87 Mo. App. 503 (1901), bilateral contract by implication; Taylor v. Ewing, 74 Wash. 214, 132 Pac. 1009 (1913). See also the charitable subscription cases, post, 242. Contra: Biggers v. Owen, 79 Ga. 658, 5 S. E. 193 (1887); Gray v. Hinton (C. C.) 7 Fed. 81 (1881).

In Wachtel v. National Alfalfa Journal Co. (Iowa) 176 N. W. 801 (1920), the defendant opened a circulation contest, offering prizes to those winning the most votes by securing subscriptions, but later discontinued the contest when the plaintiff was the leader therein. The plaintiff was held entitled to damages for breach of contract. Other voting contest cases are: Hertz v. Montgomery Journal Pub. Co., 9 Ala. App. 178, 62 South. 564 (1913); Mooney

BRACKENBURY et al. v. HODGKIN et al.

(Supreme Judicial Court of Maine, 1917. 116 Me. 399, 102 Atl. 106.)

Suit by Joseph A. Brackenbury and another against Sarah D. P. Hodgkin and Walter C. Hodgkin. From a decree for plaintiffs, defendants appeal. Appeal dismissed, and decree affirmed as to Walter C. Hodgkin.

CORNISH, C. J. The defendant Mrs. Sarah D. P. Hodgkin on the 8th day of February, 1915, was the owner of certain real estate—her home farm, situated in the outskirts of Lewiston. She was a widow and was living alone. She was the mother of six adult children, five sons, one of whom, Walter, is the codefendant, and one daughter, who is the coplaintiff. The plaintiffs were then residing in Independence, Mo. Many letters had passed between mother and daughter concerning the daughter and her husband returning to the old home and taking care of the mother, and finally on February 8, 1915, the mother sent a letter to the daughter and her husband which is the foundation of this bill in equity. In this letter she made a definite proposal, the substance of which was that if the Brackenburys would move to Lewiston, and maintain and care for Mrs. Hodgkin on the home place during her life, and pay the moving expenses, they were to have the use and income of the premises, together with the use of the household

v. Daily News Co. of Minneapolis, 116 Minn. 212, 133 N. W. 573, 37 L. R. A. (N. S.) 183 (1911).

It has been sometimes asserted that an irrevocable offer is "a legal impossibility." See Langdell, Summary of the Law of Contracts, § 178; also section 4; Wormser, The True Conception of Unilateral Contracts, 26 Yale L. Jour. 137, note; Lee, title Contracts, in Jenks' Dig. of Eng. Civ. Law, § 195; Ashley, Contracts, § 13. To the contrary, see Corbin, Offer and Acceptance and Some of the Resulting Legal Relations (1917) 26 Yale L. Jour. 169, 185–197; McGovney, Irrevocable Offers (1914) 27 Harv. L. Rev. 644.

Sir Frederick Pollock, in 28 Law Quarterly Review, 100, reviewing Ashley on Contracts, said: "Some of Prof. Ashley's positions verge on paradox, as when he suggests that the doctrine of consideration may ultimately be devoured by relaxations and exceptions. One or two seem to us really paradoxical, as where he maintains that in a unilateral contract, where a promise is offered for an act requiring an appreciable time for performance, there is no consideration for the promise and no acceptance until the act is completed. If this be so, the promisor may withdraw his offer when the work is all but done, or the promisee may capriciously leave the work half done, and in either case without remedy, unless there be something in the circumstances which can be made to support an action of tort. A carter, for example, who is carrying goods to a wharf to be put on an outgoing ship, may abandon them in the middle of the journey. Both the plain man and the average lawyer will say that, whatever Prof. Ashley's logic may be, the law really cannot be so absurd as that; and they will be right, and, what is more, any rational court before whom such a question is moved will surely find a way to make them so. It might easily be held that acting on a request for an act to be done for reward implies a promise to go through with the performance. At all events it seems to us that the offer is irrevocably accepted by the first unequivocal commencement of the act requested. In fact it does not often happen that a man sets about a job without writing or uttering some kind of word of acceptance. 'All right' is enough. Thus the practical outcome of Prof. Ashley's ingenious exercise may be to convince us that there are fewer unilateral contracts in the world than we supposed."

goods, with certain exceptions, Mrs. Hodgkin to have what rooms she might need. The letter closed, by way of postscript, with the words, "you to have the place when I have passed away."

Relying upon this offer, which was neither withdrawn nor modified, and in acceptance thereof, the plaintiffs moved from Missouri to Maine late in April, 1915, went upon the premises described and entered upon the performance of the contract. Trouble developed after a few weeks, and the relations between the parties grew most disagreeable. The mother brought two suits against her son-in-law on trifling matters, and finally ordered the plaintiffs from the place, but they refused to leave. Then on November 7, 1916, she executed and delivered to her son, Walter C. Hodgkin, a deed of the premises, reserving a life estate in herself. Walter, however, was not a bona fide purchaser for value without notice, but took the deed with full knowledge of the agreement between the parties and for the sole purpose of evicting the plaintiffs. On the very day the deed was executed he served a notice to quit upon Mr. Brackenbury, as preliminary to an action of forcible entry and detainer which was brought on November 13, 1916. This bill in equity was brought by the plaintiffs to secure a reconveyance of the farm from Walter to his mother, to restrain and enjoin Walter from further prosecuting his action of forcible entry and detainer, and to obtain an adjudication that the mother holds the legal title impressed with a trust in favor of the plaintiffs in accordance with their contract.

The sitting justice made an elaborate and carefully considered finding of facts and signed a decree, sustaining the bill with costs against Walter C. Hodgkin, and granting the relief prayed for. The case is before the law court on the defendants' appeal from this decree.

Four main issues are raised.

1. As to the completion and existence of a valid contract.[8]

A legal and binding contract is clearly proven. The offer on the part of the mother was in writing, and its terms cannot successfully be disputed. There was no need that it be accepted in words, nor that a counter promise on the part of the plaintiffs be made. The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. "In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed." 6 R. C. L. 607. This is elementary law.

The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts, and they have continued performance since that time so far as they have been permitted by the mother to do so. The existence of a completed and valid contract is clear. * * *

Appeal dismissed.

[8] Parts of the opinion, not concerning this issue, are omitted.

MacFARLANE v. BLOCH.

(Supreme Court of Oregon, 1911. 59 Or. 1, 115 Pac. 1056, Ann. Cas. 1913B, 1275.)

Action by Katherine MacFarlane against M. M. Bloch. Judgment for plaintiff, and defendant appeals. Affirmed.

On July 21, 1908, plaintiff found a pocketbook containing promissory notes of the value of more than $1,000, payable to M. M. Bloch, this defendant. For several days thereafter plaintiff was sick and did little or nothing toward finding the owner, except to consult the "Lost and Found" columns of the daily press; and also her son phoned to Bloch, the jeweler. On July 31st, defendant advertised in the Oregonian for a "Lost—Pocketbook with papers; please return to county judge's office; reward. M. M. Bloch." Immediately thereafter plaintiff phoned to the county judge's office and asked for Bloch, and was informed that there was no such person there. On August 5th, defendant again advertised in the Oregonian, making the following offer: "Lost—Pocketbook. Return to county judge's office; $100.00 reward. M. M. Bloch." And in response thereto plaintiff went to the county judge's office and saw Robert Shaw, who was Bloch's agent in this matter, and told him that she had come to get the reward, in response to the advertisement for a lost pocketbook. When asked if she had the pocketbook, she replied that she knew where it was, and offered to produce it for the $100 reward. She thereafter held it for the reward, which defendant at no time offered to pay, but he had her arrested for larceny of the book, and, in order to avoid the criminal proceedings, she surrendered it to Bloch and brought this action to recover the amount of the reward. The case was tried by the court without the intervention of a jury, and he found the facts in favor of plaintiff and from a judgment thereon defendant appeals.

EAKIN, C. J.[4] (after stating the facts as above). There is no liability upon an offer of a reward to any one who performs some specific act until the act stipulated has been performed, but the offer is to be construed by the same rules as other contractual offers.

Counsel for defendant contends that to entitle plaintiff to the reward it must be made to appear that she found the book after the offer was made, and that the finding was with a view to obtaining the reward. The courts are divided as to whether knowledge of the offer, at the time of the performance of the act, is essential to the right to the reward, or to the enforcement of it. So far as relates to the facts in this case it is immaterial which line of authorities we would be inclined to follow, as the finding of the book was not the purpose of the offer. Defendant was aware that the book had been found before the offer was made, and the offer was for its return to the county judge's office. This condition of the offer plaintiff complied with. She

[4] Part of the opinion is omitted.

took the book and its contents to the county judge's office and offered to surrender it for the payment of the reward. This was held sufficient in Pierson v. Morch, 82 N. Y. 503, a case in many respects identical with the one before us. It was contended that there was no consideration for the promise, but the court held that the return of the property completed the contract and the defendant was liable. It was also contended in that case that plaintiff was not the finder in good faith, as she made no inquiries before leaving the car where she found the goods, either of the conductor or the passengers. The court held that the question was properly submitted to the jury and their decision was in her favor, the court saying: "If the plaintiff really found and took possession of the goods, believing them to be lost, and with a purpose to preserve and return them if possible to the owner, she was in condition to claim the reward, upon complying with its terms." In that case the goods were found before the reward was offered. To the same effect is Everman v. Hyman, 3 Ind. App. 459, 29 N. E. 1140, in which case a reward was offered for the return of a stolen horse, and it was held that the finder had a right to retain the horse until the reward was paid. See, also, Cummings v. Gann, 52 Pa. 484; Grady v. Crook, 2 Abb. N. C. (N. Y.) 53; Wood v. Pierson, 45 Mich. 313, 7 N. W. 888.

Upon plaintiff's offer to return the book defendant's agent would not pay, and, in fact, had no authority to pay, the reward. It appears from the evidence and conduct of defendant that he had no intention of so doing. There is nothing in the evidence tending to show an intention on her part to keep or convert the property to her own use. Although she knew who was the owner of the property, she had not ascertained his address until after the offer of the reward of July 31st; and thereafter she retained the goods for the reward.

When the $100 reward was offered she had a lien thereon for the payment of it. 19 A. & E. E. 583; 24 A. & E. E. 961; Wentworth v. Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; Everman v. Hyman, 3 Ind. App. 459, 29 N. E. 1140. * * *

The judgment is affirmed.

STENSGAARD v. SMITH.

(Supreme Court of Minnesota, 1890. 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.)

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real-estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in

printed form: "St. Paul, Dec. 11, 1886. In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, the following property, to-wit: [Here follows a description of the property, the terms of sale, and some other provisions not necessary to be stated.] I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent. on the first $2,000, and two and one-half per cent. on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above $17,000 for such property, if the property is sold. John Smith." The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. Bailey v. Austrian, 19 Minn. 535, (Gil. 465;) Tarbox v. Gotzian, 20 Minn. 139, (Gil. 122.) If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance. Andreas v. Holcombe, 22 Minn. 339; Ellsworth v. Extension Co., 31 Minn. 543, 18 N. W. 822. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language

fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause, in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between those parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but, to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon him that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing: and, if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual, and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself for about a month of the naked present right to sell, if he could do so. He cannot now complain that the land-owner then revoked the authority, which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it. The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other

thing to be done, for which, by the terms of the promise compensation was to be made. Such was the case of Goward v. Waters, 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.[5]

BRANIFF et al. v. BAIER et al.

(Supreme Court of Kansas, 1917. 101 Kan. 117, 165 Pac. 816, L. R. A. 1917E. 1036.)

Action by T. J. Braniff and others against Henry F. Baier and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

JOHNSTON, C. J.[6] This was an action by T. J. Braniff, G. E. Holmberg, and A. Lynn against Henry F. Baier and Charles A. Baier to recover an agent's commission for procuring a purchaser for defendant's real estate. Holmberg and Lynn are the assignees of C. W. Talmadge's interest in the commission claimed, who was associated with Braniff in the transaction. Plaintiffs were awarded judgment in the sum of $702, and the defendants appeal.

Defendants engaged the services of Braniff and Talmadge on July 1, 1913 and signed the following memorandum:

"We, the undersigned, H. F. Baier and C. A. Baier, do hereby appoint and constitute C. W. Talmadge and T. J. Braniff, or either of them, as our only agents to sell our forty acres of farm land in Fellsmere, Florida, known as tracts No. 1232, 1233, 1260 and 1261 in township 31, range 37, in St. Lucie county, Florida; and we also agree to accept from the above-named agents or either of them, the actual cash we have already paid on the above-mentioned contracts, plus $50.00 plus $8.00 for transferring contracts, as full payment to us for our interest in the above-named lands; the purchaser to assume all future payments. The above-named contract to remain good until October 1, 1913. Dated July 1, 1913."

[5] In this case (as well as in others) the student should distinguish clearly between the agent's legal power and his factual ability to use it by finding a buyer. The legal power can be conferred upon any sluggard, but only a hustler will earn the commission. Between the agent and his principal the following jural relations may exist: The agent may have a power to create a right to a commission, a power to create contract relations between the principal and a third person, a right that the principal shall not revoke his powers, an immunity from such revocation by the principal, a duty to use diligence in finding a buyer. The necessary correlatives of these, existing in the principal, are: A liability to a duty to pay commission, a liability to contract with a third person, a duty not to revoke, a disability to revoke, a right that the agent shall be diligent. On the other hand, the principal may have the privilege of revoking, or he may have the power of revoking without the privilege. As the operative facts vary, so also will the resulting legal relations.

[6] Parts of the opinion are omitted.

After this appointment was made, the agents acted upon the authority by advertising the land, interviewing parties, and writing letters, and they spent considerable time and effort to find a purchaser. As a result of correspondence begun about August 1, 1913, George W. Auber of Fellsmere, Fla., on August 25th agreed to buy the land, and he sent the following letter inclosing payment:

"Farmers' National Bank, Salina, Kansas: Inclosed you will find a check for $950.00 in favor of Henry and Charles Baier for their interest in tracts south range 37, east of the Fellsmere Farms, Fla., of land No. 1232, 1233, 1260 and 1261, township 31, said check to be given to said Henry and Chas. Baier when contracts or certificates of purchase have been properly transferred and signed by them in favor of me, George W. Auber. You will also find inclosed a check for $750 in favor of C. W. Talmadge and T. J. Braniff when said contracts are properly transferred to me and mailed and registered to my address, being Fellsmere, Florida."

About 10 days before the Auber letter was written, the defendants told Braniff that they did not desire to sell the land, and on August 26th they wrote a letter stating that the land was withdrawn from sale and the authority of the agents revoked as of the date of the oral notice. When defendants were informed by the agents that a purchaser had been found in accordance with the terms of their contract, defendants replied that the lands were no longer for sale and that the money sent would not be accepted. The jury found, in effect, that the agents had found a purchaser and had complied with the terms of the written contract, and that the only reasons given by defendants for not complying with the contract was that the land had been withdrawn from sale and that they did not care to sell it at that time.

Defendants contend that the contract of agency was unilateral and subject to revocation at any time before a purchaser was produced. The employment or agency, it will be observed, was exclusive and for a fixed time. It is true, as defendants contend, that, when the promise of one party is the consideration for the promise of another, they must be obligatory upon both parties at the same time or they will not bind. The appointment or promise of defendants was unilateral when made; but, when it was accepted by the agents and they had spent time, effort, and money in carrying out its provisions, there was thereafter no lack of consideration. When the agents accepted the proposal and proceeded to perform the services which the appointment contemplated were to be performed by them, it became a mutual and binding obligation. As soon as the promises of the parties ripened into a contract, Braniff and Talmadge became the sole agents for the sale of the defendants' land with the exclusive right to sell it, until October 1, 1913. The defendants could not thereafter, by withdrawing the land from sale or by an attempted revocation, set aside the contract nor escape responsibility for the violation of its conditions. [Several cases were here discussed.]

Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205, is out of line with the cited cases, in this, that it appears to hold that the posting, advertising of property, and the individual soliciting of purchasers did not constitute an acceptance or convert a proposal into a binding contract. That court, in the later case of Lapham v. Flint, 86 Minn. 376, 90 N. W. 780, stated that the only question before the court in the Stensgaard Case was whether the contract upon its face, unaided by evidence or allegations in the complaint, expressed a mutuality of obligation, and it was held that it did not, because there was nothing in the contract itself to indicate an acceptance of the obligation either in writing or by performance.

The general trend of authorities is that, if the agent proceeds in good faith to comply with the terms of the proposal or agreement like the one in question by advertising the property and spending time and effort to find a purchaser, these acts amount to an acceptance, and thereafter both parties are bound. Note, 19 L. R. A. (N. S.) 590. * * *

No material error being found in the record, the judgment is affirmed. All the Justices concurring.[7]

[7] Where the broker has performed substantial acts toward earning his commissions, he can generally maintain suit in case of revocation by the owner. He recovers either the agreed commission, on the theory that the owner was wholly disabled to revoke; or he recovers the profits that he would have made, on the theory that the owner has the power of revocation, but not the privilege. It is often assumed that the contract is bilateral, the broker having made some sort of a promise by implication. See Blumenthal v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279 (1909); Kimmell v. Skelly, 130 Cal. 555, 62 Pac. 1067 (1900); Sill v. Ceschi, 167 Cal. 698, 140 Pac. 949 (1914), semble; Paulsen v. Rourke, 26 Colo. App. 488, 145 Pac. 711 (1915); Attix v. Pelan, 5 Iowa, 336 (1857); Knudson & Richardson v. Laurent, 150 Iowa, 189, 140 N. W. 392 (1913); Goward v. Waters, 98 Mass. 596 (1868); Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418 (1914); Lapham v. Flint, 86 Minn. 376, 90 N. W. 780 (1902); Sunflower Bank v. Pitts, 108 Miss. 380, 66 South. 810 (1914); Mercantile Trust Co. v. Lamar, 148 Mo. App. 353, 128 S. W. 20 (1910); Kruse v. Ferber, 91 N. J. Law, 470, 103 Atl. 409 (1918); Cloe v. Rogers, 31 Okl. 255, 121 Pac. 201, 38 L. R. A. (N. S.) 366, and note (1912), owner has power to revoke, but not the privilege; Schoenmann v. Whitt, 136 Wis. 332, 117 N. W. 851, 19 L. R. A. (N. S.) 598, and note (1908), revocation before any substantial action by the broker; Alexander v. Sherwood Co., 72 W. Va. 195, 77 S. E. 1027, 49 L. R. A. (N. S.) 985, note (1913).

McMILLAN v. AMES.[8]

(Supreme Court of Minnesota, 1885. 33 Minn. 257, 22 N. W. 612.)

VANDERBURGH, J. On the day it bears date the defendant executed and delivered to James McMillan & Co. the following covenant or agreement under seal which was subsequently assigned to the plaintiff:

"Exhibit A.

"I, E. B. Ames, of Minneapolis, Minnesota, for the consideration hereinafter mentioned, do hereby promise and agree to grant, bargain, sell and convey by good and lawful warranty deed, unto James McMillan & Co., their heirs and assigns, in fee-simple, free from all incumbrances, at any time between the date of this instrument and the third day of August, 1884, that the said James McMillan & Co. may elect, that certain real estate situate in the county of Hennepin and state of Minnesota, and described as follows, to-wit, a part of lots nine (9) and ten, (10,) in block twenty, (20,) in the town of Minneapolis, being a tract of land twenty-seven (27) feet wide, fronting on First avenue south, and extending back ninety-nine (99) feet, together with the two-story brick and stone building standing thereon, together with all the appurtenances thereunto belonging.

"The consideration above mentioned and referred to is the payment to me, by the said James McMillan & Co., of the sum of thirty-five hundred dollars, and the further payment of the taxes duly assessed upon said real estate between the second day of August, 1879, and the date of the execution and delivery of said deed. Said payments to be made at the time of the execution and delivery of said deed, unless otherwise agreed to by said James McMillan & Co. and myself.

"It is hereby expressly understood and agreed that in case of a violation of the lease under which the said James McMillan & Co. now hold said real estate, I am to be released from any and all promises contained and by me made in this instrument.

"Witness my hand this sixth day of October, 1879, the same being the date of this instrument. E. B. Ames. [Seal.]"

By the terms of this instrument, which is admitted to have been sealed by defendant, he covenanted to convey the premises upon the consideration and condition of the payment by the covenantees of the sum named, on or before the date fixed in the writing. Before performance on their part, the defendant notified them of his withdrawal and rescission of the promise and obligation embraced in such written instrument, and thereafter refused the tender of payment and offer of performance by the plaintiff in conformity therewith, as alleged in the complaint, and within the time limited. On the trial, it appearing that

[8] This case should be again considered in studying Contracts under Seal, post, p. 471.

such notice of rescission had been given, the court rejected plaintiff's offer to introduce the writing in evidence, and dismissed the action.

The only question presented on this appeal is whether plaintiff's promise or obligation was nudum pactum and presumptively invalid for want of a consideration, or whether, being in the nature of a covenant, the defendant was bound thereby, subject to the performance of the conditions by the covenantees. Apart from the effect of the seal as evidencing a consideration binding the defendant to hold open his proposition, or rather validating his promise subject to the conditions expressed in the writing, it is clear that such promise, made for a consideration thereafter to be performed by the plaintiff at his election, would take effect as an offer or proposition merely, but would become binding as a promise as soon as accepted by the performance of the consideration, unless previously revoked or it had otherwise ceased to exist. Langdell, Summary Cont. § 70; Boston & M. R. R. v. Bartlett, 3 Cush. (Mass.) 227, 228. In the case cited there was a proposition to sell land by writing not under seal. The court held the party at liberty to withdraw his offer at any time before acceptance, but not after, within the appointed time, because until acceptance it was a mere offer, without a consideration or a corresponding promise to support it, and the court say: "Whether wisely or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached." If, however, his promise is binding upon the defendant, because contained in an instrument under seal, then it is not a mere offer, but a valid promise to convey the land upon the condition of payment. All that remained was performance by plaintiff within the time specified to entitle him to a fulfillment of the covenant to convey. Langdell, Summary, §§ 178, 179, (vol. 2, Cases on Contract.) As respects the validity or obligation of such unilateral contracts, the distinction between covenants and simple contracts is well defined and established. Anson, Cont. *12; Chit. Cont. *5; Leake, Cont. 146; 1 Smith, Lead. Cas. (7th Ed.) 698; Wing v. Chase, 35 Me. 260; Willard v. Tayloe, 8 Wall. 564, 19 L. Ed. 501.

In Pitman v. Woodbury, 3 Exch. 11, Parke, B., says: "The cases establish that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor, who executed it, though he himself never did; for he is a party, though he did not execute, and it makes no difference that the covenants of the defendant therein are stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration." Morgan v. Pike, 14 C. B. 484; Leake, Cont. 141. The covenantee in such cases may have the benefit of the contract, but subject to the conditions and provisos in the deed. These obligations frequently take the form of bonds, which is only another method of forming a contract, in which a party binds himself as if he had made a contract to perform; a consideration being necessarily implied from the solemnity of the instrument. The consideration of a sealed instrument may be inquired into;

it may be shown not to have been paid, (Bowen v. Bell, 20 Johns [N. Y.] 338, 11 Am. Dec. 286) or to be different from that expressed,—Jordan v. White, 20 Minn. 99, (Gil. 77); McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103,—or as to a mortgage that there is no debt to secure, (Wearse v. Peirce, 24 Pick. [Mass.] 144,) etc.; but, except for fraud or illegality, the consideration implied from the seal cannot be impeached for the purpose of invalidating the instrument or destroying its character as a specialty. It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case, (had the land not been sold,) because the substantial and meritorious consideration required by the court in such cases would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief, so as to secure to defendant mutuality in the remedy, and all his rights under the contract. The inquiry would not, in such case, be directed to the constructive consideration evidenced by the seal, for a mere nominal consideration would have supported defendant's offer or promise upon the prescribed conditions. Leake, Cont. 17, 18; Railroad v. Babcock, 6 Metc. (Mass.) 353; Yard v. Patton, 13 Pa. 285; Candor's Appeal, 27 Pa. 119.

If, then, defendant's promise was irrevocable within the time limited, plaintiff might certainly seek his remedy for damages, upon the facts alleged in the pleadings, upon showing performance or tender thereof on his part. There is a growing tendency to abrogate the distinction between sealed and unsealed instruments; in some states by legislation, in others to a limited extent by usage or judicial recognition. State v. Young, 23 Minn. 557; 1 Pars. Cont. *429. But the significance of the seal as importing a consideration is everywhere still recognized, except as affected by legislation on the subject. It has certainly never been questioned by this court.

In Pennsylvania the courts allow a party, as an equitable defense in actions upon sealed instruments, to show a failure to receive the consideration contracted for, where an actual valuable consideration was intended to pass, and furnished the motive for entering into the contract. Candor's Appeal, 27 Pa. 119; Yard v. Patton, supra. But whatever the rule as to equitable defenses and counter-claims under our system of practice may be held to be in the case of sealed instruments, it has no application, we think, to a case like this, where full effect must be given to the seal. Under the civil law the rule is that a party making an offer, and granting time to another in which to accept it, is not at liberty to withdraw it within the appointed time, it being deemed inequitable to disappoint expectations raised by such offer, and leave the party without remedy. The common law, as we have seen, though requiring a consideration, is satisfied with the evidence

thereof signified by a seal. Boston & M. R. R. v. Bartlett, supra. The same principle applies to a release under seal, which is conclusive though disclosing on its face a consideration otherwise insufficient. Staples v. Wellington, 62 Me. 9; Wing v. Chase, 35 Me. 260.

These considerations are decisive of the case, and the order denying a new trial must be reversed.[9]

HOBAN v. HUDSON.

(Supreme Court of Minnesota, 1915. 129 Minn. 335, 152 N. W. 723, L. R. A. 1916B, 1114.)

HOLT, J.[10] June 7, 1910, plaintiff bought from Minnesota-Arizona Copper Company 4,166 shares of its capital stock for $2,500. In the deal he obtained from the company a contract by which he could exchange these shares for certain other shares in another corporation, but if he did not choose to exercise this privilege on or before April 1, 1912, he could avail himself of this provision:

"It is hereby further agreed that the undersigned will refund to the said Hoban the said sum of twenty-five hundred (2500.00) dollars on June 8, 1912, on the return of said stock of the Minnesota-Arizona Copper Co., properly assigned: Provided, however that the said Hoban

[9] The term "option" is used to include a variety of cases, many of which may also be properly described as "contracts." In each case the operative facts must be determined and the particular jural relations consequent thereon must be identified and isolated. Every option, like every offer, includes a power in the holder of the option. Accompanying this power, there may be a right that it shall not be revoked or an utter immunity from such revocation.

If an option is granted for a consideration or under seal, a notice of revocation is quite inoperative, and any purchaser with notice takes subject to the power of the option holder. See Smith v. Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522 (1909); Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654, 2 A. L. R. 626 (1918); O'Brien v. Boland, 166 Mass. 481, 44 N. E. 602 (1896); Parker v. Beach, 176 Cal. 172, 167 Pac. 871 (1917); option to return property if dissatisfied; Olympia Bottling Works v. Olympia Brewing Co., 56 Or. 87, 107 Pac. 969 (1910), exclusive agency to sell beer, with option for 5-year extension; Foulkes v. Sengstacken, 83 Or. 118, 163 Pac. 311 (1917), death does not terminate power; Dawley v. Potter, 19 R. I. 372, 36 Atl. 92 (1896), option to sell a colt, if sound at 5 months; Prior v. Hilton & Dodge Lumber Co., 141 Ga. 117, 80 S. E. 559 (1913). For options in leases, see Willard v. Tayloe, 8 Wall. 564, 19 L. Ed. 501 (1869); Tebeau v. Ridge, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367 (1914); McCormick v. Stephany, 61 N. J. Eq. 208, 48 Atl. 25 (1900); Spitzli v. Guth, 112 Misc. Rep. 630, 183 N. Y. Supp. 743 (1920), option irrevocable after improvements made in reliance. If there is neither a seal nor a consideration the option is revocable. Texas Co. v. Dunn (Tex. Civ. App.) 219 S. W. 300 (1920); Threlkeld v. Inglett, 289 Ill. 90, 124 N. E. 368 (1919). Sometimes a sealed option, without consideration, is held revocable in equity. Corbett v. Cronkhite, 239 Ill. 9, 87 N. E. 874 (1909). The irrevocable power in an option is assignable. Himrod Furnace Co. v. Cleveland & M. R. Co., 22 Ohio St. 451 (1872). A contract may create an option in each of the two parties. Saraceno v. Carrano, 92 Conn. 563, 103 Atl. 631 (1918); 28 Yale L. Jour. 65.

See, further, cases on Consideration dealing with Mutuality, post, 292.

[10] Parts of the opinion are omitted.

shall first give written notice to the undersigned of his election to accept said refund on or before April 8, 1912; and time is the essence of this agreement."

The company executed the agreement by its first vice president, Martin E. Tew, and its secretary. Thereto was subjoined this guaranty, signed by the defendant: "For value received I hereby guarantee the performance of the above contract." The action is upon this guaranty. Plaintiff alleged that notice of election to demand a refund of the $2,500 was duly given to the company, and to defendant, on or about April 6, 1912, and prior to April 8, 1912. The defendant expressly denied that the notice was given to the company within the time provided in the contract. The court made findings, upon stipulated facts, to the effect that the notice was not served in time upon the company, and hence there was no liability on the part of the guarantor. From the order denying a new trial plaintiff appeals.

Defendant's liability was secondary only; hence plaintiff was required to establish a breach by the copper company of its contract with him before recovery could be asked against defendant upon his guaranty. A prerequisite to showing a breach, in failing to refund the $2,500, was proof that plaintiff served upon the company, on or before April 8, 1912, a written notice of an election to demand and receive said refund. Notice to the guarantor of such election was not required, nor could such notice served on him dispense with service upon the company. The appellant rightly states that the sole issue is:

"Was the notice given through the mail by the plaintiff to the Minnesota-Arizona Copper Company on the 6th day of April, 1912, a sufficient and substantial compliance with the terms" of the contract?

It is conceded that the notice served did not actually reach the company, or any of its officers, earlier than April 10, 1912.

These are the facts upon which plaintiff predicates the claim of timely service: When plaintiff purchased the shares the certificate, together with this contract and guaranty, bearing date June 7, 1910, was mailed from Willmar, Minn., inclosed in a letter dated June 8, 1910, signed by Martin E. Tew, the first vice president of the company. The letter head indicated that the operating office of the company was in Arizona and its financial office at Willmar, Minn. The names of the directors and officers of the corporation were also given, and in such manner that the inference was that Mr. Tew and the secretary resided at Willmar. No attempt was made by plaintiff until April 6, 1912, to ascertain the whereabouts of any officer of the company. On that day he was informed by defendant where such officers were to be found in California. Thereupon plaintiff mailed at Benson, Minn., the place of his residence, three notices of his election to ask a refund of the $2,500. One of these notices was addressed to Martin E. Tew at Los Angeles, Cal., and reached Mr. Tew on April 10, 1912. One was addressed to him at Tucson, Ariz.; it was not delivered but returned through the dead letter office to the sender. The third was addressed

to Mr. Tew at Willmar, which place it reached on the 7th; it was forwarded to Los Angeles, Cal., reaching the addressee on April 11, 1912.

One of appellant's contentions is that by their course of dealings the parties selected the mail as the proper medium by which to serve notice. This is based on the fact that the company made use of the mail in sending the contract and certificate of stock to plaintiff some two years before. We cannot assent to the proposition that either this circumstance, or the fact that the office and officers of the company had in the meantime vanished from the state, authorizes an inference that the company consented to be served by depositing the notice in the United States mail. No doubt, in the absence of anything to the contrary in the contract, the mail could be used as the medium of service, but, if it be used, the service is not made until the notice is in the hands of the one intended to be served.

Neither do we think that there is anything in the situation, or the contract, which would warrant the court in saying that the company, or its officers, could not withdraw from the state without notifying plaintiff. There is no pretense that leaving this state was to evade service, or was with any intent to deceive plaintiff. * * *

Under this contract plaintiff had the option to demand a return to him of $2,500, provided he seasonably gave written notice of his election to exercise the option. The contract expressly makes time the essence of the agreement. The giving of the notice was a condition precedent to the right to a refund. No facts were pleaded giving the court any right to abrogate the clear language of the contract. Steele v. Bond, 32 Minn. 14, 18 N. W. 830; Bohn Mfg. Co. v. Lewis, 45 Minn. 164, 47 N. W. 652; Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454; Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 379, 100 N. W. 226—make clear that in a case of this kind, where either a right to money or property or a forfeiture thereof depends upon the giving of a written notice, such notice, in the absence of custom, statute, estoppel, or express contract stipulation, means a personal notice to the proper party within the stipulated time, and that if it is sought to make use of the United States mail as a means of service the service is not effected until the notice comes into the hands of the one to be served. * * *

Order affirmed.[11]

[11]Compare cases ante, dealing with notice of acceptance by mail. Compare also Shubert Theatrical Co. v. Rath (C. C. A.) 271 Fed. 827 (1921).

CHAPTER II

CONSIDERATION

SECTION 1.—EARLY DEVELOPMENT

(Debt and Assumpsit—Benefit to Promisor and Detriment to Promisee)

"*Consideration* is the material cause of a contract, without which no contract can bind the party. This consideration is either expressed, as when a man bargains to give 20s. for a horse; or is implied, as when the law itself enforces a consideration." Termes de la ley.

"*Contract* is a bargain or covenant between two parties, where one thing is given for another, which is called quid pro quo; as if I sell my horse for money, or if I covenant to make you a lease of my manor of Dale in consideration of £20 that you shall give me; these are good contracts because there is one thing for another. But if a man make a promise to me that I shall have 20s. and that he will be debtor to me thereof, and after I ask the 20s. and he will not deliver it, yet I shall never have any action to recover the 20s. because this promise was no contract but a bare promise: and Ex nudo pacto non oritur actio. But if anything were given for the 20s., though it were but to the value of a penny, then it had been a good contract." Termes de la ley.

In Calthorpe's Case, 2 Dyer, 336 b, 34 (1574), it was said: "A consideration is a cause or meritorious occasion, requiring a mutual recompense, in fact or in law. Contracts and bargains have a quid pro quo."

No single definition that has been given serves to explain all the currently approved decisions. Consideration is a fact other than a seal, which, when it accompanies a promise, operates to create a legal duty in the promisor. Courts may give such operation (1) to facts long antecedent to the promise; (2) to contemporaneous facts regarded as the equivalent of and in exchange for the promise; and (3) to subsequent facts consisting of acts in reliance on the promise.

"In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that bare words of promise do not so operate. Our problem then becomes one of determining what facts must accompany promissory words in order to create a legal duty (and other legal relations). We must know what these facts are in order that we can properly predict the enforcement of reparation, either specific or

compensatory, in case of non-performance. We are looking for a sufficient cause or reason for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called the problem of consideration." 27 Yale L. Jour. 362, 376.

ANONYMOUS.

(In the King's Bench. Y. B. 12 Hen. VIII, 11, 3.)

In the King's Bench, the plaintiff brought an action on the case against two executors of one J. S. The count was that J. N. came to the house of the plaintiff to buy goods, and the said J. S., the testator, came with him, and when the said J. N. wished to have the goods, the plaintiff said to him that he was doubtful about giving him credit, and the said J. S., the testator, said to him, "If he does not pay you, I will pay you;" upon which promise the plaintiff delivered the goods to the said J. N. Later, J. N. died without paying the plaintiff, and J. S. also died. The plaintiff alleges that the latter left assets to his executors to pay all debts and legacies, and to satisfy them also. The question was whether or not this action lay against the executors. And it was adjudged by all the justices that he recover in this action, for two reasons: One, that he had no other remedy at common law than this action; the other, because the plaintiff had delivered the goods upon the promise of the testator and there is no reason that his soul should be in jeopardy and that he should suffer prejudice by his promise when there was sufficient with which to pay the plaintiff. And so judgment was given. And

Fineux, C. J., said that this is not one of the cases where Actio moritur cum persona, for that is where the hurt or damage is corporeal; as where one beats me and then dies, my action is gone; or in case I die, my executors have no action, for the party cannot be punished when he is dead. But in this case the plaintiff can have that which he would have if the other party were alive, viz. the price of his goods, and so this action does not die, for each party can have his remedy; but it is not so in case of a battery, because the writ cannot say that the executors beat him and they are not held responsible in this action. Quære whether or not the testator could wage his law in this case, if he were alive and this action were brought against him.[1]

[1] Fourteen years later the court again held in an exactly similar case that an action on the case would lie, although debt would not. Y. B. 27 Hen. VIII, 24, 3. See Barbour, 4 Oxford Studies in Social and Legal History, 41.

On the point that the action survived against the executors, this case was strongly disapproved by Fitzherbert fifteen years later. He declares that Fineux and Conesby so held without any authority to support them and "solely upon their own opinions." He adds, "Put this case out of your books, for without any doubt it is not law." Y. B. 27 Hen. VIII, 23, 21.

WEBB'S CASE.

(In the King's Bench, 1577. 4 Leon. 110.)

In action upon the case, the plaintiff declared, that whereas Cobham was indebted to J. S. and J. S. to the defendant, the said defendant in consideration that the plaintiff would procure the said J. S. to make a letter of attorney to the defendant to sue the said Cobham, promised to pay and give to the plaintiff £10. It was objected, here was not any consideration for to induce the assumpsit; for the defendant by this letter of attorney gets nothing but his labour and travel. But the exception was not allowed of. For in this case not so much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, is to be respected.[2]

SMITH v. SMITH.

(In the King's Bench, 1584. 3 Leon. 88.)

Lambert Smith, executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator having divers children enfants, and lying sick of a mortal sickness, being careful to provide for his said children enfants; the defendant in consideration the testator would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children to him, promised to the testator, to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will, that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon non assumpsit pleaded, it was found for the plaintiff: and upon exception to the declaration in arrest of judgment for want of sufficient consideration it was said by WRAY, Chief Justice, that here is not any benefit to the defendant, that should be a consideration in law, to induce him to make this promise; for the consideration is no other, but to have the disposition of the goods of the testator pro educatione liberorum: for all the disposition is for the profit of the children; and notwithstanding, that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not shewed; and therefore the law shall intend, that the defendant hath not made any private gain to

[2] In accord: Williams v. Jensen, 75 Mo. 681 (1882), securing the signature of a married woman, even though it was legally inoperative.

himself, but that he hath disposed of the goods of the testator to the use and benefit of his children according to the trust reposed in him. Which AYLIFFE, Justice, granted. GAWDY, Justice, was of the contrary opinion. And afterwards by award of the Court, it was, that the plaintiff nihil capiat per billam.[3]

THE LADY SHANDOIS v. SIMSON.[4]

(In the Queen's Bench, 1601. Cro. Eliz. 880.)

Error of a judgment in the Common Pleas, where the plaintiff declared in debt for £256 upon several retainers to embroider divers gowns.

The first error was, that the plaintiff's declaration was not good, because he declares (inter alia) that the defendant retained him such a year, day, and place to embroider a satin gown for a maid-servant of her daughter's, and to take for the same 40s.; and the embroidering of another's gown is not a good consideration.—Sed non allocatur; for inasmuch as he did it upon her request, it is a sufficient consideration.

Secondly, it was alleged that debt lies not in this case, but an assumpsit only; for here is not any contract betwixt them, nor quid pro quo; and therefore Nelson's Case, 28 Eliz. was cited, that where one retained Nelson to be attorney for another in such a suit, and agreed that he should have so much for his labour; he brought debt against him who retained him, and not against him for whom he was retained; and it was adjudged that it lay not, for it is not any contract between them; but an assumpsit lies only because he became at his request the other man's attorney.—Sed non allocatur; for here the embroidering of the gown at her request is sufficient, and it is at his election to have debt or assumpsit; as 37 Hen. VI, pl. 8. 3 Edw. IV, pl. 21; 7 Edw. IV, pl. 26; Dyer, 347, and 337, Wooton's case. * * *

FREEMAN v. FREEMAN.

(In the King's Bench, 1615. 2 Bulst. 269.)

In an action upon the case for a promise, the case appeared to be this. Upon a motion in arrest of judgment, upon a non assumpsit, and a verdict for the plaintiffe. It was urged that the action here brought

[3] In Manwood and Burston's Case, 2 Leon. 203 (1587), it was said in argument: "There are three manner of considerations upon which an assumpsit may be grounded: 1. A debt precedent; 2. Where he to whom such a promise is made is damnified by doing any thing, or spends his labour at the instance of the promiser, although no benefit cometh to the promiser; as I agree with a surgeon to cure a poor man (who is a stranger unto me) of a sore, who doth it accordingly, he shall have an action; 3. Or there is a present consideration," etc.

[4] Part of the report, dealing with collateral matters, is omitted.

did not lie, for that there was no good consideration set forth in the declaration, to ground the promise upon; and for this the case was, that the defendant, in consideration that the plaintiff's wife, when she was sole, would take the plaintiffe to her husband, he did promise to assure unto her such an estate in land, for her life, for a joynture, accordingly, she did take the plaintiffe to her husband, and for not performance of the promise, they did bring this action upon the case.

Coke, and the whole Court, this is a good consideration, to raise the promise; and so if one say to a chyrurgeon, cure such a one, and I will pay you for the cure, or deliver to such a merchant so many cloathes, for which, if he doth not pay you, I will; though the party promising, hath no benefit by this, yet this is a good consideration, and the party liable to an action upon the case for the same.

Coke. If an act be to be done to another, at my request, of which I am to have no benefit, yet for this I shall be chargeable in an action upon the case; so if I do say to another, deliver so much to such a one and I will pay you for it, by this I am chargeable, and this is a good consideration to charge me with my promise, though no benefit at all by this redounds unto me, the Court cleer of opinion, that in this principal case the consideration was good, and so by the rule of the Court, judgment was given for the plaintiffe.

SANDS v. TREVILIAN.

(In the King's Bench, 1628. Cro. Car. 193.)

See, also, Cro. Car. 107.

Error of a judgment in the Common Pleas; where Trevilian, being an attorney, brought an attachment of privilege against Sands, and demanded against him debt of ten pounds; and declares, that he being an attorney there, the said Sands retained him to prosecute a suit in the Common Pleas betwixt one Symms and Worlich, and desired the plaintiff to be attorney for Worlich, and promised to pay him all his fees, and all that he should lay out to counsel and officers of the Court in that suit: and shews, that he laid out such sums, which amount to the money demanded; whereupon he brought this action.

The defendant there pleaded nil debet; and found against him, and judgment for the plaintiff.

Error was now assigned, that in this case debt lies not against him who so entreated him to be attorney; for there is no contract between them, nor hath he any quid pro quo; but he ought to have had an assumpsit (because he did it at his request), if he for whom he is retained doth not pay him his fees.—And thereto agreed all the Court; but if he should have debt they doubted.

But all the Court conceived, that no action of debt lies here, but an action upon the case only; for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is

no cause of debt betwixt him who retained and the attorney, and no contract nor consideration to ground this action; and he who is so retained may well have debt for his fees against him for whom he was retained, he having agreed thereto; wherein there cannot be any wager of law; but against the defendant, who is a stranger to the suit, and at whose request he took upon him to be attorney, debt lies not, as 27 Hen. VIII, pl. 24; and in the case of Rolls v. Germyn, Cro. Eliz. 425, it was so resolved. Whereupon it was adjudged, that the first judgment should be reversed.

RICHARDSON, Chief Justice, and HUTTON and HARVEY, Justices of the Common Pleas, being moved herein, said, that this point was never moved before them; and they were of the same opinion, that debt lies not, but only an action on the case.[5]

FOOLY AND PRESTON'S CASE.

(In the Common Pleas, 1586. 1 Leon. 297.)

In an action upon the case the plaintiff declared, that whereas John Gibbon was bound unto the plaintiff in quodam scripto obligatorio, sigillo suo sigillat. and coram, &c. recognito in forma statuti Stapul. The defendant in consideration that the plaintiff would deliver to him the said writing to read over, promised to deliver the same again to the plaintiff within six days after, or to pay to him £1000 in lieu thereof, upon which promise the plaintiff did deliver to the defendant the said writing; but the defendant had not, nor would not deliver it back to the plaintiff, to the great delay of the execution thereof, and the defendant did demur in law upon the declaration. It was objected, that here is no sufficient consideration appearing in the declaration upon which a promise might be grounded; but it was the opinion of the whole Court, that the consideration set forth in the declaration was good and sufficient; and by Anderson. It is usual and frequent in the King's Bench: if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express assumpsit; and afterwards judgment was given for the plaintiff.[6]

[5] Argument of counsel omitted.

[6] In accord: Bainbridge v. Firmstone, 8 Adol. & El. 743 (1838), plaintiff delivered boilers over to defendant for him to weigh on his promise to replace them; Coggs v. Bernard, 2 Ld. Raym. 920 (1703); Hart v. Miles, 4 C. B. (N. S.) 371 (1858). Cf. Pickas v. Gulle, Yelv. 128 (1608); Riches v. Briggs, Yelv. 4 (1601).

WHEATLEY v. LOW.

(In the King's Bench, 1623. Cro. Jac. 668.)

Action on the case. Whereas he was obliged to J. S. in forty pounds for the payment of twenty pounds; and the bond being forfeited, he delivered ten pounds to the defendant, to the intent he should pay it to J. S. in part of payment sine ullâ morâ; that in consideratione inde the defendant assumed, &c. and assigns for breach, that he had not paid; whereupon the other had sued him for this debt, &c.

The defendant pleaded non assumpsit; and verdict for the plaintiff. It was moved in arrest of judgment that this is not any consideration, because it is not alleged, that he delivered it to the defendant upon his request; and the acceptance of it to deliver to another sine morâ, cannot be any benefit to the defendant to charge him with this promise.

Sed non allocatur; for, being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him, Wherefore it was adjudged for the plaintiff.—A writ of error being brought, and this matter only assigned for error, the judgment was affirmed.[7]

SIR ANTHONY STURLYN v. ALBANY.

(In the King's Bench, 1587. Cro. Eliz. 67.)

Assumpsit. The case was, the plaintiff had made a lease to J. S. of land for life rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could shew to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff alledgeth that upon such a day of, &c. at Warwick, he shewed unto him the indenture of lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon non assumpsit pleaded it was found for the plaintiff; and damages assessed to so much as the rent and arrearages did amount unto.—And it was moved in arrest of judgment, that there was no consideration to ground an action, for it is but the shewing of the deed, which is no consideration.—2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the

[7] See, also, Carr v. Maine Cent. R. Co., 78 N. H. 502, 102 Atl. 532, L. R. A. 1918E, 389 (1917), post, p. 231.

shewing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in damages: but they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.[8] * * *

KNIGHT v. RUSHWORTH.

(In the Common Pleas, 1596. Cro. Eliz. 469.)[9]

Assumpsit. The case was, that one Mary Rushworth had entered into a bond of £200 to the plaintiff; and after gave all her goods to the defendant to pay her debts. The defendant pretending that this bond was read to the said Mary Rushworth as an obligation of £100 only and so void, assumed to the plaintiff, that if he and two witnesses would deponere before the Mayor of Lincoln, that the obligation was read to Mary Rushworth as an obligation of £200 that he would pay it. Whereupon the plaintiff, with two others, came before the Mayor of Lincoln, and there deposed upon a book accordingly; and hereupon brought this action. Whereto it was demurred.—Yelverton, for the defendant, moved, that this action lies not; for there is not any consideration besides this oath, which is unlawful, and therefore void.

HEARN. It is not material whether the consideration be for the plaintiff's benefit; for if it be any charge or trouble to the defendant, it sufficeth; as in Albanie's case; and he conceived the oath to be lawful enough. * * *

ANDERSON. The travail of coming before the mayor is a very good consideration; and truly the oath is not illegal, being taken before him; and the smallness of a consideration is not material, if there be any. * * *

WALMSLEY, accord. * * *

BEAUMOND and OWEN doubted herein at first; but afterwards they agreed with their companions, that the consideration was sufficient and lawful—Wherefore it was adjudged for the plaintiff.[10]

[8] Part of the report is omitted.

[9] Parts of the report are omitted.

[10] In accord: Brooks v. Ball, 18 Johns. (N. Y.) 337 (1820).

HAIGH et al. v. BROOKS.

(In the Queen's Bench and the Exchequer Chamber, 1839 and 1840. 10 Adol. & El. 309.)

The following written guarantee was in the possession of the plaintiffs:

"Manchester, February 4, 1837.

"Messrs. Haigh & Franceys:

"Gentlemen: In consideration of your being in advance to Messrs. John Lees & Sons in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount (say, £10,000) on their behalf. John Brooks."

In assumpsit, the plaintiffs now allege that at the defendant's request they surrendered this document to the defendant in return for his promise that he would see paid at maturity three bills of exchange for some £9,666, payable three months after date, accepted and to be paid by John Lees and Sons; that the bills became due and have not been paid.

The defendant pleaded that the written guarantee surrendered to him was void and of no value for the reason that it was a promise to pay the debt of another, to-wit: John Lees and Sons, and so was within the provisions of the statute of frauds, and that the writing did not express the consideration for which the promise was made, as the said statute requires.

To this plea the plaintiff demurred, assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said defendant, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder.[11]

The judgment of the Court of Queen's Bench was rendered by

LORD DENMAN, C. J. This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of £10,000, due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of £10,000, for the purchase of cotton, I do hereby

[11] **Parts of the report have been omitted.**

give you my guarantee for that amount, (say £10,000,) on their behalf. John Brooks."

It was argued for the defendant, that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance of the time of giving the guarantee, is an assertion open to argument. It may, possibly, have been intended as prospective. If the phrase had been "in consideration of your becoming in advance," or, "on condition of your being in advance," such would have been the clear import. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact, could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of Wain v. Warlters, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We, therefore, think the plea bad: and the demurrer must prevail.

Judgment for the plaintiffs. * * *

From this judgment a writ of error was argued in the Exchequer Chamber before Lord ABINGER, C. B., BOSANQUET, COLTMAN, and MAULE, JJ., and ALDERSON and ROLFE, BB. Speaking for this court, Lord ABINGER said:

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and, therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my Brother MAULE, who entertained some doubt on the question, that the

words both of the declaration and the plea import that the paper on which the guarantee was written was given up, and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.[12]

SCHNELL v. NELL.

(Supreme Court of Indiana, 1861. 17 Ind. 29, 79 Am. Dec. 453.)

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, state of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, state of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: Whereas his wife, Theresa Schnell, now deceased, has made a last will and testament in which, among other provisions, it was ordained that every one of the above-named second parties, should receive the sum of $200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: $200 to the said J. B. Nell; $200 to the said Wendelin Lorenz; and $200 to the said Donata Lorenz, in the following installments, viz., $200 in one year from the date of these presents; $200 in two years; and $200 in three years; to be divided between the parties in equal portions of $66⅔ each year, or as they may agree, till each one has received his full sum of $200. And the said parties of the second part, for, and in consideration of this, agree to pay the above-named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased. In witness whereof, the said parties have, on this 13th day of February,

[12] In accord: Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181 (1891), surrender of a worthless note of a person who had died insolvent long before; Wilkinson v. Oliveira, 1 Bing. N. C. 490 (1835).

1856, set hereunto their hands and seals. Zacharias Schnell. [Seal.] J. B. Nell. [Seal.] Wen. Lorenz. [Seal.]"

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind. Dig. p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

(1) A promise, on the part of the plaintiffs, to pay him one cent.

(2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of the property.

(3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. Baker v. Roberts, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps for other thing of indeterminate value. In this case had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush upon its face, if it be regarded as an earnest one. Hardesty v. Smith, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her

own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind. Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise upon a compromise of it, or of a suit upon it, is not legally binding. Spahr v. Hollingshead, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: (1) They are past considerations. Ind. Dig., p. 13. (2) The fact that Schnell loved his wife and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See Stevenson v. Druley, 4 Ind. 519.

Judgment reversed.[13]

NEIKIRK v. WILLIAMS.

(Supreme Court of Appeals of West Virginia, 1918. 81 W. Va. 558, 94 S. E. 947.)

Action by F. C. Neikirk against W. T. Williams. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

WILLIAMS, J.[14] In the circuit court, on appeal from the judgment of a justice, plaintiff recovered a judgment for $300, and defendant has brought the case here on writ of error. No written pleadings were filed before the justice or in court, and plaintiff's testimony is the only evidence in the case. His claim is based on defendant's prom-

[13] See in accord: Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573 (1863); Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16 (1882). The rule does not apply where gold as a commodity is being exchanged for depreciated paper money. Peabody v. Speyers, 56 N. Y. 230 (1874).

"A cent or a pepper corn, in legal estimation, would constitute a valuable consideration." Emery, J., in Whitney v. Stearns, 16 Me. 394, 397 (1839).

[14] Part of the opinion is omitted.

ise to pay him $500 in consideration for his release from an agreement made with plaintiff, as agent of the Equitable Life Assurance Company, to purchase an annuity policy the annual premium on which was $1,984; the $500 being in lieu of commissions which plaintiff would have been entitled to retain out of the premium, if it had been paid. The case was tried by a jury in the absence of defendant, and a verdict returned for plaintiff in accordance with a peremptory instruction by the court. * * * At the time of the alleged promise plaintiff says the policy had not been forwarded to the insurance company, and he had the right to cancel, and did cancel it.

Counsel for defendant insist that the verdict is contrary to law because the promise sued on is without any consideration. The $500 represented approximately the commissions which plaintiff was entitled to retain out of the premium, if it had been paid, as compensation for his services as agent of the insurance company, and if defendant was under no legal obligation to pay the premium, it follows that he was not bound to pay plaintiff any part of his commissions, and the promise to pay would be nudum pactum. No contractual relation existed between plaintiff and defendant. Plaintiff was performing no services for defendant in his efforts to sell him the insurance, and therefore no promise to compensate him could be implied. Defendant was not legally bound to pay the premium, and, notwithstanding he had drawn his check for the amount of it and delivered it to plaintiff, he could have countermanded it without violating any legal right of the insurance company or of its agent the plaintiff. The insurance company was fully protected, in case of nonpayment of premium, by its right to forfeit the policy, even if the policy had been approved by it, and this seems to be its only remedy.

Contracts of insurance being unilateral, the insurer has no right generally to maintain a suit for premiums due, and the insured, if he has not expressly promised to pay, is at liberty to refuse to make payment, as it is generally only a condition precedent to his protection under the policy. By his failure to pay the insured simply loses his benefit. He has the option to pay or not, and thus continue the insurance company's obligation or terminate it at his pleasure. 2 Bacon on Ins. (4th Ed.) § 456; 1 Cooley's Briefs, 82; 2 Cooley's Briefs, 990; New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789, and Clark v. Schromeyer, 23 Ind. App. 565, 55 N. E. 785. Plaintiff had not assumed payment of the premium for defendant, and was not liable to the insurance company for any part of it. The contract of insurance had not been consummated, and in declining to pay the premium defendant simply exercised his legal right. Hence when plaintiff canceled the policy, which is the only consideration for defendant's promise, he neither surrendered any legal right nor benefited the situation of defendant, and therefore defendant's promise was without consideration, and, for that reason, is not enforceable. That every promise must be supported by a valuable consideration, before recovery can be had on

it, is a principle too well recognized to need any citation of authorities.

The judgment will be reversed, and the cause remanded for a new trial.

CRISP v. GAMEL.

(In the King's Bench, 1605. Cro. Jac. 128.)

It was resolved that where, in an assumpsit, two considerations be alleged, the one good and sufficient and the other idle and vain, if that which is good be proved, it sufficeth; and although he fails in the proof of the other, it is not material, because it was in vain to allege it; and it is as if it had not been alleged.[15]

RANN et al. v. HUGHES.

(In the House of Lords, 1778. 7 Term R. 350, note.)

The declaration stated that on the 11th of June, 1764, divers disputes had arisen between the plaintiffs' testator and the defendant's intestate, which they referred to arbitration; that the arbitrator awarded that the defendant's intestate should pay to the plaintiffs' testator £983. That the defendant's intestate afterwards died possessed of effects sufficient to pay that sum; that administration was granted to the defendant; that Mary Hughes died, having appointed the plaintiffs her executors; that at the time of her death the said sum of £983 was unpaid, "by reason of which premises the defendant as administratrix became liable to pay to the plaintiffs as executors the said sum, and being so liable she in consideration thereof undertook and promised to pay &c." The defendant pleaded non assumpsit; plené administravit; and plené administravit, except as to certain goods &c. which were not sufficient to pay an outstanding bond debt of the intestate's therein set forth &c. The replication took issue on all these pleas. Verdict for the plaintiff on the first issue, and for the defendant on the two last; and on the first a general judgment was entered in B. R. against the defendant de bonis propriis. This judgment was reversed in the Exchequer Chamber; and a writ of error was afterwards brought in the House of Lords, where after argument the following question was proposed to the judges by the lord chancellor, "Whether sufficient matter appeared upon the declaration to warrant after verdict the judgment against the defendant in error in her per-

[15] In accord: Cripps v. Golding, 1 Rolle, Abr. 30, 1 Leon. 296 (1586); Bradburne v. Bradburne, Cro. Eliz. 149 (1589); Colston v. Carre, 1 Rolle, Abr. 30 (1600); Best v. Jolly, 1 Sid. 38 (1661); King v. Sears, 2 Cr., M. & R. 48 (1835); Drummond Realty & Investment Co. v. W. H. Thompson Trust Co. (Mo.) 178 S. W. 479 (1915); King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635 (1900).

sonal capacity;" upon which the Lord Chief Baron Skynner delivered the opinion of the judges to this effect

It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such agreement is nudum pactum ex quo non oritur actio, and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law. The declaration states that the defendant being indebted as administratrix promised to pay when requested, and the judgment is against the defendant generally. The being indebted is of itself a sufficient consideration to ground a promise, but the promise must be coextensive with the consideration unless some particular consideration of fact can be found here to warrant the extension of it against the defendant in her own capacity. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right: but here no sufficient consideration occurs to support this demand against her in her personal capacity; for she derives no advantage or convenience from the promise here made. For if I promise generally to pay upon request what I was liable to pay upon request in another right, I derive no advantage or convenience from this promise, and therefore there is not sufficient consideration for it. But it is said that if this promise is in writing that takes away the necessity of a consideration and obviates the objection of nudum pactum, for that cannot be where the promise is put in writing; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing: and this last is certainly true; but that there cannot be nudum pactum in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His lordship observed upon the doctrine of nudum pactum delivered by Mr. J. Wilmot in the case of Pillans v. Van Mierop and Hopkins, 3 Burrows, 1663, that he contradicted himself, and was also contradicted by Vinnius in his Comment on Justinian.

All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the statute of frauds has taken away the necessity of any consideration in this case; the statute of frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and ad-

ministrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of Pillans v. Van Mierop in Burrows, and the case of Losh v. Williamson, Mich. 16 Geo. III. in B. R.; and so far as these cases went on the doctrine of nudum pactum, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative.

And the judgment in the Exchequer Chamber was affirmed.[16]

SECTION 2.—RELIANCE ON A PROMISE AS CONSIDERATION

(Must Consideration be the Motive of the Promisor or the Inducing Cause of His Promise?)

THOMAS v. THOMAS.

(In the Queen's Bench, 1842. 2 Q. B. 851.)

Assumpsit. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or other assurances, grants, etc., or otherwise, assure a certain dwelling house and premises, in the county of Glamorgan, unto plaintiff for her life, or so long as she should continue a widow and unmarried, and that plaintiff should, at all times during which she should have possession of the said dwelling house and premises, pay to defendant and one Samuel Thomas (since deceased), their executors, administrators or

[16] In Pillans v. Van Mierop, 3 Burr. 1663 (1765), Lord Mansfield held that a promise was binding merely because it was in writing. The defendant had written to the plaintiff promising to accept a bill to be drawn on the credit of one White.

It is frequently provided by statute that in the case of written contracts a consideration is presumed to exist and the burden of proof is upon him who denies its existence E. g., see Ala. Code 1896, § 1800; Cal. Civ. Code, § 1614; Iowa Code, §§ 3069, 3070; Mo. Rev. St. 1909, § 2774; Mont. Code Civ. Proc. 1895, § 3266, subd. 39 (Rev. Codes, § 7962); N. M. Laws 1901, c. 62, § 12; Okl. Rev. Laws 1910, §§ 934, 935; S. D. Rev. Civ. Code, § 1232.

assigns, the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and keep the said dwelling house and premises in good and tenantable repair. That the said agreement being made, in consideration thereof, and of plaintiff's promise to perform the agreement, Samuel Thomas and the defendant promised to perform the same; and that, although plaintiff afterward and before the commencement of the suit, to wit, etc., required of defendant to grant, etc., by a necessary and sufficient deed, etc., the said dwelling house, etc., to plaintiff for her life, or while she continued a widow, and though she had then continued, etc., and still was a widow and unmarried, and although she did, to wit, on, etc., tender to the defendant for his execution a certain necessary and sufficient deed, etc., proper and sufficient for the conveyance, etc., and although, etc. (general readiness of plaintiff to perform), yet defendant did not nor would then or at any other time convey, etc.

Pleas. 1. Non assumpsit. 2. That there was not the consideration alleged in the declaration of the defendant's promise. 3. Fraud and covin.

Issues thereon.

At the trial, before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling houses in Merthyr Tidvil, in one of which, being the dwelling house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, etc., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of £100 instead thereof.

This declaration being shortly afterward brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and, after the lapse of a few days, they and the plaintiff executed the agreement declared upon; which, after stating the parties, and briefly reciting the will, proceeded as follows:

"And, whereas the said testator, shortly before his death, declared in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling house," etc., "or £100 out of his personal estate," in addition to the respective legacies and bequests given her in and by his said will; "but such declaration and desire was not reduced to writing in the lifetime of the said John Thomas and read over to him; but the said Samuel Thomas and Ben-

jamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect. Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises," the executors would convey the dwelling house, etc., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: "provided, nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas, or her assigns, shall and will, at all times during which she shall have possession of the said dwelling house, etc., pay to the said Samuel Thomas and Benjamin Thomas, their executors, etc., the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and shall and will keep the said dwelling house and premises in good and tenantable repair;" with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling house and premises for some time; but the defendant, after the death of his coexecutor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and, shortly before the trial, brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a nonsuit. Ultimately a verdict was found for the plaintiff on all the issues; and, in Easter Term last, a rule nisi was obtained pursuant to the leave reserved.

E. V. Williams, for the defendant, argued that this was "a mere gift cum onere," and that the only consideration was "the testator's expressed wish." "What is meant by the consideration for a promise, but the cause or inducement for making it? Plowden, commenting on Sharington v. Strotton, says (page 309), 'Note: That by the civil law nudum pactum is defined thus, Nudum pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.' In Chitty on Contracts the following passage is cited from the Code Civil: 'L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.' The rent and repairs cannot be said to have been the cause or motive which induced the executors to make this agreement. * * * The proviso merely causes the donee to take the gift charged with the burthen of paying the rent and keeping the premises in repair; and she cannot turn these conditions into a consideration."

Lord DENMAN, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His

Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large; the word causa in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to causa too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the defendant, or some detriment to the plaintiff; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift; but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground rent, and which is made payable not to a superior landlord, but to the executors. So that this rent is clearly not something incident to the assignment of the house, for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs, these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it, for anything that appears the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value; possibly that might be so, but suppose it would, the plaintiff contracts to take it, and does take it, whatever it is, for better for worse; perhaps a bona fide purchase for a valuable consideration might override it, but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have, in fact, disposed of the case. It is conceded that mere motive need not be stated, and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part; ut res magis valeat, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator, but in another part we find

an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of £1 annually is more than a good consideration, it is a valuable consideration, it is clearly a thing newly created and not part of the old ground rent.

Rule discharged.

WISCONSIN & M. RY. CO. v. POWERS.

(Supreme Court of the United States, 1903. 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229.)

Mr. Justice HOLMES delivered the opinion of the court:[17]

This is an appeal from a decree of the United States circuit court, dismissing the plaintiff's bill on demurrer. The bill seeks to enjoin the auditor general of the state of Michigan from collecting a tax, on the ground that the law imposing the tax is contrary to the Constitution of the United States as impairing the obligation of contracts, and interfering with interstate commerce.

The alleged contract is contained in a law of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile, except," etc. Afterwards, on October 23, 1893, the Menominee & Northern Railroad Company was incorporated under the laws of the state, and forthwith conveyed all its property, rights, and franchises to the plaintiff, a Wisconsin corporation which is assumed to stand in the shoes of the Michigan company. The plaintiff thereupon constructed the road. This road is north of parallel forty-four, its gross earnings never have been equal to $4,000 per mile, and it would be entitled to the exemptions just stated if the law of 1893 still were in force. But on June 4, 1897, the state passed a law amending the act of 1893, and levying a "specific tax upon the property and business of [every] railroad corporation operated within the state," and enacted that "when the railroad lies partly within and partly without this state, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the interstate business as the length of the road

[17] Part of the opinion is omitted.

over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried." This is the law which the plaintiff says is unconstitutional for the reasons above set forth.

The demurrer to the bill was sustained on the ground that the act of 1893 made no valid contract of exemption from taxation, and that the act of 1897, repealing the exemption granted in 1893, was a constitutional law. * * *

The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between an exemption from taxation contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. Ed. 611; Id., 19 Mich. 259, 2 Am. Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. Christ Church v. Philadelphia County, 24 How. 300, 16 L. Ed. 602; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; Grand Lodge, F. & A. M. v. New Orleans, 166 U. S. 143, 17 Sup. Ct. 523, 41 L. Ed. 951. See Tomlinson v. Jessup, 15 Wall. 454, 459, 21 L. Ed. 204. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further Welch v. Cook, 97 U. S. 541, 24 L. Ed. 1112, and Manistee & N. E. R. Co. v. Commissioner of Railroads, 118 Mich. 349, 76 N. W. 633, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases,—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the

other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while, no doubt, in some cases between private persons the above distinctions have not been kept very sharply in mind (Martin v. Meles, 179 Mass. 114, 117, 60 N. E. 397), it is clear that we should require an adequate expression of an actual intent on the part of the state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 668, 6 Sup. Ct. 625, 29 L. Ed. 770. Looking at the case in this way, then, we find no such adequate expression. No doubt the state expected to encourage railroad building, and the railroad builders expected the encouragement; but the two things are not set against each other in terms of bargain. See Covington v. Kentucky, 173 U. S. 231, 238, 239, 19 Sup. Ct. 383, 43 L. Ed. 679.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject-matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefor, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of, a statute, merely because their interest was obvious and their action likely, on the face of the law.

Decree affirmed.

BRAWN et al. v. LYFORD.

(Supreme Judicial Court of Maine, 1907. 103 Me. 362, 69 Atl. 544.)

Action by Charles H. Brawn and others against John F. Lyford. Case reported. Judgment for defendant.

PEABODY, J.[18] The defendant on the 31st day of August, 1901, conveyed to the plaintiffs his farm in St. Albans, in the county of Somerset and state of Maine, and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy.

The policy was to insure $1,350 on the buildings, and $450 on the personal property, for a term of three years, about half of which was unexpired. The premium was $27.

The defendant did not deliver the deed when it was signed, but did so at his home later in the day when he received the purchase price.

[18] The statement of facts is omitted.

After the deed and assignment were signed the attorney who prepared the instruments called attention to the necessity of having the consent of the insurance company to the assignment, and the evidence shows that after conversation on the subject the defendant promised to send the assigned policy as soon as the deed was delivered by mail to Parks Bros., agents, at Pittsfield, Me., to obtain the assent of the insurance company to the assignment; that he neglected to do this; and that on the 7th day of September the buildings were struck by lightning and wholly destroyed by the resulting fire.

The plaintiffs seek their remedy by a special action of assumpsit to recover of the defendant the amount of the insurance on the buildings, $1,350, with interest from September 7, 1901, for the alleged breach of a promise to send the policy to the agents of the company for assent necessary to the validity of the assignment.

The defendant pleads the general issue, with a brief statement denying the alleged consideration, and alleging that any promise to send the policy to the insurance agents was without consideration and void, and denying also that not sending the policy was the legal cause of the buildings being uninsured, for which he should be held responsible.

The case is before the law court on report.

There is some conflict of evidence as to whether in the original trade the $2,000, named as consideration in the deed included an assignment of the unexpired term of the insurance on the buildings. The defendant's testimony indicates that the subject came up when the parties met to have the deed drawn, but that of the plaintiffs and their witness Katen shows that it was previously agreed that the $2,000 was to be paid for the property and insurance. But this is immaterial, since the trade as consummated was for the farm and insurance on the buildings.

There is nothing in the nature of the defendant's undertaking to constitute it a part of what was purchased by the plaintiffs. The payment of the consideration and the execution of the deed and assignment embraced the whole transaction. We cannot agree with the plaintiffs' theory that the promise of the defendant to send the policy to the agents of the company is based upon the pecuniary consideration paid. It was an independent matter. The defendant was under no more obligation to procure the consent of the company to the assignment than to procure the record of the deed. He volunteered to forward the policy by mail to the agents; and he claims that his promise was not legally binding, because without consideration. Thorne et al. v. Deas, 4 Johns. (N. Y.) 84, upon which he relies, was an action on the case for the defendant's neglect to fulfill his promise to procure insurance on a vessel owned jointly by himself and the plaintiff. Chief Justice Kent thus concludes his opinion in which he held that there should be a verdict for the defendant: "A short review of the leading cases will show that by the common law a mandatory who undertakes to do an act for another without reward is not responsible

for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages be averred." But it was not decided upon the ground that there was no consideration for the alleged promise as consideration was not an element of that form of the action, but that the defendant had not assumed a legal duty by entering upon the execution of his undertaking. The doctrine of this case was reaffirmed in Smedes v. Bank, 20 Johns. (N. Y.) 372, although it was an action of assumpsit; but the plaintiff seems to have misconceived his remedy.

New rules have arisen from the development of the action of special assumpsit from an action on the case for deceit into one for the breach of a parol promise. Since the decision in Rann v. Hughes, 7 T. R. 350, note, a consideration for all promises not under seal has been necessary; and consideration is now generally defined as a benefit to the promisor, or a detriment to the promisee.

In this case the promisor's undertaking was not for any antecedent pecuniary consideration, or for an anticipated recompense, but the consideration, if any, was a detriment to the promisee. If, under the facts of the case, it may be considered that the plaintiffs, on the faith of the defendant's undertaking, parted with a present right, were delayed in the present use of a right, or suffered some immediate prejudice, it would be consideration, provided it was so treated by the parties. 5 Cyc. 168; Harriman on Contracts, §§ 91, 96; Fire Insurance Association v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860; Dutton's Estate, 181 Pa. 426, 37 Atl. 582; Ames v. Taylor, 49 Me. 381.

The defendant claims that the policy remained in his custody; that he retained it because he had an interest under it; and that consequently it cannot be said that the plaintiffs parted with the document, or surrendered any present right, or suffered any prejudice on the faith of the defendant's undertaking. But we do not consider that this custody of the policy was inconsistent with the plaintiffs' legal possession. They had a right to it until it was presented to the insurance company for assent to the assignment, and they intrusted it to the defendant to do what they otherwise would presumably have done themselves for the protection of their legal rights. By reason of the defendant's "assumption" the plaintiffs were delayed in the present use of the assigned policy for a purpose recognized as important.

But the consideration of the assumpsit as "detriment to the promisee" lacks the element of inducement. Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791. It is true that a motive might be implied from circumstances; but it clearly appears that the intrusting of the policy to the defendant was not at his solicitation, and therefore was not the consideration of the promise, but a mere condition precedent to the performance of the promise. Holmes' Common Law, 291; Haigh v. Brooks, 10 Ad. & El. 309; Hart v. Miles, 4 C. B. N. S. 371.

The voluntary promise of the defendant to perform a gratuitous service was nudum pactum, and he cannot be held liable for its nonperformance as a breach of contract.

Judgment for the defendant.[19]

CARR et al. v. MAINE CENT. R. R.

(Supreme Court of New Hampshire, 1917. 78 N. H. 502, 102 Atl. 532, L. R. A. 1918E, 389.)

Case for negligence by J. T. Carr and another against the Maine Central Railroad. A demurrer to the declaration was overruled, and defendant brings exceptions. Exceptions overruled.

YOUNG, J. The defendant bases its demurrer on (1) the nature of the plaintiffs' cause of action, and (2) the character of the agreement they allege it made with them.

The plaintiffs allege in substance that the defendant charged them more for hauling four cars of pulp wood than they had been accustomed to pay, and that when they claimed a rebate, informed them that the rate had been raised by mistake, but that it could not allow their claim unless they obtained the assent of the Interstate Commerce Commission; that if they would execute the necessary papers it would undertake to procure the assent of the commission to the allowance of their claim; that they executed the necessary papers and gave them to the defendant, but that it, either negligently or fraudulently, failed to act in the matter until after the time within which the commission could give its consent had expired. The fault with which the declaration charges the defendant is its failure to do what the average man would have done if he had undertaken to procure the assent of the commission to the allowance of the plaintiffs' claim; not its failure to perform a duty imposed on it by the federal statute entitled "An Act to regulate commerce." Act Feb. 4, 1887, c. 104, 24 Stat. 379. In other words, the plaintiffs allege that they have been damaged by the defendant's failure to perform a duty imposed on it by the common law—not a federal statute. Since this is so there is no merit in the defendant's contention that the courts of this state have no jurisdiction of the plaintiffs' cause of action.

This also disposes of the defendant's contention that the plaintiffs cannot recover because the agreement they allege it made is one that it could not legally make, and that it had no consideration to support it, for as has already appeared their declaration sounds in tort. In other words, they are not seeking to enforce the agreement they allege the defendant made, but to recover the damages they sustained because of its fraudulent or negligent failure to do what the average

[19] See, also, Texas Co. v. Dunn (Tex. Civ. App.) 219 S. W. 300 (1920), where in reliance upon a gratuitous option for 25 days, the offeree paid $25 to an attorney to examine the title.

man would have done if he had undertaken to procure the assent of commission to the allowance of their claim. In short, the office of the allegation that the defendant agreed to procure the assent of the commission is not to set forth the foundation on which the plaintiffs rest their cause of action, but to show how they came to rely on it to procure the assent of the commission to the allowance of their claim.

The question therefore and the only question of law raised by the defendant's exception is whether the common law imposes the duty of using average care on those who undertake to perform a service for them. The common law imposes that duty on every member of the community for the benefit of all those with whom he comes in contact, regardless of whether he is or is not to be compensated for his services. Coggs v. Bernard, 2 Ld. Raym. 909; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160.

It follows that if the defendant accepted the papers evidencing the plaintiffs' claim for the purpose of forwarding them to the commission, it then and there became its duty to do what the average man would do in that situation. Pittsfield, etc., Mfg. Co. v. Pittsfield Shoe Co., 71 N. H. 522, 533, 53 Atl. 807, 60 L. R. A. 116. In other words, notwithstanding the defendant owed the plaintiffs no duty in respect to procuring the assent of the commission to the allowance of their claim, still when it undertook to perform that service for them the law then and at that instant imposed on it the duty of doing what the average man would do in that situation, and it is no answer to an action to recover damages caused by its failure to perform that duty to show that it was not to be paid for what it undertook to do. Coggs v. Bernard, 2 Ld. Raym. 909.

If, therefore, the plaintiffs show that the defendant accepted the papers evidencing their claim for the purpose of forwarding them to the commission, and then did or omitted to do something the average man would not have done or omitted, they can recover all the damage they sustained as the result of such failure, provided no fault of theirs contributed to produce their loss.

Defendant's exception overruled. All concurred.[20]

KIRKSEY v. KIRKSEY.

(Supreme Court of Alabama, 1845. 8 Ala. 131.)

Assumpsit by the defendant, against the plaintiff in error.

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some

[20] See, also, Fooly & Preston's Case, 1 Leon. 297 (1586), ante, p. 211, and Wheatley v. Low, Cro. Jac. 668 (1623), ante, p. 212.

sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend; and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for $200, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is that the loss and inconvenience which the plaintiff sustained in breaking up and moving to the defendant's a distance of sixty miles is a sufficient consideration to support the promise to furnish her with a house and land to cultivate until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach.

The judgment of the court below must therefore be reversed, pursuant to the agreement of the parties.[21]

[21] See, in accord: Dunshee v. Dunshee, 255 Ill. 296, 99 N. E. 593 (1912); Brevator v. Creech, 186 Mo. 558, 85 S. W. 527 (1905).

In Richards' Ex'r v. Richards, 46 Pa. 78, 82 (1863), Lowrie, C. J., said: "No doubt there is evidence that the testator said he would pay that balance, and that he drew up notes that would have held him to it, if they had been passed as at first intended; but they were given up and destroyed, and therefore go for nothing, and the securities actually given do not hold him. We have nothing, therefore, but his advice to the plaintiff to buy the farm, and not move to the West, accompanied with an assurance that he would furnish him with the balance of the purchase-money. But this does not make a legal contract. Assurances of assistance accompanying kind advice are never intended as contracts. And conformance to advice is never intended to stand as a legal consideration for the kind assurances that accompany the advice, though it is a motive for their fulfillment. It would be exceedingly hurtful to the freedom of social intercourse to create even a suspicion in the public mind, that those kind offers of advice and assistance, which take place among friends and kindred, could be converted into contracts which the law would enforce..

DEVECMON v. SHAW.

(Court of Appeals of Maryland, 1888. 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422.)

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared on the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff, at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken, and the money so expended, by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct, in being thus willing to pay his nephew's expenses, as liberal and generous on his part." On objection the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But, whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own money. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in indebitatus assumpsit, and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his life-time, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses

to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that, if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted.

The defendants offered the following prayer, which the court granted:

"The defendants, by their attorneys, pray the court to instruct the jury that there is no sufficient evidence in this case to entitle the plaintiff to recover the interest claimed in the bill of particulars marked 'Exhibit No. 1, Bill of Particulars.'"

The only evidence bearing on this question is the account taken from the books of the deceased, which was offered in evidence by the plaintiff. This account showed on its face a final settlement of all matters embraced in it. In the absence of proof showing errors of some kind, the parties must be concluded by it in all respects. We think the prayer was properly granted.

Judgment reversed, and new trial ordered.[22]

[22] In accord: Young v. Boyd, 107 Md. 449, 69 Atl. 33 (1908), plaintiff attended a school "at the instance of the defendant and upon a promise by the defendant" to pay expenses; Bigelow v. Bigelow, 95 Me. 17, 49 Atl. 49 (1901), uncle promised nephew a farm if he would give up his work and move to the farm.

Where a promise is made subject to an express condition, the fulfillment of which requires action or forbearance by the promisee, the fulfillment of the condition will usually be held to be sufficient consideration. See Traver v. ———, 1 Sid. 57 (1661); Wild v. Harris, 7 C. B. 999 (1849); Millward v. Littlewood, 5 Exch. 775 (1850); Brooks v. Ball, 18 Johns. (N. Y.) 337 (1820); Wigan v. Eng., etc., Life Ass. Ass'n, [1909] 1 Ch. 291, 298, semble, "ex post facto consideration"; Dunton v. Dunton, 18 Vict. L. R. 114 (1892); Shadwell v. Shadwell, 30 L. J. C. P. 145 (1860); Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 42 L. R. A. 794, 73 Am. St. Rep. 491 (1898); State ex rel. Lattanner v. Hills, 94 Ohio St. 171, 113 N. E. 1045, L. R. A. 1917B, 684, and note (1916); Union Bank of Brooklyn v. Sullivan, 214 N. Y. 332, 108 N. E. 558 (1915); De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816 (1917); State Bank of Pittsburg v. Kirk, 216 Pa. 452, 65 Atl. 932 (1907); Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449 (1903); Hay v. Fortier, 116 Me. 455, 102 Atl. 294 (1917); Jamieson v. Renwick, 17 Vict. L. R. 124 (1891).

See, further, the cases on Irrevocable Offers, ante, pp. 189–203.

A promise by the owner of land to make a gift thereof will be specifically enforced in equity if the donee is induced thereby and in reliance thereon to go into possession and make valuable improvements. Expenditures of this sort in money or labor, are held to "constitute a consideration for the promise." Messiah Home for Children in City of New York v. Rogers, 212 N. Y. 315, 106 N. E. 59 (1914); Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657 (1870); Seavey v. Drake, 62 N. H. 393 (1882); Neale v. Neales, 76 U. S. (9 Wall.) 1, 19 L. Ed. 590 (1869); 1 Ames, Cases Eq. 306, 308, citing many cases in notes.

UNDERWOOD TYPEWRITER CO. v. CENTURY REALTY CO.

(Supreme Court of Missouri, 1909. 220 Mo. 522, 119 S. W. 400, 25 L. R. A. [N. S.] 1173.)

LAMM, J.[23] This case is here from the St. Louis Court of Appeals on the dissent of Judge Bland. 118 Mo. App. 197, 94 S. W. 787. The majority opinion of that court reversed the judgment of the circuit court sustaining a demurrer to the petition, and remanded the case to be tried on its merits. We think the majority opinion is soundly reasoned on both principle and precedent. It should be read in connection with this; for we shall not restate its reasoning, but rest content with adopting it, only supplying a sufficient statement here to make this opinion intelligible, and adding some observations of our own.

The statement: Plaintiff was tenant of defendant in possession under a written lease for a five-year term beginning on the 1st day of February, 1901, and ending on the last day of January, 1906. The lease provided, inter alia, that plaintiff could not assign or underlet without the written consent of defendant indorsed on it. Thereafter plaintiff and defendant entered into a written agreement to the effect that defendant would give its written assent to an assignment of the lease to an acceptable tenant. The petition pleads the lease, the provision against assigning or subletting, and the subsequent written agreement to give consent in writing to an acceptable tenant; and then states, in substance, that plaintiff, in reliance on said written agreement, with the knowledge of defendant, expended a large amount of time and labor in securing an acceptable and satisfactory tenant, and did secure such tenant, but that, notwithstanding that fact, defendant refused and still refuses to consent to the assignment of said lease and to permit said tenant to enter into the possession of said premises, though often requested to do so; that by reason of defendant's refusal to consent to said assignment of said lease plaintiff was and is prevented by defendant from securing such tenant at a large advance over the rent reserved by defendant under said lease, to its damage in the sum of $4,500. Wherefore, etc. The circuit court sustained a general demurrer to the petition. Thereat plaintiff stood on its petition, and, refusing to plead over, judgment went on the demurrer. From that judgment plaintiff appealed to the court of appeals, with the result indicated. When the case came here it was assigned to Division 1, and there argued and submitted. That division was evenly divided, and the cause came into banc. So much by way of statement.

The observations: True, the typewriter company was not bound to do anything under the written agreement. True, it was executory only, and may be called in a sense a nude pact as born. True, defendant realty company could at no time have sued the typewriter company on

[23] Parts of the two opinions are omitted.

that agreement for failure to perform. Why should it sue? It already had a tenant in the person of the typewriter company. It wanted no other. But mutuality, in its essence, is but a phase, strictly speaking, of the consideration that will support a contract. It is not the only phase. If mutuality, in a broad sense, was held to be an essential element in every valid contract, to the extent that both contracting parties could sue on it, there could be no such a thing as a valid unilateral or option contract, or a contract evidenced by a subscription paper, or a contract to enforce a reward offer, or a guaranty, or in many other instances readily put in ordinary business affairs. The contract sued on in this case was made for the benefit of the typewriter company. It could furnish an acceptable tenant to defendant to take its place, or let it alone. In that respect it does not differ from many contracts, the breach of which is actionable at the option of the promisee.

Being in writing, and signed by the party to be charged, it was not obnoxious to the statute of frauds. Being fully performed by the promisee, it was no longer a nude pact, but became clothed with a consideration executed on request. That performance, on the strength of the offer made, having been accomplished at an outlay of time and labor on the part of the offeree or promisee, with defendant's knowledge as alleged in the petition, makes it enforceable against the offerer or promisor so long as both parties were capable of contracting and their contract be not vitiated by fraud or as against good morals or public policy.

We take it as good doctrine worthy of all acceptance that it is the primary duty of courts to enforce contracts, not to abrogate them. A contract (such as this) between two parties not in fiduciary relation, but dealing at arm's length, free from taint of fraud, duress, or other form of overreaching or oppression, when performed by the promisee, comes into a court of justice entitled to every fair presumption of validity. Such a contract bespeaks, in the first instance, judicial diligence and astuteness to support the act of the party by the act and art of the law. To that extent, at least, those fine rules of personal honor obtaining between man and man, requiring one to keep his word with another, accord with the rules of law.

It is afield to point to the contract word "acceptable," and say that it would be illusory or unthinkable to suppose that its terms could be complied with by the plaintiff by its furnishing a tenant acceptable to the landlord. As to whether a landlord could stand on mere whim and caprice or some fanciful conceit in rejecting a party furnished by his tenant, under the contract sued on and the lease out of which it grew, we need not inquire. It is likely his refusal would have to stand on something better than mere caprice and whim. It is likely the law would compel such landlord to acquit himself by acting with reason, and that courts would hold that the contract implied he would so act. But in this case, as pointed out in the majority opinion in the court of appeals the petition says that the party furnished was acceptable. The

demurrer assumes that allegation true; hence, for present purposes, it is true.

Discussing the question of mutuality, a law-writer, whose views are fortified by the weight due to a virile and a luminous mind, enriched with great research and strengthened by a profound grasp of legal principles, lays down the right doctrine to be: "But if, without any promise whatever, the promisee does the thing required, then the promisor is bound on another ground. The thing done is itself a sufficient and a completed consideration; and the original promise to do something, if the other party would do something, is a continuing promise until the other party does the thing required of him. A very large proportion of our most common contracts rest upon this principle." 1 Parsons on Contracts (9th Ed.) bottom p. 488.

In a learned note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543, Mr. Clark, author of Clark on Contracts, in speaking to the point, says: "Again, contracts may be formed by the offer of a promise for an act and acceptance by performing the act, as where a man requests another to perform services for him, and the latter does so. The request is an offer of a promise to pay for the services, and performance of the services is an acceptance of the offer. This is described as consideration executed upon request. Here, also, the act of one party forms the consideration which supports the promise of the other. In these two cases one of the parties, in the formation of the contract, does all that he can be required to do, and there remains an outstanding obligation on the other side only. The contract is unilateral. It is obvious that in these cases the question of mutuality of obligation or contract cannot arise. The question is whether the act is such as to supply a consideration for the promise of the other party."

To illustrate, if Roe writes Doe: "If you loan Lowe your Jersey cow, I will see she is returned in good order." And, if Doe (relying) loan her to Lowe and she is not returned in good order, is Roe not liable to Doe?

If Box write Cox: "If you find my lost horses, Bucephalus and Rosinante, I will release the debt of $50 you owe me." And if Cox (relying) find and return Bucephalus and Rosinante, is his debt not paid to Box?

If Smith agree in writing with Jehu that he will pay him $100 if he drive from Jefferson City to Kansas City and return in four days, and Jehu presently (relying) drives it in four days, is not Smith liable?

If John agree in writing with Gambrinus that if the latter will not drink beer for a year he will pay him a sum certain, and if Gambrinus (relying) drink no beer for that year, is not John bound?

Yet in each of these cases neither Doe, Cox, Jehu, nor Gambrinus was bound to do anything. In each of them there was no consideration other than acceptance by actual performance on request. In the last two and the first no benefit accrued to Roe, Smith, or John. But in each of them there was a consideration (i. e., performance) moving

from the promisee in the form of labor done and inconvenience and detriment suffered.

In an old case, Lindell v. Rokes, 60 Mo. 249, 21 Am. Rep. 395, Rokes agreed to pay Lindell $50 if he would not use intoxicating liquors and beer for one year. Lindell performed. Rokes refused to pay, and, being sued, set up a want of consideration as a defense. * * * The case was put on the reason of the thing, and the law was declared to be that: "It is true that the plaintiff did not undertake, in direct terms, to do anything when the note was made; but the prevailing doctrine now is that if one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not void for want of mutuality, and the promisor is liable, though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory." * * *

In another case (Williams v. Jensen, 75 Mo. 681), Stonebreaker, as principal, and Jensen, as surety, executed a note to Williams. Being sued on the note, Jensen contended he was released from liability on two grounds. One of them was an extension of time to the principal by a valid contract without his consent. It was held that the contract to extend was valid as supported by a sufficient consideration, hence Jensen was discharged as surety. The consideration for the extension agreement arose in this way: When the note was about due, Williams agreed with Stonebreaker he would extend the time to a date certain if Stonebreaker would get his wife to sign the note. Stonebreaker procured this to be done without his surety's knowledge or consent. The signature of Mrs. Stonebreaker was worthless, as the law then stood, she being a married woman with no separate estate, and Williams contended there was no consideration for the extension agreement. But this court, disallowing that contention, said: "Whatever may have been his motive, he agreed to extend the time of payment upon the condition that her husband would obtain her signature to the note; and the obtainment of her signature, though such signature be of no value to Williams, constitutes a sufficient consideration for his agreement to extend the time of payment. It is not always necessary that the consideration for a promise should be of some value to the promisor. Damage or inconvenience to the promisee is a sufficient consideration, and where the court can see that there may have been such inconvenience it will uphold the contract. It may have been an inconvenience for Stonebreaker to secure the signature of his wife, and, thus much appearing, the law will shut its eyes to the inequality between the consideration and the promise." At this point the court cites Lindell v. Rokes, supra. Continuing, the court said: "In Brooks v. Ball, 18 Johns. (N. Y.) 337, a promise to pay a certain demand if the claimant would swear to its correctness was enforced. Any trouble or labor, however slight, undertaken by one person at the request of an-

other, will support a promise by such other person, although the trouble or labor be of no benefit to the promisor. Addison on Contracts (Morgan's Ed.) § 9; Clark v. Sigourney, 17 Conn. 511. Being of opinion that the agreement to extend the time of payment was supported by a sufficient consideration, the judgment, which was for the defendant, will be affirmed."

In a late case in banc (Strode v. Transit Co., 197 Mo. loc. cit. 622 et seq., 95 S. W. 851, 7 Ann. Cas. 1084) to which we all agreed, our Brother Graves reviewed authorities and case learning on the question of consideration, and announced the right doctrine to be, as laid down in 6 Am. & Eng. Ency. of Law (2d Ed.) p. 689, viz., "If the promisee do any act to his injury, however slight, at the request of the promisor, either express or implied, the detriment sustained operates as a consideration."

Barclay, J., in Trustees of Christian Univ. v. Hoffman, 95 Mo. App. loc. cit. 495, 69 S. W. 475, with the concurrence of all his learned brethren, said: "But, apart from the inference of law arising under the above-mentioned statute" (Rev. St. 1899, § 894, supra), "it has been held that where such a promise as that under review has been made to an institution like that of the plaintiffs, and, before the promise is withdrawn, obligations have been created or expenses incurred by the promisee upon the faith of the promise, these facts furnish a consideration to support the original agreement, although in the first instance, it may have partaken somewhat of the nature of a gift. Koch v. Lay, 38 Mo. 147; Pitt v. Gentle, 49 Mo. 74; Corrigan v. Detsch, 61 Mo. 290; School District v. Sheidley, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576." See, also, authorities collected in the principal opinion, 118 Mo. App. 197, 94 S. W. 787, and there applied.

But I have pursued the matter further than intended. The upshot of it all is the conclusion that the petition was good and the demurrer bad. Hence, the judgment of the circuit court should be reversed, and the cause remanded to be tried on its merits. It is so ordered.[24]

GANTT, FOX, and GRAVES, JJ., concur.

[24] The opinion of the lower court contained the following language: "It is true that in such agreements, which at first are insufficient by reason of the want of the very essential element of every valid contract, sufficient consideration and mutuality, the promisor can, if he sees fit, revoke and recall the promise at any time prior to the promisee having moved toward its fulfillment and expended time, labor or money and inconvenience himself thereabout, for up to that time nothing having been done thereunder, by the promisee, it will remain a nude pact and is not obligatory. Andreas v. Holcombe, 22 Minn. 339 (1876). But if the promise is permitted to stand and with the knowledge of the promisor, the promisee expends time, labor or money, or otherwise inconveniences himself or forfeits any legal rights, relying upon the faith of the promise, the element of consideration and mutuality is thereby supplied as of the date of the agreement and the contract at once becomes enforceable at law. It appears from the allegations of the petition that although the defendant was under no obligation to make the promise, and although it received no recompense for so doing, that nevertheless it did promise

WOODSON, J. (dissenting). * * * In the case at bar the promise of respondent to permit appellant to assign the lease was unilateral, and was without consideration of any kind to support it. The appellant never at any time, even down to the time of bringing this suit, agreed to find or furnish respondent a suitable tenant; and if appellant had at any time, or even now should withdraw its tender of such tenant, clearly the respondent would have no cause of action against the former for said refusal or withdrawal, for the obvious reason that it never agreed to do so. According to the allegations of the petition, the appellant was under no legal or moral obligation to find for respondent a suitable tenant for the occupancy of the floor space in question.

For the purpose of illustration, let us suppose a farmer should enter a shoe store and ask the proprietor thereof if he would take a cord of hickory wood for a certain designated pair of shoes, and in reply thereto the proprietor should say, "Yes," and without more the farmer should turn and walk from the store without agreeing to take the shoes or to furnish the wood, and he should then return home and chop a cord of hickory wood, load it upon his wagon, haul it to town, drive up to the store, and say to the proprietor that he had chopped the wood, hauled it in for him, and demand the shoes in consideration of and in payment for the wood; and in reply thereto suppose the merchant had said to the farmer that he was sorry, but he could not deliver the shoes to him, for the reason that he had sold them during the time which had elapsed between the first conversation and the time when the wood was hauled to town and tendered to the merchant—could it be seriously contended that the farmer would have a cause of action against the merchant for breach of contract for his failure to deliver the shoes? I think not, for the reason the farmer never agreed to take the shoes, or to cut, haul, and deliver the wood in exchange for them. Such a contract, if it may be so called, would clearly be unilateral in character, and the subsequent tender of the wood would not change the agreement into a bilateral contract. The tender of the wood could not perform

in writing to the plaintiff as alleged. No doubt this promise was purely a matter of accommodation to the plaintiff, but it appears that the promise was permitted to stand unrevoked and unrecalled when the defendant had the clear right to recall it for want of mutuality and consideration, and that the plaintiff, relying upon the faith of the promise, which he had a right to do, proceeded and with knowledge of the defendant, expended a large amount of time and labor in securing an acceptable and satisfactory tenant. Under the circumstances stated, a majority of the court are of the opinion that a sufficient consideration and mutuality was imported into the agreement by such performance, which related back to its origin and rendered it a contract valid in law, and affixed a mutual obligation on the defendant to respond."

In Spitzli v. Guth, 112 Misc. Rep. 630, 183 N. Y. Supp. 743 (1920), a lessor gave an option to his lessee for the purpose of protecting the latter in case he made valuable improvements. Such improvements were made, after which the lessor give notice of revocation. The lessee accepted in spite of such notice and obtained a decree for specific performance. See, also, "Power of Revocation," ante, chapter I, section 9, and note to Vickrey v. Maier, post, p. 311.

the twofold office of furnishing a consideration for the contract, and at the same time constitute an agreement to accept the shoes, which had never been done before. And the same is true as regards the case at bar. The finding of a suitable tenant could not perform the twofold function of furnishing a consideration to support the promise of the Century Realty Company to agree to subletting of the floor space to such tenant, and at the same time constitute an agreement on the part of the typewriter company to furnish such tenant, which, confessedly, it has never done down to this date in any mode or manner whatsoever.

The principle announced in the majority opinion is too far-reaching and startling in its effect. Under that holding no merchant or property owner could safely answer a question as to what he would take for a certain article or piece of property, for, if he should do so, he would be liable at any time within the period prescribed by the statute of frauds to be called upon to deliver the property to the party who asked the question, and be subjected to an action for damages for breach of contract for failure to deliver the property, if for any reason he should see proper to decline to deliver it, even though he had disposed of it in the meantime. * * *

I am, therefore, of the opinion that the action of the trial court in sustaining the demurrer to the petition was proper, and that the judgment of the St. Louis Court of Appeals reversing the judgment of the circuit court is erroneous.

VALLIANT, C. J., and BURGESS, J., concur.

YOUNG MEN'S CHRISTIAN ASS'N v. ESTILL et al.

(Supreme Court of Georgia, 1913. 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. [N. S.] 783, Ann. Cas. 1914D, 136.)

Action by the Young Men's Christian Association against M. H. Estill and others, executors. Judgment for defendants, and plaintiff brings error. Reversed.

The Young Men's Christian Association, a corporation, brought suit against the executors of J. H. Estill to recover an amount alleged to be due on a verbal contract to give $500 for the construction of a building to be devoted to the general purposes of the plaintiff corporation. * * * On April 21, 1905, W. B. Stubbs and J. B. Reid, representing the plaintiff, solicited from Mr. Estill a subscription for the construction of the building. Mr. Estill agreed to subscribe and did subscribe $500, and the following memorandum was made on a card at the time: "Will give $500 as soon as work begins." This memorandum was not signed by Mr. Estill, and the subscription was verbal. Subscriptions were made by others for the same purpose, prior and subsequent to the promise of Mr. Estill, all of which were mutual subscriptions for the common object; and because of the subscriptions

made by Mr. Estill and others the work was undertaken by the plaintiff. The contract was given out and the work completed at a very large expense; and if the subscriptions had not been made by Mr. Estill and others, the work would not have been undertaken by the plaintiff. * * * The contract for the erection of the building was let on April 24, 1907, and the work was begun on June 3, 1907, and on the last-mentioned day the subscription became due and payable. On November 9, 1907, Mr. Estill died, and on November 12, 1907, his will was duly probated and letters testamentary issued to his executors. The executors refuse to pay the subscription of Mr. Estill to the plaintiff and judgment is prayed for the sum of $500, the amount of the subscription, with interest thereon from June 3, 1907. The court sustained a demurrer to the petition and dismissed it.[25]

Evans, P. J. * * *

The Young Men's Christian Association is a charitable corporation, and its directors determined to erect in the city of Savannah a large building for the advancement of the cause represented by it, which was entirely charitable and benevolent. Several persons subscribed in writing, promising to give named sums of money for the accomplishment of the enterprise. When Mr. Estill was solicited for a subscription, he promised to give $500 for the work as soon as the work of constructing the building began. The local newspaper owned and published by a company of which he was the chief, if not the only, stockholder, and managed by him, published a list of the subscribers, which included his name among the rest as subscribing the amount which he had orally promised to give. The building was completed at great expense, in reliance upon the subscriptions of promises of Mr. Estill and others. Work began upon the building more than six months before the death of Mr. Estill, and has been fully completed. Mr. Estill never withdrew or repudiated his promise to pay the amount he promised to donate. His executors deny the binding force of his promise to donate $500 to the enterprise. The contention is that a promise to donate a named sum to a charitable purpose is purely gratuitous and unenforceable, for want of a consideration. If Mr. Estill had signed a subscription contract with others to erect this building, the mutual promises of the subscribers would have furnished a good consideration. Our Code declares that "in mutual subscriptions for a common object the promise of the others is a good consideration for the promise of each." Civil Code, § 4246. This section has been held applicable to subscriptions to build churches, and to locate assembly grounds of a religious denomination at a particular point. Wilson v. First Presbyterian Church, 56 Ga. 554; Owenby v. Georgia Baptist Assembly, 137 Ga. 698, 74 S. E. 56, Ann. Cas. 1913B, 238. The petition alleges that other subscriptions were made by other persons be-

[25] The statement of facts is abbreviated and part of the opinion is omitted.

fore and after Mr. Estill's promise to give $500, and that all of them, including Mr. Estill's verbal promise, were mutual subscriptions for the common object. Notwithstanding this allegation, we do not think the case in hand comes within the Code section quoted. That section has application to mutual subscriptions, which means written promises mutually entered into by the subscribers. The statute is not sufficiently broad to include oral promises, and cannot be extended so as to cover the promise in the case at bar.

A promise to donate money to a charitable purpose is gratuitous and unenforceable, unless some consideration therefor exists. Such a promise amounts to nothing more than a voluntary offer, which may be withdrawn before being acted upon. But if, on the faith of the promise, the promisee, before withdrawal of the promise, expends money and incurs enforceable liabilities in furtherance of the enterprise the promisor intended to promote, the consideration is supplied, and the promise is rendered valid and binding. Owenby v. Georgia Baptist Assembly, supra; School District of Kansas City v. Sheidley, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576; McCabe v. O'Connor, 69 Iowa, 134, 28 N. W. 573; Amherst Academy v. Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; 1 Page on Contracts, § 298; 1 Elliott on Contracts, § 228. In 1 Parsons on Contracts (8th Ed.) *453, it is said: "On the important question, how far voluntary subscriptions for charitable purposes, as for alms, education, religion, or other public uses are binding, the law has in this country passed through some fluctuation, and cannot now be regarded as on all points settled. Where advances have been made, or expenses or liabilities incurred by others in consequence of such subscriptions, before any notice of withdrawal, this should, on general principles, be deemed sufficient to make them obligatory, provided the advances were authorized by a fair and reasonable dependence on the subscriptions; and this rule seems to be well established." The death of the promisor before any liability has been incurred on the faith of the promise would, of course, serve to withdraw or revoke the promise.

We do not think that, because the promise to give rests in parol, it is unenforceable after it has been acted on. If the promise is found in a written subscription by the promisor and others, the mutual promises furnish a consideration under our Code. But the promise to give to a charitable purpose need not be in writing to be an enforceable contract, where the promisee has acted on the faith of it. So long as the promise is gratuitous, it is without consideration; but, when acted on, there is not only mutuality of contract, but a consideration for the contract. If A. promise to buy a house for his nephew, that is nothing; but if A. promise to buy a house for his nephew, and request the nephew to enter into a contract of purchase in the nephew's own name, and the nephew does so, the law implies a promise on the part of A. to

reimburse the nephew any part of the purchase money which he may be called on to pay. Skidmore v. Bradford, L. R. 8 Eq. 134. * * *

Judgment reversed.[26]

PRESBYTERIAN CHURCH OF ALBANY v. COOPER et al.

(Court of Appeals of New York, 1889. 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767.)

Appeal from supreme court, general term, Third department.

Action by the Presbyterian Church of Albany against Thomas C. Cooper and another, administrators of Thomas P. Crook, deceased, on a subscription made by the decedent towards paying off a mortgage debt owing by the plaintiff. Judgment was given for defendants, and plaintiff appeals.

ANDREWS, J. It is, we think, an insuperable objection to the maintenance of this action that there was no valid consideration to uphold the subscription of the defendants' intestate. It is of course unquestionable that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted. The performance of such a promise rests wholly on the will of the person making it. He can refuse to perform, and his legal right to do so cannot be disputed, although his refusal may disappoint reasonable expectations, or may not be justified in the forum of conscience.

By the terms of the subscription paper the subscribers promise and

[26] Subscriptions for a charitable purpose have been enforced in very many cases. Action toward carrying out the purpose and in reliance on the subscription is the fact that is most commonly approved as a consideration. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325 (1901), other subscriptions obtained in reliance; De Pauw University v. Ankeny, 97 Wash. 451, 166 Pac. 1148 (1917); Young Men's Christian Ass'n of Wenatchee v. Olds Co., 84 Wash. 630, 147 Pac. 406, L. R. A. 1917F, 1132 (1915); Brokaw v. McElroy, 162 Iowa, 288, 143 N. W. 1087, 50 L. R. A. (N. S.) 835 (1913); Beatty's Estate v. Western College of Toledo, Iowa, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242 (1898); Albert Lea College v. Brown, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870 (1903); Hodges v. Nalty, 104 Wis. 464, 80 N. W. 726 (1899); Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727 (1897); Rogers v. Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636 (1898).

Some cases hold that one subscription is sufficient consideration for another, creating an enforceable right in the beneficiary. In re Leigh's Estate (Iowa) 173 N. W. 143 (1919). In re Converse's Estate, 240 Pa. 458, 87 Atl. 849 (1913); Higert v. Trustees of Indiana Asbury University, 53 Ind. 326 (1876); Christian College v. Hendley, 49 Cal. 347 (1874).

In some cases the court has found an implied promise by the trustees of the charity to execute the work contemplated, such promise operating as a consideration. Trustees of Maine Cent. Inst. v. Haskell, 73 Me. 140 (1882); Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68 (1847); In re Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449 (1875); Superior Consolidated Land Co. v. Bickford, 93 Wis. 220, 67 N. W. 45 (1896); Martin v. Meles, 179 Mass. 114, 60 N. E. 397 (1901).

In England charitable subscriptions are generally not enforceable. In re Hudson, 54 L. J. Ch. 811 (1885). There are cases in the United States holding likewise. See note in 48 L. R. A. (N. S.) 783.

agree to and with the trustees of the First Presbyterian Church of Albany to pay to said trustees within three years from its date the sums severally subscribed by them, for the purpose of paying off "the mortgage debt of $45,000 on the church edifice," upon the condition that the whole sum shall be subscribed or paid in within one year. It recites a consideration, viz.: "In consideration of one dollar to each of us (subscribers) in hand paid, and the agreement of each other in this contract contained." It was shown that the one dollar recited to have been paid was not in fact paid, and the fact that the promise of each subscriber was made by reason of and in reliance upon similar promises by the others, constitutes no consideration as between the corporation for whose benefit the promise was made and the promisors. The recital of a consideration paid does not preclude the promisor from disputing the fact in a case like this, nor does the statement of a particular consideration, which on its face is insufficient to support a promise, give it any validity, although the fact recited may be true. It has sometimes been supposed that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise would not in a legal sense be beneficial to the promisors entering into the engagement. This seems to have been the view of the chancellor, as expressed in the Hamilton College Case, when it was before the court of errors, (2 Denio, 417;) and dicta of the judges will be found to the same effect in other cases. Trustees v. Stetson, 5 Pick. (Mass.) 508; Watkins v. Eames, 9 Cush. (Mass.) 537. But the doctrine of the chancellor, as we understand, was repudiated when the Hamilton College Case came before this court, (1 N. Y. 581), as have been also the dicta in the Massachusetts cases, by the court in that state, in the recent case of Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors, and a failure to carry out, as between themselves, their mutual engagement. It is in no proper sense a case of mutual promises as between the plaintiff and defendant. If any action would lie at all, it would be one between the promisors for breach of contract.

In the disposition, therefore, of this case, we must reject the consideration recited in the subscription paper as ground for supporting the promise of the defendants' intestate,—the money consideration,—because it had no basis in fact, and the mutual promise between the subscribers, because, as to their promises there is no privity of contract between the plaintiff and the promisors. Some consideration must therefore be found other than that expressly stated in the sub-

scription paper in order to sustain the action. It is urged that a consideration may be found in the efforts of the trustees of the plaintiff during the year, and the time and labor expended by them during that time, to secure subscriptions in order to fulfill the condition upon which the liability of the subscribers depended. There is no doubt that labor and services rendered by one party at the request of another would constitute a good consideration for a promise made by the latter to the former, based on the rendition of the service. But the plaintiff encounters the difficulty that there is no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation or its trustees did, or undertook to do, anything upon the invitation or request of the subscribers. Nor is there any evidence that the trustees of the plaintiff, as representatives of the corporation, in fact did anything in their corporate capacity, or otherwise than as individuals interested in promoting the general object in view. Leaving out of the subscription paper the affirmative statement of the consideration, (which for reasons stated may be rejected,) it stands as a naked promise of the subscribers to pay the several amounts subscribed by them for the purpose of paying the mortgage on the church property, upon a condition precedent limiting their liability.

Neither the church nor the trustees promise to do anything, nor are they requested to do anything, nor can such a request be implied. It was held in the Hamilton College Case, 1 N. Y. 581, that no such request could be implied from the terms of the subscription in that case, in which the ground for such an implication was, to say the least, as strong as in this case. It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money paid on subscriptions upon the mortgage debt did not constitute a consideration for the promise of the defendants' intestate.

We are unable to distinguish this case in principle from the Hamilton College Case, 1 N. Y. 581. There is nothing that can be urged to sustain this subscription that could not with equal force have been urged to sustain the subscription in that case. In both the promise was to the trustees of the respective corporations. In each case the defendant had paid part of his subscription, and resisted the balance. In both part of the subscription had been collected and applied by the trustees to the purpose specified. In the Hamilton College Case, (which in that respect is unlike the present one,) it appeared that the trustees had incurred expense in employing agents to procure subscrip-

tions to make up the required amount, and it was shown also that professors had been employed upon the strength of the fund subscribed. The Hamilton College Case is a controlling authority in this case. It has not been overruled, and has been frequently cited with approval in the courts of this and other states.

The cases of Barnes v. Perine, 12 N. Y. 18, and Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500, are not in conflict with the decision in the Hamilton College Case. There is, we suppose, no doubt that a subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the church or corporation for whose benefit it is made. Both of the cases cited, as we understand them, were supported on this principle. There was, as was held by the court in each of these cases, a subsequent request by the subscriber to the promisee to go on and render service, or incur liabilities, on the faith of the subscription, which request was complied with, and services were rendered or liabilities incurred pursuant thereto. It was as if the request was made at the very time of the subscription, followed by performance of the request by the promisor. Judge Allen, in his opinion in Barnes v. Perine, said "the request and promise were to every legal effect simultaneous;" and he expressly disclaims any intention to interfere with the decision in the Hamilton College Case.

In the present case it was shown that individual trustees were active in procuring subscriptions. But, as has been said, they acted as individuals, and not in their official capacity. They were deeply interested, as was Mr. Crook, in the success of the effort to pay the debt on the church, and they acted in unison. But what the trustees did was not prompted by any request from Mr. Crook. They were all co-laborers in promoting a common object. We can but regret that the intention of the intestate in respect to a matter in which he was deeply interested, and whose interest was manifested up to the very time of his death, is to be thwarted by the conclusion we have reached; but we think there is no alternative, and that the judgment must be affirmed.

All concur.

MARTIN et al. v. MELES et al.

(Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 114, 60 N. E. 397.)

HOLMES, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others:—"January 21, 1896. We, the undersigned manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the Committee demand from any manufacturer or firm a total of

subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses, under the direction of the Committee, in depending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us, the Committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid $750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in Institute v. French, 16 Gray, 196, 201 (see Institute v. Haskell, 71 Me. 487), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for a mere benevolence to the purposes of the trust imposes no new burden upon them. Johnson v. University, 41 Ohio St. 527, 531. See Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of

the defendant's promise than on the counter-promise of the plaintiff. Cottage St. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg v. Danielson, 141 Mass. 195, 196, 4 N. E. 622. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. Sherwin v. Fletcher, ubi supra.

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration,—Williams v. Carwardine, 4 Barn. & Adol. 621 (see Institute v. Haskell, 71 Me. 487),—or of fraud. Windram v. French, 151 Mass. 547, 553, 24 N. E. 914, 8 L. R. A. 750. In Cottage St. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In Academy v. Gilbert, 2 Pick. 579, 13 Am. Dec. 457, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See Academy v. Cowls, 6 Pick. 427, 438, 17 Am. Dec. 387; Ives v. Sterling, 6 Metc. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may

furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. In re Hudson, 54 Law J. Ch. 811; Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Academy v. Cowls, 6 Pick. 427, 438, 17 Am. Dec. 387. But if that were true, it would follow that as to the future conduct of the committee their promise not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definitive decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the case where an order for work is countermanded at the moment when performance is about to begin under the contract,—Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783,—or when at a later moment the plaintiff was directed to stop. Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, followed by many later cases in this country. See Collins v. Delaporte, 115 Mass. 159, 162. We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place, it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election (Ballou v. Billings, 136 Mass. 307), it would not have been a breach of the contract (Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384), and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent (Davis v. Campbell, 93 Iowa, 524, 61 N. W. 1053; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; Cravens v. Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep.

298). See Frost v. Knight, L. R. 7 Exch. 111, 112; Johnstone v. Milling, 16 Q. B. Div. 460, 470, 473; Dalrymple v. Scott, 19 Ont. App. 477; John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518; Davis v. Bronson, 2 N. D. 300, 303, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783.

Before leaving the case it is interesting to remark that the notion rightly exploded in Cottage St. Church v. Kendall, 121 Mass. 528, 530, 531, 23 Am. Rep. 286, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in Perkins v. Lockwood, 100 Mass. 249, 250, 1 Am. Rep. 103 (Farrington v. Hodgdon, 119 Mass. 453, 457; Trecy v. Jefts, 149 Mass. 211, 212, 21 N. E. 360; Emerson v. Gerber, 178 Mass. 130, 59 N. E. 666), with what he says in Music Hall Co. v. Carey, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. Sherwin v. Fletcher, 168 Mass. 413, 47 N. E. 197.

Demurrer overruled.

Exceptions overruled.[27]

SECTION 3.—FORBEARANCE AS CONSIDERATION

(Compromise Agreements)

HAMER v. SIDWAY.

(Court of Appeals of New York, 1891. 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.)

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew as-

[27] A similar case is Carr v. Bartlett, 72 Me. 120 (1881).

sented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000.

The uncle received the letter, and a few days later, and on the 6th day of February, he wrote and mailed to his nephew the following letter: "Buffalo, Feb. 6, 1875. W. E. Story, Jr.—Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. * * * This money you have earned much easier than I did, besides, acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. * * * Truly yours, W. E. Story. P. S. You can consider this money on interest."

The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.[28]

PARKER, J. * * * The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask

[28] The statement of facts has been abbreviated, and part of the opinion is omitted.

whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars. Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts, (page 166,) after citing the definition given by the Exchequer Chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. * * *

Order appealed from reversed, and judgment of the special term affirmed.[29]

ORR v. ORR.

(Appellate Court of Illinois, 1913. 181 Ill. App. 148.)

Mr. Justice PHILBRICK delivered the opinion of the court.

Mina M. Orr, appellee, was married to one Fred W. Orr, on June 5, 1909. Prior to the time of his marriage to appellee, Fred W. Orr held a benefit certificate in the Modern Woodmen of America in the sum of $2,000. One child, Carol W. Orr, was born of this marriage. Fred W. Orr died on August 17, 1910, intestate, at his father's house where he had been sick for several weeks, leaving surviving him ap-

[29] In accord: Lindell v. Rokes, 60 Mo. 249, 21 Am. Rep. 395 (1875); Dunton v. Dunton, 18 Vict. L. R. 114 (1892), promise to pay a divorced wife as long as she lived soberly, virtuously, and respectably.

pellee and his son, Carol W. Orr. Appellee and her child were dependent upon the father and husband for their support. The father, John W. Orr, was the beneficiary named in this policy at the time of the death of Fred W. Orr, and after his death, proper proofs having been made, the amount of the policy was paid to John W. Orr.

Appellee contends that prior to the death of her husband, it had been her desire that the beneficiary in the said benefit certificate be changed so that she would become the beneficiary. After Fred W. Orr was taken sick and while at his father's house, appellee insists that she and John W. Orr, the father, talked over and discussed the question of the change in the name of the beneficiary in this certificate from John W. Orr, the father, to appellee. That she made known to John W. Orr, her intention to go to her husband while he was sick at the home of John W. Orr and have him surrender the old certificate and to cause to be issued in lieu thereof another benefit certificate in which appellee should be named as beneficiary, so that upon the death of her husband appellee would receive this money. Appellee insists that when her intention of going to her husband for this purpose was made known to John W. Orr that he demurred to her going to his son with this request; fearing that a request of this kind at a time when Fred W. Orr was sick and not expected to recover would result fatally to him; the said John W. Orr promised and agreed with appellee herein that if she would refrain from going to Fred W. Orr who was then dangerously ill, and not worry or bother him concerning the change of beneficiaries that he would hold the policy for the benefit of her and the child, and that he, fearing that if the husband was worried about a change in the beneficiary that the result to the said Fred W. Orr, who was dangerously ill and suffering from a weak heart, might hasten his death and result fatally to him; and that the said John W. Orr then and there promised and agreed to and with appellee that if she would refrain from approaching Fred W. Orr upon this subject that he would guarantee to her and see that she and her child received the benefit of this certificate; and that if his son did not recover from that sickness he would collect the same and hold it for the benefit of her and the child; and that, relying upon the promises of the said John W. Orr, she did refrain and forbear from going to her husband with a request that the beneficiary be changed.

John W. Orr collected the insurance and claims to own and hold the same for his own use and benefit. The suit was originally commenced by appellee as administratrix. Before final judgment, the child died, and thereupon appellee was granted leave and amended the cause of action so as to prosecute the cause in her own name. The trial below resulted in a verdict and judgment against appellant, from which he appeals.

Appellant contends this judgment is erroneous and should be reversed, insisting that the evidence does not sustain the allegations of the declaration regarding the promise alleged to have been made by ap-

pellant to appellee; also, that, conceding that the promise was made, there was no consideration therefor for the reason that she had no power even though she did request her husband to change this policy, to compel him to do so; further, that it was a mere speculation on her part whether or not he would make the change at her request; that the court erred in permitting appellee to amend and prosecute the cause in her own name.

The child died soon after the death of the father, and if appellant made a promise that he would collect the money and pay it over to appellee for the benefit of herself and child, after the death of the child appellee would be entitled to receive the entire amount.

We are satisfied from the testimony of the various witnesses that the contention of appellee that appellant made the promise alleged to have been made to her is fully sustained, and that the verdict of the jury is not contrary to the evidénec and that it cannot be set aside on the ground that there is no evidence to support it.

Appellee had the right to request her husband to make the change of beneficiary in this policy before his death, and secure the benefit of the certificate for herself and child if it was possible for her to do so. The policy was taken out by the deceased before his marriage to appellee and the father then made beneficiary; after appellee and his only child became the natural objects of his bounty, it would only be natural that he should change the beneficiary during his last illness so that they would derive the benefit therefrom, unless some urgent reasons for his not so doing are shown. Appellee at least had the right to go to him and urge this, with such persuasion as she might bring to bear upon him for that purpose. And the father, knowing the condition of his son and desiring that he should recover from his illness, undoubtedly desired to do everything in his power to prevent anything which might worry or aggravate the condition of his son, and to avoid any serious consequence to him by reason of the importunities that the wife might make, promised appellee that if she would refrain from exercising her right in endeavoring to secure a change of beneficiary in this policy and would allow the policy to stand as it was that she and the child should receive the benefits of it, and that he would collect the same and pay it to her.

It is well established that a promise or agreement carried out or completed which deprives the party of any substantial right, when done at the request of another, is a sufficient consideration to sustain the promise by the other party for the fulfillment and enforcement of the agreement then made by him, that one promise is a sufficient consideration for another, and the question of the adequacy of the consideration or the inequality of the consideration is wholly immaterial. And it is wholly immaterial on the question of the consideration for this promise whether or not appellee would have been able to have secured the change in the beneficiary which she desired, it was a valuable consideration, if by acceding to the demands or request of appel-

lant she waived and abandoned a right she then had of endeavoring to persuade her husband to make the wife and child beneficiaries under the policy.

In determining whether there was a valuable consideration for the making of this promise by defendant it is not necessary that there should have been any pecuniary benefit to appellant, if there was a valuable consideration, however small it might have been, then it was sufficient. Parsons on Cont. (6th Ed.) 443; Page on Cont. vol. 1, § 274; Talbott v. Stemmons' Ex'r, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, notes, 21 Am. St. Rep. 693.

We are of the opinion that the agreement of appellee to refrain from going to her husband in his then condition with the request which she had the right to make and which she had the right to expect would be granted her, was sufficient consideration on her part to sustain the promise of appellant that in case the husband should not recover from that sickness appellant would collect the money and pay the same over to appellee for the benefit of herself and child.

There is no error in this record. The judgment is right and will be affirmed.

Affirmed.[30]

WHITE v. McMATH & JOHNSTON.

(Supreme Court of Tennessee, 1913. 127 Tenn. 713, 156 S. W. 470, 44 L. R. A. [N. S.] 1115.)

Action by McMath & Johnston against W. C. White. A judgment for plaintiff was affirmed by the Court of Civil Appeals, and defendant petitions for a writ of certiorari. Denied.

WILLIAMS, J.[31] This suit was brought by McMath & Johnston against White to recover $240, and is before us on petition of certiorari to reverse the judgment of the Court of Civil Appeals, affirming the judgment of the circuit court of Shelby county in favor of plaintiffs in the last-named court.

McMath & Johnston were engaged in the business, in Memphis, of buying and selling real estate, and had entered into negotiations with the owners of a tract of land near Dundee, Miss., and had examined the land and obtained an offer from the owners to sell same to them at $17.50 per acre, and an acceptance was under consideration. White later made an examination of the tract, and endeavored to negotiate

[30] Forbearance to make unwelcome visits and requests. Sharon v. Sharon, 68 Cal. 29, 8 Pac. 614 (1885); Jamieson v. Renwick, 17 Vict. L. R. 124 (1891). Cf. White v. Bluett, 23 L. J. Ex. 36 (1853), forbearance of son to make complaints to his father held no consideration; "by the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts."

[31] Part of the opinion is omitted.

with its owners; but, in view of the offer then outstanding to McMath & Johnston, the owners of the land would not sell. White then went to the office of McMath & Johnston in an effort to get them out of the way. At his instance and for his benefit the following contract was entered into:

"For a valuable consideration to me in hand paid by McMath & Johnston, receipt of which I hereby acknowledge, I hereby agree that I will purchase from Trotter & Dreyfus, owners, a certain tract of 480 acres of land near Dundee, Miss., and upon delivery to me by owners of satisfactory conveyance therefor I will pay said McMath & Johnston the sum of $240.

"It being expressly understood between the parties hereto that said McMath & Johnston have had said land offered to them by the owners at $17.50 per acre, and they are now considering the purchase of said land on their own account. The consideration for the payment of said sum is relinquishment by said McMath & Johnston of their right to purchase said land at said prices, and leaving me, W. C. White, free to conduct negotiations on my own account with said owners. Sale to any one else caused by me, or in my interest, shall be deemed a sale to me. We agree to perform the above contract [Signed] W. C. White. McMath & Johnston, Incorporated, by F. M. McMath, Pres."

The errors assigned disclose two defenses: (1) That the contract is void, because executed for the purpose of preventing competition, and is, therefore, against public policy;[32] (2) that the contract is not supported by a consideration. * * *

That the contract was supported by a sufficient consideration is held in the cases above cited. Withholding competition, when not opposed to public policy, is a binding consideration. 6 Am. & Eng. Enc. L. (2d Ed.) 746, and cases there cited; Spitz v. Bank, 8 Lea, 641; Bedford County v. Railroad, 14 Lea, 525.

The result of the decree of the Court of Civil Appeals being a correct one the writ of certiorari is denied.[33]

[32] The court held, citing several authorities, that the agreement was not illegal, there being no stifling of competition at a public or auction sale.

[33] Did the agreement destroy the plaintiffs' power of accepting the Dundee offer, or did it create merely a duty not to exercise such power of acceptance? Did it create a power in White to accept the Dundee offer?

The surrender of any legal power that one is privileged to exercise is a sufficient consideration, and so also is the forbearance to exercise such a power, even if it is not surrendered. Schade v. Muller, 75 Or. 225, 146 Pac. 144 (1915), power of filing mechanic's lien; Skinner v. Fisher, 120 Ark. 91, 178 S. W. 922 (1915); Bickel v. Wessinger, 58 Or. 98, 113 Pac. 34 (1911), forbearance to redeem property sold under mortgage foreclosure.

Forbearance to make an offer or bid, or the revocation of an offer already made, or the forbearance to accept an offer, is sufficient consideration. See Hughes v. Foltz, 142 Mo. App. 513, 127 S. W. 112 (1910); Rauch v. Donovan, 126 App. Div. 52, 110 N. Y. Supp. 690 (1908).

GILL v. HAREWOOD.

(In the Common Pleas, 1587. 1 Leon. 61.)

Gill brought an action upon the case against Harewood, and declared, that where the defendant was endebted to the plaintiff in such a sum, and shewed how; the defendant in consideration that the plaintiff, per parvum tempus deferret diem solutionis, &c. did promise to pay, &c. And upon non assumpsit pleaded it was found for the plaintiff, and it was moved in arrest of judgment, that here is not any consideration, for no time is limited for the forbearance, but generally, parvum tempus, which cannot be any commodity to the defendant, for the same may be, but punctum temporis, &c. But the exception was not allowed, for the debt in itself is a sufficient consideration.

MAPES v. SIDNEY.

(Court of Common Pleas, 1623. Cro. Jac. 683.)

Assumpsit; for that the defendant, in consideration the plaintiff would forbear to sue one J. S. on an obligation of eighty pounds, promised to pay to him the said debt; and alledgeth in fact, in the writ, that he forbore to sue the said J. S. per magnum tempus, and that the defendant had not as yet paid it to him, licet requisitus.

The declaration was, that he forbore him per magnum tempus, viz. from such a time of the promise until such a day, which was for a year and a half after the promise, yet he had not paid it.

The defendant pleaded non assumpsit; and it was found against him to the damage of eighty pounds.

Hitcham moved in arrest of judgment.

Lord HOBART, WINCH, and HUTTON, (JONES being absent in Chancery) held, that the plaintiff should recover: for they all conceived that a consideration to forbear to sue a person for such a debt is a good consideration, and it shall be intended a total and absolute forbearance (as HUTTON and WINCH held); and that if the defendant paid it before upon this promise, and after the plaintiff sued for the debt, the plaintiff is chargeable in an action upon the case, for it is an implied promise in the plaintiff that he should forbear his suit totally; but yet when the plaintiff hath forborne a convenient time (when there is no time mentioned), if the defendant do not pay the debt according to his promise, the plaintiff may well sue him upon his promise, and he needs not tarry all his life. And here, when he shows that he forbore per magnum tempus, viz. such a day and year, that well agrees with the writ; and when the date of the writ doth not appear, it shall be intended that he did forbear until the day of the writ; and so the action is well brought.

HOBART, Chief Justice, agreed with them, that the action was well brought, and the declaration good, because he shews he did forbear it

for a convenient time: and he held that he was not bound by this agreement to forbear totally; and denied, that upon this agreement he is chargeable in an assumpsit, if he (after this debt recovered from the defendant) should sue for the same debt; for it is not a promise to restrain him totally, and without express words he is not chargeable by promise. Wherefore it was adjudged for the plaintiff.[34]

DAVIES v. WARNER.

(In the King's Bench, 1620. Cro. Jac. 593.)

Assumpsit. Whereas the defendant's testator was indebted to him in thirty-three pounds; that in consideration the plaintiff would forbear to sue the defendant until he had execution upon such a judgment, the defendant promised to pay the said thirty-three pounds upon request, after he had obtained execution of such a judgment; and alledgeth in facto, that he had obtained execution of the said judgment: et licet requisitus, &c. such a day had not paid.

Upon non assumpsit pleaded, and found for the plaintiff, it was alledged in arrest of judgment, that it doth not appear how he was indebted, nor that he had assets, otherwise there is no cause to bind him.

Sed non allocatur; for if the action were founded upon the debt, then he ought to shew how he was indebted; but it is grounded upon his own promise; and it shall be intended he was indebted; otherwise he would not assume: wherefore it was adjudged for the plaintiff.[35]

[34] The surrender and discharge of any legal right, or a forbearance to enforce it, even though it is not surrendered, is a sufficient consideration. This is true, even though the right is future and subject to an uncertain contingency. Release of "inchoate right of dower" by woman whose husband is still living. Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471 (1913); Holmes v. Winchester, 133 Mass. 140 (1882); Beverlin v. Casto, 62 W. Va. 158, 57 S. E. 411 (1907).

Release from engagement to marry. Snell v. Bray, 56 Wis. 156, 14 N. W. 14 (1882); Henderson v. Spratlen, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655 (1908).

A promise to forbear for a "reasonable time" is sufficient. Traders' Nat. Bank v. Parker, 130 N. Y. 415, 29 N. E. 1094 (1892). So also is actual forbearance for a "reasonable time." Oldershaw v. King, 2 H. & N. 399, 517 (1857).

Of course, the surrender of a privilege (or forbearance to exercise it) is a sufficient consideration. To surrender a privilege is to create a duty to some one. The doing of an act which creates a duty to a third person (e. g., giving a guaranty) is a sufficient consideration. Ziehm v. Frank Steil Brewing Co. of Baltimore City, 131 Md. 582, 102 Atl. 1005 (1917).

[35] In accord: Austin v. Bewley, Cro. Jac. 548 (1619); Linghill v. Broughton, Moore, K. B. 853 (1617).

"If an executor promiseth to a creditor that if he will forbear to sue him until such a time that then he will satisfy the creditor his debt, in that case the executor is liable to pay the debt of his own goods; adjudged." Escrig's Case, 4 Leon. 3 (1589).

DOWDENAY v. OLAND.

(In the Queen's Bench, 1599. Cro. Eliz. 768.)

Error of a judgment in the Common Pleas, in Trinity term, 40 Eliz. Roll 2716. Assumpsit, whereas he was obliged to the defendant by an obligation in £40 for the payment of £20 at a day mentioned in the condition; and whereas the plaintiff intending to exhibit a bill in the Chancery against the defendant pro eo, that he confessed that he was satisfied of the debt, took forth a writ of subpœna out of Chancery, returnable at a day certain; that the defendant, in consideration the plaintiff would desist from his suit in the Chancery, assumed to the plaintiff to restore that bond upon request: and alledgeth in fact, that he required the redelivery of that bond, and his desisting from the said suit; and that the defendant had not delivered it, but prosecuted suit thereupon, &c. The defendant pleaded non assumpsit; and found against him. And after divers motions in the Common Pleas in stay of judgment, because the consideration is not sufficient, being only to stay a suit in Chancery, which is matter of conscience, and not at the common law, it was held to be good enough, and adjudged for the plaintiff.—And now error being brought, the judgment was affirmed.

RIVETT and RIVETT'S CASE.

(In the King's Bench, 1588. 1 Leon. 118.)

Edmund Rivett brought an action upon the case against George Rivett, and declared, that where it was pretended by the defendant, that one R. made his will, and by the same devised certain legacies to the defendant, and the plaintiff upon that had sued in the Prerogative Court of Canterbury for to disprove the said will; and if he prosecutus fuisset, he might have disproved the said will and so defeated the defendant of his pretended legacies: the defendant in consideration that the plaintiff, ultra non procederet, did promise to give to the plaintiff one hundred pounds; and averred, that he had surceased his said suit; and further declared, that licet the defendant, ad hoc requisitus fuerit tali die & anno, &c. It was moved in arrest of judgment, that here is not any consideration, for the defendant hath not any means to compel the plaintiff for to surcease his suit, for there is not any cross promise set forth in the declaration; and although that he doth surcease his suit, yet he may begin the same again, and therefore the plaintiff ought to have shewed in his declaration a release or other discharge of it. Judgment was given for the plaintiff.[36] * * *

[36] A portion of the report is omitted.

J. H. QUEAL & CO. v. PETERSON.

(Supreme Court of Iowa, 1908. 138 Iowa, 514, 116 N. W. 593, 19 L. R. A. [N. S.] 842.)

Action on a written instrument of guaranty. At the conclusion of the evidence there was a directed verdict for defendant, and from the judgment thereon plaintiff appeals. Affirmed.

McCLAIN, J. On April 8, 1896, one Nielson was indebted to plaintiff on a promissory note for $120 then past due, and defendant executed to plaintiff his promise to pay the same in the following words: "In regard to the N. S. Nielson note of $120 held by you and due September 1, 1895, if this note is not paid by said Nielson by October 1, 1896, I hereby agree to take it up October 1, 1896, for $100."

Action being brought against defendant on this obligation, nonpayment by Nielson of his note being alleged, defendant denied his liability on the ground that his obligation was entered into without any consideration, and the evidence showed that, while defendant did voluntarily undertake to satisfy Nielson's obligation for $120, with interest, by paying $100 at a future date, provided Nielson's note then remained unpaid, there is no evidence that defendant requested plaintiffs to forbear suit on the Neilson note, or that plaintiffs agreed to forbear such suit, or that plaintiffs did forbear in reliance on defendant's guaranty. An agreement to forbear for a time the enforcement of a claim is a valid consideration for the promise of a third person to pay. Burke v. Dillin, 92 Iowa, 557, 564, 61 N. W. 371; Rix v. Adams, 9 Vt. 233, 31 Am. Dec. 619. While it seems to have been thought at one time that the promise to forbear which would serve as consideration for a guaranty by a third person must be for a definite time, or for a reasonable time, nevertheless it has been held that, where there is an agreement to forbear, it will be presumed to be for a reasonable time in the absence of any stipulation as to a specified time. Strong v. Sheffield, 144 N. Y. 392, 39 N. E. 330; Sidwell v. Evans, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387. If the creditor does in fact forbear from suing at the request of another, there is a good consideration for the guaranty of the indebtedness in connection with such request. Crears v. Hunter, 19 Q. B. D. 341.[37] But the mere fact of forbearance is not sufficient evidence from which a promise to forbear may be presumed, in the absence of any circumstances from which such agreement may be inferred. Manter v. Churchill, 127 Mass. 31.

[37] Forbearance to press a claim against A. is a sufficient consideration for a promise of B. to pay A.'s debt, if so agreed. Thayer v. Pray's Estate, 111 Minn. 449, 127 N. W. 392 (1910); Wells & Morris v. Brown, 67 Wash. 351, 121 Pac. 828, Ann. Cas. 1913D, 317 (1912); United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. Law, 286, 78 Atl. 203, Ann. Cas. 1912A, 412 (1910), promise to forbear; Silver v. Graves, 210 Mass. 26, 95 N. E. 948 (1911); Waters v. White, 75 Conn. 88, 52 Atl. 401 (1902); Markel v. Di Francesco, 93 Conn. 355, 105 Atl. 703 (1919); Estate of Thomson, 165 Cal. 290, 131 Pac. 1045 (1913).

As the defendant did not request plaintiffs to forbear suit on the Nielson note, and plaintiffs did not agree to do so, the fact of forbearance does not indicate that it was in pursuance of a promise to forbear, nor does the forbearance itself imply a request. Had plaintiffs brought suit against Nielson immediately after the execution of defendant's obligation, Nielson could not have defended on the ground that there was an agreement of extension. Therefore plaintiffs, having remained without interruption entitled to all the rights which they had against Nielson, suffered no detriment in consequence of the guaranty given by defendant, and, on the other hand, neither Nielson nor defendant received any benefit in consequence of defendant's promise. It is clear that under such circumstances defendant's promise to pay Nielson's debt was without consideration.

Judgment of the trial court is therefore affirmed.[38]

SCHROYER et al. v. THOMPSON et al.

(Supreme Court of Pennsylvania, 1918. 262 Pa. 282, 105 Atl. 274, 2 A. L. R. 1567.)

Assumpsit on notes by E. E. Schroyer and others against Josiah V. Thompson and others. From an order refusing judgment for plaintiffs for want of a sufficient affidavit of defense, plaintiffs appeal. Reversed, and record remitted to lower court, with directions to enter judgment against defendants, unless cause is shown.

FRAZER, J. Plaintiffs' action is founded on two demand notes signed by one defendant as principal and the others as sureties, and assigned by the payees to plaintiffs. The sureties each filed an affidavit of defense alleging release from liability, owing to a memorandum indorsed on the back of the notes, subsequent to their execution and without consent of the sureties, stating, "All overdue int. to bear int. to be compounded semiannually." A rule for judgment for want of a sufficient affidavit of defense was discharged, and plaintiffs appealed.

It is not denied the agreement to pay interest on interest is a material alteration affecting the sum payable for interest within the meaning of the 125th section of the Negotiable Instrument Act of May 16, 1901 (P. L. 194). Plaintiffs contend, however, the memorandum is without effect so far as the sureties are concerned, because not on the face of the instrument, and consequently not an alteration of its terms, but merely a separate agreement between maker and payee. Discussing or deciding this question is unnecessary since, under the view we take of the case, the decree of the court below must be reversed for a different reason.

[38] Is not forbearance in fact a detriment to the creditor and a benefit to the debtor, irrespective of any agreement? What caused the creditor to forbear in this case?
In accord: Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403 (1888).

A surety has a right to require strict performance of the contract, and an agreement between the principals varying its terms in a material part without the consent of the surety will release him from liability. Bensinger v. Wren, 100 Pa. 500; Nesbitt v. Turner, 155 Pa. 429, 26 Atl. 750; Robbins v. Robinson, 176 Pa. 341, 35 Atl. 337. It must be conceded that an agreement between the principals having the effect of altering the written terms of the contract must be based upon a sufficient consideration, that is, must be a valid and enforceable contract.

The affidavit of defense filed contained no averment of an extension of time for payment of interest, nor do they set up other facts capable of being construed as a consideration for the agreement to pay compound interest. No consideration appears in the memorandum unless it be an extension of the time for payment of interest implied by the recognition of nonpayment from time to time by reason of the provision that it should bear interest. Nothing is said specifically as to extension of time, or concerning an agreement not to enforce payment of interest for a definite or indefinite period. While forbearance to sue has always been recognized as an adequate consideration for a promise made in reliance thereon, there must be an agreement to that effect; mere forbearance without an agreement has been held not a good consideration, because of there being nothing to prevent the bringing of suit at any time. Clark v. Russel, 3 Watts, 213, 27 Am. Dec. 348; Sidwell v. Evans, 1 Pen. & W. 383, 21 Am. Dec. 387; Cobb v. Page, 17 Pa. 469; Saalfield v. Manrow, 165 Pa. 114, 30 Atl. 823. While it has been said that actual forbearance at the instance of a defendant may also be sufficient (Clark v. Russel, supra), yet, in such case, the burden is on the one relying thereon to show by clear and satisfactory proof that the request to forbear was, in fact, the inducing cause of the act of forbearance. Clark v. Russel, supra.

In the present case the court below, in discussing this question, stated there was an actual forbearance in the enforcement of the payment of interest for a period of nearly four years, and such forbearance was sufficient consideration for the agreement to pay compound interest. The difficulty with this view of the case is that the record fails to show the delay of four years in collecting the interest was pursuant to a request or promise made to the payee by the maker. Under the circumstances there was no valid agreement to pay compound interest, the sureties are not prejudiced, and there is nothing to effect their discharge from liability.

The judgment is reversed, and the record remitted to the court below, with directions to enter judgment against defendants for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court below why such judgment should not be entered.

ALLIANCE BANK v. BROOM.

(In the Court of Chancery, 1864. 2 Drew. & S. 289.)

This case came on upon a demurrer.

It appeared, from the bill, that in June, 1864, the Alliance Bank opened a loan account with the defendants, who are merchants at Liverpool, and that such loan account was continued down to September 19th, 1864, when there was a balance due from the defendants to the bank on such loan account to the amount of £22,205 15s. 1d.

On September 19th, 1864, the plaintiffs requested the defendants, Messrs. Broom, to give them some security for the amount so due, and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the bank the following letter:

"Liverpool, September 19th, 1864.

"Dear Sir: We hand you the following particulars of produce, which we propose to hypothecate against our loan account, and at the same time undertake to pay the proceeds as we receive them, to the credit of the said account."

The letter then contained a list of goods and their values, and was signed by Messrs. Broom.

In pursuance of this letter the plaintiffs, on September 20th, 1864, applied to the defendants for the warrants for delivery of the goods mentioned in the letter, and the defendants promised to deliver the warrants to the plaintiffs as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants, or other documents relating to the goods, to the plaintiffs, and threatened and intended to deliver them to other persons; and the bill charged that the plaintiffs were entitled to a lien or charge upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be ordered to deliver to the plaintiffs the warrants and other documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due to them on the loan account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration; and therefore one which the Court would not enforce.

The VICE-CHANCELLOR: The defendant demurs to the plaintiff's bill in this case, on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration—that it is, in fact, a nudum pactum, which the Court will not enforce; and in support of this proposition it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought

an action for the payment of the debt; and that they could have done so is perfectly true.

Now, according to the facts stated in the bill, a demand was made by the creditor for security; and upon that demand a promise and agreement was made by the debtor that he would give such security; and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

On this ground the demurrer must be overruled.[39]

STRONG v. SHEFFIELD.

(Court of Appeals of New York, 1895. 144 N. Y. 392, 39 N. E. 330.)

ANDREWS, C. J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is nudum pactum. The law governing commercial paper which precludes an inquiry into the consideration as against bonâ fide holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an

[39] See, in accord, In re All Star Feature Corp. (D. C.) 232 Fed. 1004 (1916), where Hand, J., said: "It is quite true that here there was no express reference to forbearance in the contract, and no statement that the lien was in exchange for it, but the situation reasonably implied that the parties so intended it." Schoening v. Maple Valley Lumber Co., 61 Wash. 332, 112 Pac. 381 (1910).

agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforcible agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. Morton v. Burn, 7 A. & E. 19; Wilby v. Elgee, L. R., 10 C. P. 497; King v. Upton, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; Leake on Con., p. 54; Am. Lead. Cas., Vol. II., p. 96 et seq. and cases cited.[40] The general rule is clearly, and in the main accurately, stated in the note to Forth v. Stanton (1 Saund. 210, note b). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. Oldershaw v. King, 2 H. & N. 517; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593. The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243; Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor

[40] In some cases it has been held that mere forbearance cannot be a consideration and that there must be a promise to forbear, wholly overlooking the possibility of a unilateral contract. See Manter v. Churchill, 127 Mass. 31 (1879); Shupe v. Galbraith, 32 Pa. 10 (1858); Lambert v. Clewley, 80 Me. 480, 15 Atl. 61 (1888); Smith v. Bibber, 82 Me. 34, 19 Atl. 89, 17 Am. St. Rep. 464 (1889). But see Moore v. McKenney, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753 (1890).

at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial Court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

All concur, except GRAY and BARTLETT, JJ., not voting, and HAIGHT, J., not sitting.

Ordered accordingly.

BARNARD v. SIMONS.

(1617. 1 Roll. Abr. f. 26, pl. 39; 1 Vin. Abr. 312, pl. 39.)

If A. makes a void assumpsit to B., and then a third party comes to B. and promises to pay him £10 in consideration that B. will relinquish the assumpsit made to him by A., there is no valid consideration to charge him on the promise, because the first assumpsit was void.

LOYD v. LEE.

(At Nisi Prius, before Pratt, C. J., 1718. 1 Strange, 94.)

A married woman gives a promissory note as a feme sole; and after her husband's death, in consideration of forbearance, promises to pay it. And now in an action against her it was insisted that though she being under coverture at the time of giving the note, it was voidable for that reason; yet by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration. But the CHIEF JUSTICE held the contrary, and that the note was not barely voidable, but abso-

lutely void; and forbearance, where originally there is no cause of action, is no consideration to raise an assumpsit. But he said it might be otherwise where the contract was but voidable. And so the plaintiff was called.

BIDWELL v. CATTON.

(In the King's Bench. 1618. Hobart, 216.)

Bidwell, an attorney, brought an action of the case against Catton, executor of Reve, and counted, that whereas he had in Michaelmas term 14 Jac. prosecuted an attachment of privilege against Reve the Testator, retornable in Hil. term, the testator knowing of it, in consideration that at his request, the plaintiff would forbear to prosecute the said writ any farther against the testator, the testator did promise to pay him fifty pounds, and then avers, &c. And after a verdict it was excepted in arrest of judgment.

First, that it was not alledged, that the plaintiff had any just cause of action.

Secondly, that this action still remains.

Thirdly, that this kind of action would not lie against an executor, because it is not in the nature of a debt.

But THE COURT nevertheless gave judgment: For first, suits are not presumed causeless, and the promise argues cause, in that he desired to stay off the suit. Quære, if the defendant had averred that there was no cause of suit.

Secondly, though this did not require a discharge of the action, yet it requires a loss of the writ, and a delay of the suit, which was both a benefit to the one, and a loss to the other.

Thirdly, it was agreed, that if the testator promise to build an house, or to do some such collateral act, that an assumpsit upon that will not lie against the executor. But the Court held an action of debt would well lie against the testator for the fifty shillings, being a sum of money due upon a contract in which he received quid pro quo; for the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining. And 17 E. 4. If a man promise a chirurgeon money to cure a poor man, he shall have an action of debt for it.

WADE v. SIMEON.

(In the Common Pleas, 1846. 2 C. B. 548.)

Assumpsit.[41] The first count of the declaration stated that the plaintiff had brought a previous suit against the defendant in the court of Exchequer, to recover two sums amounting to £2,000; that issue was joined in said action, and trial set for December 7, 1844;

[41] The statement has been condensed and concurring opinions are omitted.

that the defendant had notified the plaintiff that he would apply to the Chancery for an injunction; that thereupon, on the day before the day set for trial, in consideration that the plaintiff would forbear prosecuting and would stay all proceedings in the said action until December 14, 1844, the defendant promised the plaintiff that he would on that day pay the sum of £2,000 with interest and costs, and that the application for an injunction should be abandoned. The plaintiff averred that he had forborne to prosecute until December 14, and had stayed all proceedings, but the defendant had failed and refused to pay as agreed and had prevented the plaintiff from getting any judgment in the action that had been brought. * * *

Fourth plea,—to the first count,—that the plaintiff never had any cause of action against the defendant in respect to the subject-matter of the action in the Court of Exchequer in that count mentioned; which he the plaintiff, at the time of the commencement of the action, and thence until and at the time of the making of the promise in the said first count mentioned, well knew—Verification. * * *

Special demurrer to the fourth plea, * * *

The defendant joined in demurrer.

TINDAL, C. J. The only question now remaining is upon the demurrer to the fourth plea. I am of opinion that the fourth plea is a good and valid plea, on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of £1,300 and £700, respectively, which action was about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action, until the 14th of December then next, the defendant promised the plaintiff that he would on that day pay the money, with interest, and costs; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named; but that defendant did not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until the time of the making the promise in the first count mentioned, well knew. By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost contra bonos mores, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, somewhat beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be; for, in con-

templation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged that the cases cited for the defendant were not cases where actions had already been brought, but only cases of promises to forbear commencing proceedings. I must, however, confess that, if that were so, I do not see that it would make any substantial difference. The older cases, and some of the modern ones too, do not afford any countenance to that distinction. In Tooley v. Windham (Cro. Eliz. 206, more fully reported, 2 Leon. 105), it is stated that the plaintiff had purchased a writ out of Chancery against the defendant, to the intent to exhibit a bill against him; upon the return of the writ, which was for the profits of certain lands, which the father of the defendant had taken in his lifetime, the defendant, in consideration he would surcease his suit, promised to him, that, if he could prove that his father had taken the profits, or had the possession of the land under the title of the father of the plaintiff, he would pay him for the profits of the land: and the court held that the promise was without consideration, and void. There the suit was in existence at the time of the making of the promise. So, in Atkinson v. Settree (Willes, 482), an action had been commenced at the time the promise was made. These cases seem to me to establish the principle upon which our present judgment rests; and I am not aware that it is at all opposed by Longridge v. Dorville (5 B. & Ald. 117). It may be that the peculiar circumstances of that case took it out of the general rule. The ship was under detention by virtue of process from the Admiralty Court; the event of the suit in that court was uncertain; neither party could foresee the result; and therefore the relinquishment by the plaintiff of his hold upon the ship might well be a good consideration for the promise declared on. Here, however, there was no uncertainty: the defendant asserts, and the plaintiff admits, that there never was any cause of action in the original suit, and that the plaintiff knew it. I therefore think the fourth plea affords a very good answer, and that the defendant is entitled to judgment thereon.[42]

[42] In accord: Majors v. Majors, 92 Neb. 473, 138 N. W. 574 (1912); Nicholson v. Neary, 77 Wash. 294, 137 Pac. 492 (1914), forbearance to sue on a note void for lack of consideration; Osborne v. Fridrich, 134 Mo. App. 449, 114 S. W. 1045 (1908), on a note known to be void for usury.

SPRINGSTEAD et al. v. NEES et al.

(Supreme Court, Appellate Division, of New York, 1908. 125 App. Div. 230, 109 N. Y. Supp. 148.)

Action by Anna Springstead and others against George Nees and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

JENKS, J. This action was tried by stipulation as a common-law action before the court without a jury. The parties are all of the surviving children of Nees, deceased, who died intestate, leaving them his sole heirs at law. Nees died, the owner and seised of realty called the "Sackett Street Property" and the owner of realty, called the "Atlantic Avenue Property," which he held by deed to him as trustee for his children, Sophia and George. Shortly after Nees' death all of the parties, an attorney at law, and friends met in Nees' house. Nees' strong box was opened, and when the deed to the Atlantic avenue property was found therein the attorney handed it to Sophia, saying: "This is yours." The evidence for the plaintiffs is that they, or some of them, were surprised to learn that this deed was to their father in trust for two of the children; for theretofore they had believed that he was the owner and seised in fee. They expressed their surprise, and there were murmurings. Thereupon Sophia spoke up, saying, "We will give you our share in the Sackett street property if you don't bother us about the Atlantic avenue property," and George assented. The Sackett street property was sold thereafter. This action is brought by the other three children against Sophia and George, upon that alleged promise of Sophia and George, to recover their proportionate share of the proceeds of that sale. Sophia and George testified that no such promise ever was made. The learned court gave judgment for the defendants, dismissing the complaint, with costs.

After finding the preliminary facts, which were not disputed, the court found that the defendants, after the death of their father, were seised in fee simple of the Atlantic avenue property and held indefeasible title thereto; that the plaintiffs had no color of right in the Atlantic avenue property, and did not at any time threaten or attempt to assert any claim of right hostile to the defendants in that property; that there was no compromise, either wholly or partly executed, between the parties, affecting rights which the plaintiffs might have in that property; that the plaintiffs had given up no rights in that property, nor had they changed their position therein; and that a promise (referring to which I have heretofore described as shown by the testimony for the plaintiffs) made by the defendants to the plaintiffs that, if the plaintiffs "would not 'molest,' or 'bother,' or 'make a fuss' about, the defendants' rights on the Atlantic avenue property, the defendants would give the plaintiffs their share in the Sackett street property, if made, would have been without consideration." The plaintiffs appeal.

The record sustains the facts found. Assuming that such promise was made, I am of opinion that there was no consideration shown. In

Rector, etc., v. Teed, 120 N. Y. 583, 24 N. E. 1014, Vann, J., for the court says (pages 586, 587 of 120 N. Y., page 1015 of 24 N. E.):

"'A valuable consideration may consist of some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' 3 Am. & Eng. Cyclopedia of Law, 831; Currie v. Misa, L. R. 10 Ex. 162; Chitty on Cont. (9th Am. Ed.) 29; 2 Kent's Comm. 465. It is not essential that the person to whom the consideration moves should be benefited, provided the person from whom it moves is in a legal sense injured. The injury may consist of a compromise of a disputed claim or forbearance to exercise a legal right; the alteration in position being regarded as a detriment that forms a consideration independent of the actual value of the right forborne."

The consideration for the promise cannot be found in the fact that there was a compromise of a disputed claim, for there is no evidence thereof. It must rest, then, upon the forbearance to exercise a legal right. Forbearance to assert either a legal or an equitable claim is sufficient consideration, as we have seen. See. also, Wharton on Contracts, § 532, and authorities cited; Leake on Contracts (Randall's Ed.) 438; 1 Parsons on Contracts (15th Ed.) p. 441. It seems unnecessary to consider the conflict over the question whether forbearance as to a claim without foundation can constitute good consideration. See 1 Parsons on Contracts (8th Ed.) p. 441, note, discussing the various authorities. It seems to be the rule with us that it is not essential that the claim should be valid; but it is enough if it could be regarded as doubtful or colorable. In White v. Hoyt, 73 N. Y. 515, the court cites the language of Richardson v. Mellish, 2 Bing. 229: "It is not necessary that the party should have a right to hold, if he be doubtful whether he has a right to hold"—and of Mr. Chitty, when he describes a claim as "colorable." See Cox v. Stokes, 156 N. Y. 491–505, 51 N. E. 316; Zoebisch v. Von Minden, 120 N. Y. 406–419, 24 N. E. 795. But if the claim be not even doubtful, or colorable, or plausible, in that there is no reason for an honest belief that it has some foundation in law or in equity, then forbearance applied to it is not good consideration. Parsons in his final note (ut supra) says:

"In all jurisdictions it would be admitted that forbearance of a claim is no consideration, if the claimant knows his claim to be unfounded or conceals material facts relating thereto"—citing authorities.

Wharton on Contracts, § 532, says:

"The fact that the suit is not well founded makes no difference, if it has a show of title though it is otherwise in cases of fraud, and in cases where the claim to be forborne is utterly destitute of support."

See, too, Parsons, supra; Bishop on Contracts, § 63, and note; Wald's Pollock on Contracts, p. 214; Leake on Contracts, p. 439; Smith on Contracts (7th Ed.) p. 187, note 1.

In the case at bar the court, as I have said, found properly that the plaintiffs had no color of right in the Atlantic avenue property; nor

did they at any time threaten or attempt to assert any claim. The evidence of the plaintiffs is that, when they were surprised to find that the deed to the Atlantic avenue property was in trust for but two of their number, thereupon and without any further reason, save that they expressed surprise and were dissatisfied, the defendants made the promise in question. The promise was not even in response to any suggestion of any possible claim then or thereafter against the deed, or despite it, or of any action adverse to it. There was no suggestion, then or at any time thereafter, made that the deed was invalid for any reason, or of any ground upon which it was open to attack. Indeed, I can discover no reason upon the evidence how any of the parties could seriously suppose that even a doubtful or a colorable claim could be asserted then or thereafter. It does not appear that anything was ever done, then or thereafter, in consequence of the alleged promise, or that the rights of the parties were in any way thereby changed or affected.

I think that the judgment must be affirmed, with costs. All concur, except

HOOKER, J. (dissenting). The circumstances surrounding the opening of the strong box after decedent's death and the finding there of a deed running to the defendants, and the conversation then between the children, seem to me such as to present a situation where there was at least color of a valid claim by the plaintiffs, by reason of their heirship, to the Atlantic avenue property. One of these circumstances is that the strong box where the deed was found belonged to the decedent, and it might well be doubted whether there had ever been a delivery of the deed before the grantor's death, which was necessary to pass title. If such claim was open to be urged, there was consideration for the promise.

The judgment should be reversed.

COOK et al. v. WRIGHT.

(In the Queen's Bench, 1861. 1 Best & S. 559.)

Action on two promissory notes. The plaintiffs, as commissioners acting under the Whitechapel improvement act, had expended money in paving streets adjoining certain houses owned by one Mrs. Bennett, a nonresident. One of the houses was occupied by the defendant as tenant, and he acted as Mrs. Bennett's agent in collecting rents on the other houses and in paying taxes. The defendant informed the plaintiffs of these facts, and they nevertheless believed that the defendant was the person described in the improvement act as the owner against whom the charges for paving should be assessed. The defendant insisted that he was not bound to pay under the act; but when the plaintiffs threatened proceedings against him he induced the plaintiffs to reduce the amount of the charges and to give further time for payment, in return for his giving the notes now sued upon.

At the trial a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff. In pursuance of such leave, a rule to show cause was obtained on the ground that there was a sufficient consideration shown by the evidence and that the plaintiff was entitled to a verdict.[43]

BLACKBURN, J. In this case it appeared on the trial that the defendant was agent for a Mrs. Bennett, who was nonresident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defendant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that, if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments. He gave three promissory notes for the three instalments. The first was duly honoured; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt (Bell v. Gardiner, 4 Man. & G. 11), and, according to the cases of Southall v. Rigg and Forman v. Wright, 11 C. B. 481, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant, either of law or fact. What he did was not merely the

[43] This statement is condensed from the original report.

making an erroneous account stated, or promising to pay a debt for which he mistakenly believed himself liable. It appeared on the evidence that he believed himself not to be liable, but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In Longridge v. Dorville, 5 B. & Ald. 117, it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In Atlee v. Backhouse, 3 M. & W. 633, where the plaintiff's goods had been seized by the excise, and he had afterward entered into an agreement with the Commissioners of Excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment (page 650) on the ground that this agreement of compromise honestly made was for consideration and binding. In Cooper v. Parker, 15 Com. B. 822, the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff has actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending is void. Edwards v. Baugh, 11 M. & W. 641, was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pages 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real bonâ fide claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was bonâ fide intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterward opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his liti-

gation, he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance, in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceedings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the bonâ fides of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.

Rule absolute.

PROUT v. INHABITANTS OF FIRE-DIST. OF TOWN OF PITTSFIELD.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 450, 28 N. E. 679.)

Action of contract by Florence Prout against the Inhabitants of the Fire-District of the Town of Pittsfield on an offer of compromise, and an acceptance thereof, of a claim which plaintiff had against defendant. Judgment for plaintiff and defendant appeals. Affirmed.

ALLEN, J. The defendant is a fire-district, duly organized and established under the general laws of the commonwealth. St. 1844, c. 152; Pub. St. c. 35, §§ 40–61. By express provision of statute, fire-districts may raise money for the purchase of engines and other articles necessary for the extinguishment of fires, for the purchase of land, for the erection and repairs of necessary buildings, for the erection and maintenance of street lamps within their limits, and for other incidental expenses of the fire department. Pub. St. c. 35, § 51. Certain other powers were specially conferred upon the defendant by the legislature, in respect to water supply and to sewers and drains. St. 1854, c. 210; St. 1867, c. 132. By virtue of its general authority, defendant established an electric fire-alarm system, one of the wires of which ran into the house where the plaintiff lived, and during a thunder-storm she was injured by electricity conducted into the house by

means of the wire. It is not controverted that the establishment of the fire-alarm system was within the defendant's authority. The plaintiff sued the defendant for this injury, and obtained a verdict, with substantial damages, in the superior court, under instructions from the presiding justice authorizing the same to be rendered. Exceptions were taken to these instructions, and before the same were argued in this court the defendant passed the vote which is the subject of the present action, appropriating a sum less than the verdict to be paid in compromise of the action and claim, and the plaintiff accepted the vote and the offer therein contained.

The defendant now contends that it was not liable in the first instance for any negligence of the fire department, or of its members and officers, and that it was wholly beyond its power to assume liability therefor by a compromise of the plaintiff's claim. This latter ground of objection is clearly untenable, and we have therefore no occasion to consider the former. The defendant, as a fire-district, is a quasi corporation, with certain limited corporate powers, which are to be measured by its other powers, its privileges and duties. Among its inherent corporate powers is the power to sue and be sued. School-Dist. v. Wood, 13 Mass. 193; Stebbins v. Jennings, 10 Pick. 173, 188; Linehan v. Cambridge, 109 Mass. 212; 2 Kent, Comm. 277, 278, 283, 284, and notes; Ang. & A. Corp. §§ 23, 24, 78; Dill. Mun. Corp. §§ 21, 22. The general power to compromise doubtful and disputed claims is necessarily incident to the power to sue and the liability to be sued. If a claim against the defendant cannot be adjusted by way of compromise, neither could a claim in its favor. If this doctrine were applied generally to all claims, the result would be that in all disputed cases the defendant must perforce engage in a litigation, the expense of which would be certain, but the result doubtful. The defendant would be under the necessity of insisting at all hazards upon a judicial determination of all its controverted rights, and would be bound to pursue or resist all doubtful claims until final adjudication by the court of last resort.

The learned counsel for the defendant does not carry his objection so far as this, but he contends that liability for negligence of the kind now in question is so far removed from any obligation imposed upon the defendant by law that it was entirely outside of its power to assume any such liability, even by way of compromise. This argument overlooks the ground upon which compromises rest and are upheld by courts. Whether the result of a litigation depends chiefly upon the ascertainment of the facts by the verdict of a jury, or upon the determination of the rules of law found applicable by the court, in either case there is an uncertainty until the decision is reached. No better illustration could be needed than the present case affords. The counsel for the defendant asks us to say that the rules of law so clearly exempted the fire-district from liability that a settlement of the claim by way of compromise was ultra vires. But the learned justice of the

superior court ruled that the fire-district might be held liable. It certainly could not be said, therefore, that the law was so plain as to be free from doubt.[44] It must at least be assumed that the defendant was involved in a litigation in which the result might be adverse to it. If the defendant had chosen to rest content with the verdict of the jury and the ruling of the judge of the superior court, there would have been a final judicial determination that it was liable. Could it be urged, in such a case, that it would be beyond its powers to raise money to pay the judgment against it? Or could it be urged that it would be beyond its powers to submit to the result in the superior court, without taking or pressing in this court exceptions in matters of law?

What the defendant has done is, in effect, to agree to waive its exceptions taken at the trial in consideration that the plaintiff will accept a sum less than the verdict of the jury. This verdict was rendered in the due course of the administration of justice. Although subject to be set aside upon a further hearing in this court of the matters of law involved in the case, it was prima facie an obligation resting upon the defendant, which it was in great danger of being compelled to meet. Certainly the plaintiff's claim cannot be said to be merely frivolous or vexatious, or one not urged in good faith. It must be conceded that the plaintiff, or those acting for her, might well believe in its justice and legality, since the court and jury have upon a trial upheld it. There is no suggestion of fraud or misrepresentation practiced on the defendant. Under these circumstances, we can see no good ground for holding that the compromise was beyond the power of the fire-district, or that its promise to pay was founded on no sufficient consideration. The power is incident to its liability to be sued. Cushing v. Stoughton, 6 Cush. 389; Drake v. Stoughton, 6 Cush. 393; Matthews v. Westborough, 131 Mass. 521, Id., 134 Mass. 555; Medway v. Milford, 21 Pick. 349, 354; Bean v. Jay, 23 Me. 117; Petersburg v. Mappin, 14 Ill. 193, 56 Am. Dec. 501; Agnew v. Brall, 124 Ill. 312, 16 N. E. 230; Supervisors v. Bowen, 4 Lans. (N. Y.) 24, 30, 31; Supervisors v. Birdsall, 4 Wend. (N. Y.) 453; 1 Dill. Mun. Corp. §§ 30, 477, 478.

The plaintiff's claim, whether on a final determination it might or might not be found to be valid, was sufficiently substantial to furnish a good consideration for the compromise. Barlow v. Insurance Co., 4 Metc. 270; Cobb v. Arnold, 8 Metc. 403; Allis v. Billings, 2 Cush. 19, 25, 26; Leach v. Fobes, 11 Gray, 506, 71 Am. Dec. 732; Kerr v. Lucas, 1 Allen, 279; Easton v. Easton, 112 Mass. 438, 443; Riggs v. Hawley, 116 Mass. 596; Wilton v. Eaton, 127 Mass. 175; Bank v. Geary, 5 Pet. 99, 114, 8 L. Ed. 60; Miles v. New Zealand Alford Est. Co., 32 Ch. Div. 266, 283, 284, 291, 292, 297, 298; Ex parte Banner, 17 Ch. Div. 480; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Cook

[44] The rule of law generally followed is that a municipal corporation is not bound to pay for injuries caused by the operation of its fire department. A few cases have held contra. See 29 Yale L. Jour. 911.

v. Wright, 1 Best & S. 559; Metc. Cont. 177; Poll. Cont. 181, 182, 407; Chit. Cont. (11th Amer. Ed.) 35–41, 46–50. The case of Palfrey v. Railroad Co., 4 Allen, 55, is to be distinguished on the ground that there it was plain that the plaintiff had no real claim to be compromised; and Wade v. Simeon, 2 C. B. 548, rests on the same ground. The defendant's further objection that the plaintiff has given no complete and unreserved acceptance of the defendant's vote cannot prevail. The plaintiff's acceptance was complete and unreserved, but the defendant's prudential committee sought to repudiate the defendant's vote, the effect of which, if successful, would be to leave the plaintiff's original action as it was. The plaintiff has never withdrawn from its agreement to accept the sum voted by the defendant in full satisfaction of all her claims.

Judgment for the plaintiff affirmed.[45]

BLOUNT v. WHEELER et al.

(Supreme Judicial Court of Massachusetts, 1908. 199 Mass. 330, 85 N. E. 477, 17 L. R. A. [N. S.] 1036.)

Suit by Edith Eliza Dillaway Blount against Frank Henry Dillaway and Frank A. Wheeler to compel specific performance of an agreement of compromise. Decree for plaintiff, and defendants appeal. Affirmed.

Loring, J.[46] This is a bill brought by a sister against her brother and against the executor of the will of their mother. The plaintiff seeks to establish an agreement of compromise between her brother and herself as to the will and property of their mother, and to have the executor directed to pay to her one-third of the residue when his accounts are settled in the probate court and the time for distribution shall have come.

The mother died at 1:30 a. m. on Friday, July 28, 1905, at the City Hospital. There had been an estrangement between the plaintiff and her mother for some 10 years. The brother lived in New York. He reached Boston in the afternoon of the day of his mother's death, and went directly to the house of the plaintiff in Everett. The judge found that on the morning of the 29th the defendant Dillaway told the plaintiff there was a will leaving him everything and her nothing. This was

[45] See, also, Longridge v. Dorville, 5 B. & Ald. 117 (1821); Cook et al. v. Wright, 1 Best & S. 559 (1861); Attorney General v. Supreme Council, American Legion of Honor, 206 Mass. 193, 92 N. E. 151 (1910). If the claim was ill-founded as a matter of positive law, and no question as to the validity of the claim was raised, forbearance is insufficient. First Nat. Bank of Plattsmouth v. Lehnhoff's Estate, 77 Neb. 303, 109 N. W. 164 (1906). If the claim was void because based upon an illegal consideration (as distinguished from insufficient), a forbearance to press the claim by suit is not a valid consideration for a new promise. Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609 (1907).

[46] Part of the opinion is omitted.

the only knowledge she had of the contents of the will. They made the agreement of compromise on the evening of that day. By this agreement the plaintiff promised not to contest the will and the defendant promised that he would share with her, she taking one part and he two parts of the estate.

The mother was buried on Sunday. After the funeral the brother told his sister that he would not keep this agreement. The will was admitted to probate on September 27th, without opposition, and this bill was filed on November 14th.

The cause was heard on the merits, the evidence being taken by a commissioner. The judge made findings of the material facts and ordered a decree to be entered for the plaintiff. In pursuance of that order a decree was entered declaring that by virtue of the agreement of compromise the plaintiff was entitled to one-third of all moneys coming to the defendant in addition to one-third of the legacy of $5 bequeathed to her, and directing the defendant Wheeler as executor to make said payments after the settlement of his final account in the probate court. It was further provided in said decree that the plaintiff should have the same standing in the probate proceedings that she would have had if the plaintiff and defendant had been residuary legatees.

The case is now before us on appeal by both defendants.

1. The first contention of the appellants is that the offer of the defendant was by its terms to ripen into a contract of compromise on the plaintiff's not contesting the probate of the will, that it was withdrawn before the time for such an acceptance came, and therefore no contract ever came into existence. But the plaintiff testified that when the defendant made the offer to her she told him that she would not contest the will. The judge in terms found that to be true. He found that "the plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and in consideration of his agreement to share the estate with her promised not to make any contest." After a careful examination of the whole evidence we see no reason to overturn that finding.

2. The second contention is that on the evidence there was as matter of law no valid consideration because it was not proved that the plaintiff had a fair chance of success in contesting the will. Their argument in support of this contention is that forbearance to prosecute an invalid claim is not a valid consideration for a promise unless "the promisee as a reasonable person believed that she had some fair chance of already succeeding in the contest." As we have already said, the judge found that the plaintiff "acted in good faith" in stating that she would contest the will and in agreeing not to contest it in consideration of his agreement to share with her. The judge further ruled "that she is not required to go further and prove that there was a doubtful ques-

tion as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest and she promised not to exercise that right, and did not exercise it."

There are decisions in other jurisdictions for the position taken by the appellants. A collection of the decisions to that effect may be found in Wald's Pollock on Contracts (3d Am. Ed.) 214, note 23. But since the decision of this court in Prout v. Pittsfield Fire District, 154 Mass. 450, 28 N. E. 679, those cases are not law in this commonwealth, and the earlier case of Palfrey v. Portland, Saco & Portsmouth Ry. Co., 4 Allen, 55, must be taken to be modified accordingly. This court in Prout v. Pittsfield Fire District adopted the rule finally established in England in Miles v. New Zealand Alford Estate Co., 32 Ch. D. 266, in which Cook v. Wright, 1 B. & S. 559, Callisher v. Bischoffsheim, L. R. 5 Q. B. 449, Ockford v. Barelli, 20 W. R. 116, and the doubts thrown on those decisions by Lord Esher, M. R., in Ex parte Banner, 17 Ch. D. 480, 490, were considered at length. The rule there laid down was stated on page 291 with accuracy by Lord Bowen to be: "If an intending litigant bona fide forbears a right to litigate, he does give up something of value." He added, speaking of the case then before him: "I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." Again, on page 292, Lord Bowen says: "When the Master of the Rolls in Ex parte Banner, 17 Ch. D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action, that is to say, one that is bona fide and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case." The case of Prout v. Pittsfield Fire District, 154 Mass. 450, 453, 28 N. E. 679, was affirmed in Kennedy v. Welch, 196 Mass. 592, 83 N. E. 11.

In the case at bar, having regard to the knowledge of the plaintiff, can it be said that her claim was a vexatious or frivolous one? Unless a duly executed will had been made she was entitled as one of the two next of kin to a half of her mother's estate. She had just been told by the other next of kin, her brother, that their mother had left a will by which everything had been bequeathed to him. Even although she had been estranged from her mother for ten years, a determination to examine the will and the circumstances under which it had been made could not be said (having regard to the knowledge of the plaintiff) to be either vexatious or frivolous. We are of opinion that this finding and this ruling were right. The claim in Palfrey v. Portland, Saco &

Portsmouth Ry. Co., 4 Allen, 55, was a frivolous and vexatious one. * * *

Decree affirmed.[47]

MILES v. NEW ZEALAND ALFORD ESTATE CO.

(In the Court of Appeal, 1886. L. R. 32 Ch. Div. 266.)

The New Zealand Alford Estate Company, Limited, was incorporated under the Companies Acts of 1862 and 1867, with articles of association, the material clauses of which were as follows:

"8. The company shall not be bound to recognize any contingent, future, partial, or equitable interest, in the nature of a trust or otherwise, in any share, or any other right in respect of any share, except an absolute right thereto in the person from time to time registered as the holder thereof. * * *"

"23. No shares shall be transferred to a stranger so long as the company or any member is willing to purchase the same at a fair value."

"28. The company may decline to register any transfer of shares upon which the company has a lien by virtue of clause 43 hereof."

[47] In accord: Burleson v. Mays, 189 Ala. 107, 66 South. 36 (1914); Silver v. Graves, 210 Mass. 26, 95 N. E. 948 (1911); Layer v. Layer, 184 Mich. 663, 151 N. W. 759 (1915); Heath v. Potlatch Lumber Co., 18 Idaho, 42, 108 Pac. 343, 27 L. R. A. (N. S.) 707 (1910), the claim being made in good faith; Latulippe v. New England Inv. Co., 77 N. H. 31, 86 Atl. 361 (1913).

A compromise contract is not invalidated by the fact that the claim was unfounded, if it was believed in by the party making the claim. It is hard to be convinced of good faith if there was no reasonable ground for belief. Such contracts are nearly always sustained. See Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451 (1899); Lewis v. Gove County Tel. Co., 95 Kan. 136, 147 Pac. 1122, Ann. Cas. 1916B, 1035 (1915); Western & Southern Life Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456 (1908); Alexander v. Maryland Trust Co., 106 Md. 170, 66 Atl. 836 (1907); Wood v. Kansas City Home Tel. Co., 223 Mo. 537, 123 S. W. 6 (1909); Armijo v. Henry, 14 N. M. 181, 89 Pac. 305, 25 L. R. A. (N. S.) 275, and note (1907); Post v. Thomas, 212 N. Y. 264, 106 N. E. 69 (1914); Id., 212 N. Y. 585, 106 N. E. 1042 (1914); Kelly v. Burnham, Williams & Co., 248 Pa. 223, 93 Atl. 949 (1915); Roane v. Union Pac. Life Ins. Co., 67 Or. 264, 135 Pac. 892 (1913); Bowers Hydraulic Dredging Co. v. Hess, 71 N. J. Law, 327, 60 Atl. 362 (1905); Smith v. Monteith, 13 M. & W. 427 (1844), discharge of one from arrest; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 (1870); Crawford v. Engram, 157 Ala. 314, 47 South. 712 (1908), forbearance is no consideration, if no suit has been brought and there is no reasonable ground to contest.

"It is settled in this commonwealth that forbearance to sue constitutes or may be found to constitute a good consideration for a promise to an intending litigant, and that it is not necessary in a suit on such promise that it should appear that there was in fact a good cause of action, or a fair and reasonable ground of success in the threatened suit. * * * In order that forbearance to sue should constitute a valid consideration for the defendant's promise there must have been a bona fide intention on the part of the plaintiff to contest the will, * * * a threat to contest the will, merely for the purpose of compelling the defendant to settle with her and buy his peace without any intention on her part of actually contesting the will if no such settlement was made, would not be sufficient and would not constitute a valid consideration for the defendant's promise." Mackin v. Dwyer, 205 Mass. 472, 91 N. E. 893 (1910).

"43. The company shall have a first and paramount lien upon all the shares of each member for his debts, liabilities and engagements, solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not."

"44. For the purpose of enforcing such lien the directors may sell the shares subject thereto without any notice to or consent by the holder of such shares, or any other person; but no sale shall be made unless and until default be made in the payment, fulfilment, or discharge of such debts, liabilities, or engagements."

The defendant, Samuel Grant, who was one of the promoters of the company, was in May, 1882, and at the hearing of this action was still, the registered holder of 125 shares of £100 each in the company. In May, 1882, when £40 apiece had been paid up on these shares, Grant accepted and discounted two accommodation bills payable at six and eighteen months after date for £5,000 each, drawn on him by the plaintiff, E. P. W. Miles, applied the proceeds to his own use, and deposited the certificates of his shares with the plaintiff.

By indenture dated October 19th, 1882, the defendant Grant charged his 125 shares with the two sums of £5,000 and interest thereon at £5 per cent. per annum, and covenanted at any time during the continuance of the security to execute a legal transfer of the shares in favor of the plaintiff; and by an agreement under seal of the same date Grant covenanted with the plaintiff to pay all calls upon the shares during the continuance of the security, and it was agreed that in default the plaintiff might pay such calls and add the moneys so paid with interest thereon to his security.

On November 4th, 1882, notice in writing of the plaintiff's interest in Grant's 125 shares under the indenture of October 19th, 1882, was served upon the company, and this notice was acknowledged by the company on November 6th, and was entered in the share register.

When the bills came to maturity Grant made default in payment, and the plaintiff paid them.

A call of £20 per share was made by the company on December 12th, 1882. Grant made default in payment, and this and the subsequent calls made by the company were paid by the plaintiff in order to avoid a forfeiture of the shares.

Grant, besides being a promoter of the company and the holder of the above-mentioned shares, was the vendor to the company of the property in New Zealand known as the Alford Estate, the acquisition and working of which was the substantial object of the formation of the company. He was also the chairman of the board of directors, and at a general meeting of the company held on March 15th, 1883, an angry discussion took place, at the close of which he gave to the company a written guarantee or warranty signed by himself in the following terms:

"Gentlemen: I hereby guarantee that a dividend (duly earned during the year) of not less than £3 per centum per annum be paid to the shareholders for the year ending June 30th, 1883, and afterward that there shall be paid to them a yearly dividend of not less than £5 per centum per annum (duly earned during the year) for a period of ninety years, and I undertake within three calendar months after the end of any and every year to pay to you any sum requisite to pay the agreed minimum dividend if the company has not earned it."

No resolution was passed at the general meeting with reference to the giving of the guarantee.

Grant was adjudicated a bankrupt on February 19th, 1884. In May, 1884, there being due to the plaintiff upon the security of the indenture and memorandum of agreement of October 19th, 1882, the sum of £7,885, he applied to the company to do and concur in all acts necessary for effecting a sale and transfer of the 125 shares.

The company, however, claimed a lien on the shares under the guarantee given to them by grant in their articles of association in priority to the plaintiff's charge; and they refused to permit any sale or transfer of the shares until their claim was satisfied. The plaintiff then brought this action against the company and Grant and his trustee in bankruptcy, and claimed a declaration that under the deed of October 19th, 1882, he was entitled to a first charge on the 125 shares for the principal and interest secured thereby, and for all sums paid by him for calls, and to have this charge enforced by foreclosure or otherwise, and he pleaded that the guarantee given by Grant was not under seal, that no consideration had been given for it, and that even if consideration had been given, the document did not comply with the requirements of the Statute of Frauds. To this the company rejoined that the guarantee "was executed as part of a contract whereby the company and the shareholders for whose benefit it was executed, in consideration of the execution by the defendant S. Grant of the said documents, agreed to put an end to certain contemplated proceedings against the defendant S. Grant and to give up certain claims against him, and that they did in pursuance of such contract abandon such proceedings and give up such claims and accept the guarantee in full accord and satisfaction of the right of action founded on such claims;" and they pleaded also that the said contract was one to be performed, and that it was in fact performed, within one year from the making thereof.

There was evidence that Grant had misrepresented the Alford Estate, that the defendant company had made claims against Grant and had threatened proceedings, that at a shareholders' meeting Grant had made several offers of compromise and finally offered to sign the guaranty previously set out in consideration of the defendant company and the said shareholders agreeing to abandon their claims against him, and that the company did in fact forbear to bring action and did give up all claims.

The action came on for trial before North, J., upon motion for judgment in default of pleading against the defendant Grant and his trustee in bankruptcy, and was heard on June 22d, 23d, and 24th, 1885.[48]

COTTON, L. J. This is an appeal of the defendant company from a judgment of North, J., in an action brought by the plaintiff in order to enforce his right under an equitable mortgage on shares in the company, and two questions are raised for the decision of the Court. First, whether the company, supposing them to have a legal claim against Grant, the holder of the shares, are entitled under their articles of association to priority for that claim as against the claim of the plaintiff; and, secondly, whether they had in fact any legal claim against Grant. Mr. Justice North held that, in fact, they had a good claim, but he held on the authority of Bradford Banking Company v. Briggs & Co. [29 Ch. D. 149], as decided in the Court below, that the company were not entitled in priority to the plaintiff. * * *[49]

But then comes the question, had the company in fact any legal claim as against Grant? Their claim was under a letter signed by Grant, which guarantees or undertakes that a certain yearly dividend shall be paid to the shareholders during a long period of years, and it is objected that no consideration appears upon the face of the letter, and that no consideration was in fact given to Grant for that promise (I call it "promise," because to call it "contract" would be to assume there was consideration) given by the shareholders.

Now there was much argument upon the question, what is a good consideration for a compromise; and there are authorities which for a considerable time were considered as laying down the law upon the subject; but Lord Esher, the present Master of the Rolls, in Ex parte Banner [17 Ch. D. 480], is supposed to have thrown doubts on these authorities; and what he said was in fact that if the question ever came before this Court the authority of Callisher v. Bischoffsheim [L. R. 5 Q. B. 449], Ockford v. Barelli [20 W. R. 116], and Cook v. Wright [1 B. & S. 559] would have to be considered.

Now, what I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good "consideration" for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the Court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee. I am not going into the question at present as to how far the Statute of Frauds will raise any difficulty in the way. And I think also that the mere fact of an action being brought is not material except as evidence that the claim was

[48] Statement of facts is condensed. Opinion of North, J., and part of opinions of Cotton and Bowen, L. JJ., are omitted.

[49] The court held that Justice North's decision on this point was wrong, the Bradford Case having been later reversed. North's opinion will be found in 32 Ch. D. 273.

in fact made. That, I think, was laid down by Lord Blackburn in Cook v. Wright, and also in Callisher v. Bischoffsheim, and, subject to the question whether these cases are overruled, or ought to be considered as unsound, that, I think, is a correct statement of the law. Now, by "honest claim," I think is meant this, that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one. Of course, if both parties know all the facts, and with knowledge of those facts obtain a compromise, it cannot be said that that is dishonest. That is, I think, the correct law, and it is in accordance with what is laid down in Cook v. Wright and Callisher v. Bischoffsheim and Ockford v. Barelli. What was stated in Cook v. Wright by Lord Blackburn is this: "We agree that unless there was a reasonable claim on the one side, which it was bona fide intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Again, what his Lordship says in the subsequent case of Callisher v. Bischoffsheim is this: "If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated." The doubt of the Master of the Rolls seems to have been whether a compromise would not be bad, or a promise to abandon a claim would be a good consideration if, on the facts being elicited and brought out, and on the decision of the Court being obtained, it was found that the claim which was considered the consideration for the compromise was a bad one. But if the validity of a compromise is to depend upon whether the claim was a good one or not, no compromise would be effectual, because if it was afterward disputed, it would be necessary to go into the question whether the claim was in fact a good one or not; and I consider, notwithstanding the doubt expressed by the Master of the Rolls, that the doctrine laid down in Cook v. Wright and Callisher v. Bischoffsheim and Ockford v. Barelli is the law of this Court.

Now was there here any claim in fact made on behalf of the company against Grant, and was there, in fact, anything which would bind the company to abandon that claim? The conclusion at which I have arrived is, that there is no evidence on which we ought to rely that there was in fact a claim intended to be made against Grant, and, in my opinion, on the evidence before us, we ought not to arrive at the conclusion that there was ever intended to be any contract by the company, much less that there was in fact any contract binding the company that that claim should not be prosecuted, and should be given up. [His Lordship alluded shortly to the facts of the case, and continued.] Now, undoubtedly, on the evidence, several of the shareholders present at the general meeting of March 15th, 1883, expressed

a very hostile feeling against Mr. Grant, who had sold the property to the company; that is admitted by him, and is in my opinion clear. But then what was done? There is nothing at all on the face of this letter of guarantee, as I have already stated, which says that it was given by Grant in consequence of the company giving up any claim they might have against him, and there is nothing whatever in the minutes of the board which states in fact that this was so, nor is there anything after that time in the minutes of the board of directors which can be referred to as showing an agreement by them to give up any claim they otherwise intended to prosecute against him. What I should say was the state of the case is this—there was angry feeling, and Mr. Grant thought it might result in proceedings being taken against him; and, therefore, what he considered the wisest course was to make this offer in the hope and expectation that he would keep things quiet, and let things go on peaceably.

Now, in my opinion, a simple expectation, even though realized, would not be a good consideration for the promise which he gave. In order to make a good consideration for the promise there must be something binding done at the time by the other party, there must be something moving from the other party toward the person giving the promise. In my opinion, to make a good consideration for this contract, it must be shown that there was something which would bind the company not to institute proceedings, and shown also that in fact proceedings were intended on behalf of the company; and, in my opinion, I cannot come to the conclusion as a matter of fact that these two things existed. It is true that directors were present at the meeting, and that their guarantee was entered on the minutes, but although this was the case, it cannot in my opinion be considered that the directors by being there entered into any contract as directors not to enforce the claim of the company. The proper mode of proving any agreement made by the directors would be the production of evidence of its having been made at a meeting held by them as the persons having the conduct of the business of the society. No doubt, they might, if they had been so minded, at a meeting of the board agree that they should not make any claim against him in consideration of this having taken place, but I find nothing of that kind.

Again, this is an incorporated company, and even if any statement had been made at this meeting that no proceedings should be taken, yet to bind the company there ought to be something done by way of a resolution, and mere statements by individual members that they were satisfied with this guarantee would not in any way bind the company so as to prevent them from taking proceedings if they ever intended to do so. In my opinion this promise was given in the expectation that this would be a sop to the angry shareholders, and that no proceedings would be taken. The mere fact that none have been taken, will not in my opinion make that a consideration, unless (putting aside the question as to the company being bound) something was done or said in

such a way as to be the action or saying of the company, that if this guarantee was given no proceedings would be taken. Of course if this company were an individual, and the individual made a representation that if this guarantee was given he would take no proceedings, that would be a contract binding him, but in my opinion if a company is to be bound, it ought to be bound by some more formal proceedings, either by the action of the directors sitting as such, or by something equivalent to a resolution of the shareholders in general meeting.

Mr. Justice NORTH, although he decided in favor of the plaintiff, has held that there was sufficient consideration for the guarantee; and if he had come to the conclusion that there was upon the evidence before him that which amounted to a contract binding the company, then I should undoubtedly feel some difficulty, because he had a better opportunity of judging of the evidence than we can have. But, on reading his judgment, I come to the conclusion that he rather considered there was an expectation than that this would be the result, and that if that expectation was performed and completed, this would be enough to give a consideration. * * *

I come accordingly to the conclusion that there is, in fact, no consideration to support the guarantee on which the company rely, and to make it a contract binding on Mr. Grant; and as I have come to the conclusion that there was not sufficient consideration to support the promise, it is not necessary for me to enter into the question as to the Statute of Frauds.

BOWEN, L. J. * * * Therefore we have to determine whether or no there was any consideration for this guarantee, and it is upon that point that I am, with great regret, obliged to state that my opinion is at variance with the view at which Lord Justice COTTON has arrived. The inquiry whether there was or was not consideration for this guarantee renders it necessary to say some words upon the law, and then to apply the law to the question of fact.

Speaking broadly, what has to be determined is, in my opinion, whether there was at a critical moment any forbearance to press a real claim on the part of the company, or of the directors of the company, who had ample powers under their articles of association to act for the company, and, if so, whether such forbearance was brought about by the express or implied request of Mr. Grant, and in consideration of his guarantee. A valuable consideration may, of course either consist of some right, interest, profit, or benefit which accrues to one party, or some forbearance, or detriment, or loss, or responsibility, which is given to or undertaken by the other. We have to see here in the first place whether there was forbearance promised, in which case the promise would be the consideration for the guarantee, or whether there was an actual forbearance given at the request of the guarantor and in return for something. The two views run very close together. If the directors, in consideration of this guarantee, made an actual agreement to

forbear, they really took the agreement in accord and satisfaction of any claims, if there were claims, and beyond that agreed not to prosecute the question whether there were any; but such an agreement as that need not be in writing. It seems to me there is no magic at all in formalities, and that there would be ample evidence of such an agreement, if this guarantee to the knowledge of both parties was given and accepted upon the understanding that no proceedings should be instituted. But I do not accept the proposition that this guarantee cannot be effectual and supported by consideration unless there is at the moment it was given something to bind the company. If the guarantee were given on the condition and on the contingency that there should be forbearance, and was taken upon that condition, and upon that contingency and the contingency afterwards happened, then the forbearance when given, being at the request expressed or implied of the guarantor, would furnish an implied consideration for the guarantee which had already been given. That is, I think, no new law. In Oldershaw v. King, 2 H. & N. 399, 517, 520, there was a guarantee given to the following effect: "I am aware," said the guarantor, "that my uncles Messrs. J. & J. F. King, stand considerably indebted to you for professional business, and for cash lent and advanced to them, and that it is not in their power to pay you at present, and as in all probability they will become further indebted to you, though I by no means intend that this letter shall create or imply any obligation on your part to increase your claim against them, I am willing to bear you harmless against any loss arising out of the past and future transactions between you and my said uncles to a certain extent, and therefore in consideration of your forbearing to press them for the immediate payment of the debt now due to you, I hereby engage and agree to guarantee you the payment of any sum they may be indebted to you upon the balance of accounts between you at any time during the next six years, to the extent of £1,000, whenever called upon by you to pay the same, and after twelve calendar months' previous notice." In that case, Erle, J., expressed himself in the following language: "Looking at the whole letter, and the circumstances under which it was written, and considering the importance of further advances, I come to the conclusion, that the consideration contemplated was, that further advance should be made, and time given by the creditor before he would press for the payment of the existing debt. Though the contract did not bind the creditor to make further advances, or to give time unless he chose to do so, it is clear that if he did make the advances and did give time, that which was contingent at the time when the instrument was written became an absolute and binding contract." The same principle was applied in the case of the Alliance Bank v. Broom, 2 Dr. & Sm. 289. "It appears to me," said the Vice-Chancellor, 2 Dr. & Sm. 292, "that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to

abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance." So it will be sufficient here that the directors did forbear, if their forbearance was at the request expressed or implied of the guarantor and in consequence of his guarantee being given, and it seems to me there is no sort of necessity to discover language of any particular form, or writing of any particular character, embodying the resolution of the directors. We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to shew that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all. We were referred to the language of the Master of the Rolls in the case of Ex parte Banner, 17 Ch. D. 480, which seems to throw doubt upon the doctrine which has more than once been laid down in the Courts of Common Law, and finally in the well-known case of Callisher v. Bischoffsheim, Law Rep. 5 Q. B. 449. It seems to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all. With regard to the observations of the Master of the Rolls in Ex parte Banner I should like to point out in respect to Callisher v. Bischoffsheim in the first place that whatever be the objection taken to the language of the Court in that case, in any point of view the case was rightly decided. The plea there only denied the existence of the debt, and left it on the record undisputed that the debt might have been put forward reasonably as a substantial claim. But with regard to the language of the Court in Callisher v. Bischoffsheim, Law Rep. 5 Q. B. 449, I confess it seems to me that the language of Lord Blackburn was correct, that the decision in Ockford v. Barelli, 20 W. R. 116, was right, and that the language in Cook v. Wright, 1 B. & S. 559, is equally unimpeachable. When the Master of the Rolls in Ex parte Banner, 17 Ch. D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I

agree if by that he means there must be a real cause of action, that is to say, one that is bona fide and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case. * * *

[The Lord Justice then reviewed the evidence, and arrived at the conclusion "that proceedings had been threatened, that Mr. Grant knew that they had been threatened, that he gave the guarantee in order to put an end to them, and that the proceedings were dropped in consequence of his giving that undertaking." He said that he was differing from COTTON, L. J., only upon a question of fact, but that he was obliged to dissent.

[The opinion of FRY, L. J., is here omitted. He agreed with COTTON, L. J., in result, his reasons being that the company had no bona fide claim against Grant, and that if such a claim existed they had never agreed to extinguish it.

[The result was that the majority of the court, while differing with Mr. Justice NORTH on both points decided by him, affirmed the decree and dismissed the appeal. The claim of Miles to a charge on Grant's shares was sustained.]

SECTION 4.—MUTUAL PROMISES AS CONSIDERATION FOR EACH OTHER

(Conditional and Illusory Promises—Mutuality of Legal Duty or Obligation)

STRANGBOROUGH AND WARNER'S CASE.

(In the King's Bench, 1589. 4 Leon. 3.)

Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give to me £10 on such a day, I promise to give you £10 such a day after.[50]

[50] In Thorpe v. Thorpe, 12 Mod. 455 (1701), Holt, C. J., said: "A is possessed of Black Acre, to which B has no manner of right, and A desires B to release him all his right to Black Acre, and promises him, in consideration thereof, to pay so much money, surely this is a good consideration and a good promise, for it puts B to the trouble of making a release. Then where the doing a thing will be a good consideration, a promise to do that thing will be so too." See, also, 2 Street, Foundations of Legal Liability, 110 (1906); Williston, Consideration in Bilateral Contracts, 27 Harv. L. Rev. 518 (1914).

"So far as regards the matter of the consideration, as being executed or executory it may be observed that whatever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration: so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any

COOK v. SONGAT.

(In the King's Bench, 1588. 1 Leon. 103, 4 Leon. 31.)

In an action upon the case by Cook against Songat, the plaintiff declared, quod cum quædam lis and controversie had been moved betwixt the plaintiff lord of the manor, &c. and the defendant claiming certain lands parcel of the said manor, to hold it by copy; and whereas both parties submitted themselves to the judgment and arbitrament of J. S. counsellor at law, concerning the said land, and the title of the defendant to it: the defendant in consideration that the plaintiff promised to the defendant, that if the said J. S. should adjudge the said copy to be good and sufficient for the title of the defendant, that then he would suffer the defendant to enjoy the said land accordingly without molestation: the defendant reciprocally promised the plaintiff, that if the said J. S. should adjudge the said copy not sufficient to maintain the title of the defendant, that then he would deliver and surrender the possession of the said land to the plaintiff without any suit; and shewed further, that J. S. had awarded the said copy utterly insufficient, &c. yet the defendant did continue the possession of the land, &c. And by GODFREY, here is not any consideration: but by GAWDY, the same is a good and sufficient consideration, because it is to avoid variances and suits: and judgment was given for the plaintiff.

HOLT v. WARD CLARENCIEUX.

(In the King's Bench, 1732. 2 Strange, 937.)

The plaintiff declared, that it was mutually agreed between the plaintiff and defendant that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4,000.

The defendant with leave of the Court pleaded double (viz.) non assumpsit, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

The plaintiff joins issue on the non assumpsit, and a verdict is found for her, with £2,000 damages. And as to the plea of infancy demurred.

particular matter to form a consideration." Leake, Contracts (1st Ed.) p. 314; Id. (2d Ed.) pp. 612, 613.

The theory that consideration must always be a detriment to the promisee is not properly applicable to bilateral contracts. See 2 Street, Foundations of Legal Liability; Holdsworth in 11 Mich. L. Rev. 347; Corbin, "Does a Pre-existing Duty Defeat Consideration?" (1918) 27 Yale L. Jour. 362, 374.

For further discussions see Ames, "Two Theories of Consideration," 12 Harv. L. Rev. 515; Williston, "Successive Promises of the Same Performance," 8 Harv. L. Rev. 27; Langdell, "Mutual Promises as a Consideration," 14 Harv. L. Rev. 496.

This cause was several times argued at the Bar: 1. By Mr. Strange for the plaintiff, and Serjeant Chapple for the defendant. When the Court inclined strongly with the plaintiff, because though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, viz. by suit in the Ecclesiastical Court, to compel a performance, the plaintiff being of the age of consent: and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant, strongly insisted, that in the case of a contract per verba de futuro, (as this was) there was no remedy, even against a person of full age, in the Spiritual Court, but only an admonition. And the only reason why they hold jurisdiction in the case of a contract per verba de præsenti is, because that is looked upon amongst them to be ipsum matrimonium, and they only decree the formality of a solemnization in the face of the Church.

After their arguments it was spoke to a fourth time by Mr. Reeve and Serjeant Eyre. And now this term the CHIEF JUSTICE delivered the resolution of the Court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is nudum pactum, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election. Cro. Car. 502; 2 Roll. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the

infant has this privilege yet the party with whom he contracts has not; he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

COLEMAN v. EYRE.

(Court of Appeals of New York, 1871. 45 N. Y. 38.)

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done or contributed any thing to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was

then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterwards, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that in consideration of the agreement by the plaintiff to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intendment is that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other. Briggs v. Tillotson, 8 Johns. 304.

The evidence was conflicting as to whether the defendant was to share in the commissions. The referee found in the plaintiff's favor on that point, and the court below, at general term, refused to interfere with that finding. We cannot disturb it.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss in consideration of a share of an expected profit.

The judgment of reversal and order granting a new trial should be reversed, and the judgment for the plaintiff entered on the report of the referee should be affirmed, with costs.

All concur.

Order of general term reversed, and judgment for the plaintiff affirmed.[51]

SEWARD & SCALES v. MITCHELL.

(Supreme Court of Tennessee, 1860. 1 Cold. 87.)

CARUTHERS, J.[52] On the 16th Oct., 1856, Mitchell sold to Seward and Scales, for the consideration of $8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5,000-acre tract granted to George Dougherty, and bounded as follows," &c.

The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement that it should be surveyed by Gillespie, and if there were more than 521

[51] An exactly similar case is Dockley v. Bury, 1 Bulst. 202 (1613). Other aleatory contracts were enforced in Earl of March v. Pigot, 5 Burr. 2802 (1771); Christie v. Borelly, 29 L. J. C. P. 153 (1860); Martindale v. Fisher, 1 Wilson, 88 (1745).

[52] Part of the opinion is omitted.

acres, the vendee should pay for the excess at the rate of $16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of 57 acres, and the tract embraced in the deed was 578 acres, instead of 521, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for $1,079. * * *

There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is, that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise, that the party did not own before by a perfect legal right.

It is true, if the sale was by the tract and not by the acre, as appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But if the sale was not in gross, but by the acre and the recitation in the deed would not be conclusive in a court of equity on that point if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in Miller v. Bentley, 5 Sneed, 671, and a more recent case; but independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount, we see no good reason in law or morals why such an agreement should not be binding upon them. The case of Howe v. O'Mally, 5 N. C. 287, 3 Am. Dec. 693, is precisely in point. The court there held that a promise to refund in case of deficiency is a good consideration for a promise to pay for any excess over what is called for in the deed,—that such mutual promises are sufficient considerations for each other.

The case of Smith v. Ware, 13 Johns. (N. Y.) 259, which is supposed to conflict with this, is entirely different; "there was no mutuality" because the promise sued upon was to pay for the deficiency, without any obligation on the other party to pay for an excess, if any there had been.

The principle of the North Carolina case commends itself to our approbation, because of its equity and justice.

Without further citation of authorities we are satisfied to hold that the promise in this case was binding upon the defendant, as his Honor charged, and therefore affirm the judgment.

GREAT NORTHERN RY. CO. v. WITHAM.

(In the Common Pleas, 1873. L. R. 9 C. P. 16.)

The cause was tried before Brett, J., at the sittings at Westminster after the last term. The facts were as follows: In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows:

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from November 1st, 1871, to October 31st, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side. [Signed] Samuel Witham."

The company's officer wrote in reply, as follows:

"Mr. S. Witham:

"Sir: I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company at Doncaster station any quantity they may order during the period ending October 31st, 1872, of the descriptions of iron mentioned on the enclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter, [Signed] S. Fitch, Assistant Secretary."

To this the defendant replied:

"I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. Witham."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs,

Digby Seymour, Q. C., moved to enter a nonsuit.[53]

KEATING, J. In this case Mr. Digby Seymour moved to enter a nonsuit. The circumstances were these: The Great Northern Railway Company advertised for tenders for the supply of stores. The defendant made a tender in these words: "I hereby undertake to supply the Great Northern Railway Company, for twelve months, from etc. to etc., with such quantities of each or any of the several articles named in the attached specifications as the company's store-keeper may order from time to time, at the price set opposite each article respectively," etc. Some orders were given by the company, which were duly executed. But the order now in question was not executed; the de-

[53] The statement of facts is condensed.

fendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to supply the goods. The case mainly relied on in support of that contention was Burton v. Great Northern Railway Co., [9 Ex. 507; 23 L. J. (Ex.) 184.] But that is not an authority in the defendant's favor. It was the converse case. The Court there held that no action would lie against the company for not giving an order. If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

Brett, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you £100," that is in a certain sense a unilateral contract. He has not promised to go to York. But if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. Burton v. Great Northern Railway Co., [9 Ex. 507; 23 L. J. (Ex.) 184,] is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the

defendant might have absolved himself from the further performance of the contract by giving notice.

Rule refused.[54]

COHN v. LEVINE et al.

(Supreme Court of New York, Appellate Division, 1918. 185 App. Div. 529, 173 N. Y. Supp. 289.)

Action by Alex Cohn, trading as the Cohn Company, against Barnett Levine and another, copartners. From an order granting plaintiff's motion for judgment on the pleadings, defendants appeal. Order reversed, motion denied, and demurrer sustained, with leave to file amended complaint.

DOWLING, J. This is an appeal from an order granting plaintiff's motion for judgment on the pleadings, consisting of the complaint and a demurrer thereto, which demurrer set forth that the complaint did not state facts sufficient to constitute a cause of action.

The complaint alleges that on or about the 6th day of August, 1917, the plaintiff and defendants entered into an agreement in writing, which was thereafter renewed on January 2, 1918, to continue until December 31, 1918. The contract in substance was that the defendants would furnish to the plaintiff certain samples of ladies' and misses' coats and suits identical with those furnished to salesmen for the defendants, in order that plaintiff might take orders therefor, and that upon the sale of such coats and suits by plaintiff to its customers the

[54] The "acceptance" of an offer to supply such goods or services as the offeree may order or may desire creates no contractual duty, because there is no consideration. Northern Iowa Gas & Electric Co. v. Luverne, Iowa (D. C.) 257 Fed. 818 (1919); Leach v. Kentucky Block Cannel Coal Co. (D. C.) 256 Fed. 686 (1919); Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39. 34 Am. St. Rep. 341 (1892), holding also that an order for some specific quantity makes the offer irrevocable; Hudson v. Browning, 264 Mo. 58, 174 S. W. 393 (1915); Mowbray Pearson Co. v. E. H. Stanton Co., 109 Wash. 601, 187 Pac. 370, 190 Pac. 330 (1920); Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240 (1870); Thayer v. Burchard, 99 Mass. 508 (1868); Teipel v. Meyer, 106 Wis. 41, 81 N. W. 982 (1900); Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. 65 (1890); American Cotton Oil Co. v. Kirk, 68 Fed. 791, 15 C. C. A. 540 (1895); Westhead v. Sproson, 6 Hurl. & N. 728 (1861); Burton v. Great Northern R. Co., 9 Exch. 507 (1854), agreement to transport all grain that defendant might present, for 12 months. Parke, B., said: "It would be a parallel case if a person agreed with a wine merchant to purchase of him all the wine which the former might choose to drink during a year, and before six months expired he gave notice that he discontinued drinking wine"); Percival v. London, etc., Committee, [1918] 87 L. J. K. B. 677.

A specific order in accordance with the standing offer creates a contract for the amount ordered, bilateral unless the price accompanies the order. National Surety Co. v. Atlanta (Ga. App.) 102 S. E. 175 (1920); Keller v. Ybarru, 3 Cal. 147 (1853); Cooper v. Lansing Wheel Co., supra.

A promise to buy land if any is found that suits the promisor, is enforceable, if a consideration is given for it, and if the condition is fulfilled. Eells Bros. v. Parsons, 132 Iowa, 543, 109 N. W. 1098, 11 Ann. Cas. 475 (1906).

plaintiff would be entitled to the difference between the cost price, to be stipulated, and the price at which the plaintiff and his customers should agree as the sales price. Bills of all merchandise manufactured and shipped were to contain a statement that payment was to be made at the place of business of the defendants at 142 West Twenty-Fourth street, New York City, and all checks for said merchandise which came in for the Cohn Company were to be turned over to the defendants. The agreement then contained the following provision: "Upon the receipt of any and all checks as aforesaid, the parties of the second part shall pay to the party of the first part the difference between the amount which the customer was charged for the goods and the amount which it was mutually agreed and determined that the party of the first part shall be charged therefor."

The agreement also contained a stipulation that the defendants should not directly or indirectly "drum" customers of the plaintiff, and that, if any goods should be sold by defendants to any of said customers, the same should be sold in the name of the plaintiff, and that the plaintiff should receive the difference between the price at which the goods were to be sold to such customers and the price determined upon as the basis of allowance for cost of material and labor and for profit, the same as though the order had been given in the first instance to the plaintiff. A copy of the agreement in question is annexed to the complaint.

The complaint further set forth that the plaintiff entered upon the performance of the terms of the agreement and duly performed the same. It then alleges that the defendants, "without just cause, prevented plaintiff from fulfilling the terms and conditions of said contract," and that defendants dispossessed plaintiff from space occupied in defendants' place of business, and refused to deliver any of the merchandise to be delivered to the customers of the plaintiff, as set forth in the agreement, and wrongfully and unlawfully "converted checks for merchandise sent by customers to plaintiff at the address of the defendants in payment of bills for merchandise manufactured and shipped by defendants to plaintiff's said customers, which were sent by said customers to No. 142 West Twenty-Fourth street, borough of Manhattan, city of New York, to the order of the plaintiff," and that defendants secretly solicited trade or "drummed" the customers of plaintiff, and did not charge same to plaintiff, nor sell same in plaintiff's name, all to the plaintiff's damage in the sum of $4,000.

It is apparent that the contract was unilateral, and consisted merely of an offer on the part of the defendants to furnish samples to the plaintiff for goods to be sold by him to his customers, and to be delivered to them when procured. There is no agreement of any kind on the part of the plaintiff either to take goods from the defendants or to endeavor to bring to the defendants plaintiff's customers, or other customers. The agreement is not under seal, and is not mutu-

ally binding. The general rule in respect to such contracts is laid down in Grossman v. Schenker, 206 N. Y. 466, 100 N. E. 39, as follows:

"The general rule is that a promise, not under seal, made by one party, with none by the other, is void, for, unless both are bound, so that either can sue the other for a breach, neither is bound."

While in certain special contracts courts have implied promises sufficient to create mutuality, the contract in the present case is not subject to any interpretation which would warrant the court in implying that the plaintiff in any way agreed to take any particular amount of merchandise, or to endeavor to sell or sell any of the designs of the defendants. Plaintiff did not even agree to pay anything to defendants, for they were to receive all the checks and pay the difference between cost and selling price to plaintiff.

The learned trial justice in the case at bar seems to have laid stress on the allegation in the complaint that the agreement had been performed on the part of the plaintiff. While the Code authorizes a general allegation of due performance by plaintiff of the conditions precedent to a right of recovery on certain contracts, without stating all of the facts constituting performance (Code of Civil Procedure, § 533), still the complaint in the case at bar sets forth no facts which show that plaintiff had done anything under the contract which called for action upon the part of defendants, or imposed any duty or obligation upon them under the contract. The complaint wholly fails to state that the plaintiff obtained any customers whatever for defendants' goods, or ever notified defendants of its alleged orders.

The learned court at Special Term upheld the complaint, upon the ground that it set forth a cause of action in conversion; but plaintiff admits upon this appeal that it sets forth no such cause of action, nor could such a contention be successfully urged, inasmuch as, under the contract, defendants were expressly given the right to receive all checks for merchandise which came in for plaintiff, and were only bound to turn over to plaintiff the difference between the amount of such checks and the cost price of the goods agreed to be charged against plaintiff by defendants. There are no facts alleged from which it appears that plaintiff is even entitled to an accounting from defendants.

The order appealed from will be reversed, with $10 costs and disbursements, and the motion for judgment on the pleadings denied, with $10 costs. The demurrer is sustained, with leave to plaintiff to serve an amended complaint on payment of said costs. Order filed. All concur.

LIMA LOCOMOTIVE & MACHINE CO. v. NATIONAL STEEL CASTINGS CO.

(Circuit Court of Appeals of United States, 1907. 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. [N. S.] 713.)

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Action upon account for goods sold and delivered, and cross-action for damages for breach of contract. Jury waived. The trial judge made a finding of facts and a general finding for the plaintiff for the full amount of the account and against the defendant upon its cross-petition.

On April 10, 1902, the National Steel Castings Company made in writing the following proposition to the Lima Locomotive & Machine Company: "Gentlemen: We make the following proposition for furnishing all your requirements in steel castings for the remainder of the present year at the prices mentioned below, f. o. b. cars at Montpelier, the terms to be thirty days net. You agree to furnish us on or before the 15th of each month the tonnage that you wish to order during the following month. We agree to fill your orders as specified to the amount of this tonnage, and to make such deliveries as you require." Then followed a schedule of steel castings and prices per pound. This was accepted in writing by indorsing thereon, at the foot of the proposition, "Accepted April 10, 1902," and duly signed by the Lima Company. This contract the defendant set out in its cross-petition and averred: First, that the castings for which the plaintiff had sued were ordered and supplied under this contract; second, that the plaintiff had failed and refused, though requested, to supply it with other castings necessary to meet the requirements of its business, and that defendant in consequence had been obliged to contract for same with other founders and had paid for the castings so procured $5,498.24 over and above the contract price with plaintiff.

The defenses to the cross-petition were: First, that the contract was void for want of mutuality.[55] * * *

LURTON, Circuit Judge, delivered the opinion of the court.

1. We find ourselves unable to agree with the learned circuit judge in respect to the nonmutuality of the contract by which the plaintiff agreed to supply all of the "requirements" of the defendant's business for the remainder of the year 1902. The defendant was engaged in an established manufacturing business which required a large amount of steel castings. This was well known to the plaintiff, and the proposition made and accepted was made with reference to the "requirements" of that well-established business. The plaintiffs were not proposing to make castings beyond the current requirements of that

[55] Parts of the report, not dealing with this first defense, are omitted.

business, and would not have been obligated to supply castings not required in the usual course of that business. By the acceptance of the plaintiff's proposal, the defendant was obligated to take from the plaintiff all castings which their business should require. The contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties. The second and third paragraphs must be read in the light of the first. Thus read, there is no ground for doubting that the words the "tonnage you wish to order," and "such deliveries as you may require," have reference to the established "requirements" of the business for the following "month," and the deliveries of the tonnage thus estimated. The contract falls under and is governed by the case of Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402, where the contract was to sell to a manufacturer of fertilizer "its entire consumption of phosphate rock" for a term of five years. In that case we held that the contract was mutual, and the buyer under obligation to take its entire requirement of phosphate rock from the seller. Concerning the definiteness of such a contract, we said: "A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise."

To the same effect and directly in point are the cases of Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, and Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. * * *

Judgment reversed.[56]

[56] Other cases in accord: Jenkins & Co. v. Anaheim Sugar Co., 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918E, 293 (1918), contract to sell and to buy the buyer's "August requirements" of beet sugar, the buyer being a wholesale grocer; "a mere option to buy is readily distinguishable from an agreement to buy all to be required"; McIntyre Lumber & Export Co. v. Jackson Lumber Co., 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 66 (1910), contract to buy and to sell "all the ties * * * you manufacture at your mill until notified to discontinue cutting"; here the plaintiff had the duty not to sell to others and the power by manufacturing ties to create a duty in the defendant to buy and pay for them, also he had the privilege of making no ties at all; the defendant had the privilege to buy of others and the power, by giving notice, to terminate the plaintiff's power so far as it had not been exercised; Ayer & Lord Tie Co. v. O. T. O'Bannon & Co., 164 Ky. 34, 174 S. W. 783 (1915), "all the ties that plaintiff could deliver before Jan. 1"; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218 (1891), contract to supply vessels with all the coal they might use in a certain season; El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S. W. 460 (1910), the entire output of any lumber mill plaintiff might obtain; see also note in

KOEHLER & HINRICHS MERCANTILE CO. v. ILLINOIS GLASS CO.

(Supreme Court of Minnesota, 1919. 143 Minn. 344, 173 N. W. 703.)

Action by the Koehler & Hinrichs Mercantile Company against the Illinois Glass Company. Findings by the court for plaintiff, and from an order denying a new trial defendant appeals. Order affirmed.

LEES, C. This was an action to recover damages for breach of a contract of sale tried by the court without a jury. The findings were in plaintiff's favor, and defendant appeals from an order denying a new trial.

Plaintiff is a dealer at wholesale in glassware, bottles, flasks, and other merchandise. Its place of business is at St. Paul. Defendant is a manufacturer of glassware at Alton, Ill., and has an agency for the sale of its goods at St. Paul. On January 9, 1915, a contract in writing between defendant and the Koehler & Hinrichs Company was executed. By its terms the former agreed to sell and the latter agreed to buy, on or before December 31, 1916, 12 carloads of Ko-Hi flasks, at a stipulated price, shipments to be made upon specifications furnished by the buyer at least 30 days in advance of the shipping date, the final specifications to be furnished not later than October 1, 1916. Payments were to be made within 30 days after shipment, with certain discount privileges. It was provided that, if the financial responsibility of the buyer became impaired or unsatisfactory to the seller, cash in advance of shipment or satisfactory security might be demanded. There was a clause reading as follows:

"It is agreed that under this contract Koehler & Hinrichs Company may have the privilege of increasing quantity as much as they may desire at price shown herein during the period covered by this contract."

On June 6, 1916, the contract was assigned by Koehler & Hinrichs Company to Koehler & Hinrichs Mercantile Company, the plaintiff in this action. The latter was a corporation organized to succeed to the business of the former and became the owner of all its assets at that time. Prior thereto defendant had furnished and been paid for two carloads of Ko-Hi flasks. Defendant had notice of the transfer to plaintiff as early as July 1, 1916. Between that date and August 25th following, defendant furnished the plaintiff, at various times and upon its orders and specifications, 1 carload of flasks. They were furnished and paid for in accordance with the terms of the contract. Between

1 A. L. R. 1392; Kenan, McKay & Spier v. Yorkville Cotton Oil Co., 109 S. C. 462, 96 S. E. 524, 1 A. L. R. 1387 (1918), "season's output"; Pittsburgh Plate Glass Co. v. H. Neuer Glass Co., 253 Fed. 161, 165 C. C. A. 61 (1918); Ramey Lumber Co. v. John Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241 (1916); Stuart v. Home Tel. Co. of Detroit, 161 Mich. 123, 125 N. W. 720 (1910), "our requirements up to the amount of 500"; National Pub. Co. v. International Paper Co. (C. C. A. 2d) 269 Fed. 903, decided November 12, 1920, "the entire supply of half-tone newspaper required to print rotogravure supplements, * * * estimated at 400 tons."

August 25 and October 1, 1916, plaintiff furnished specifications and delivered orders to defendant for 13 carloads of flasks, and was able and offered to pay for them in cash at the contract price before they were shipped, but defendant refused to furnish any of them. The difference between the contract price of the flasks and their market price when defendant refused to deliver them was $1,993.70. This amount, with interest from January 1, 1917, was awarded to plaintiff.

The questions we are called upon to decide are: (1) Whether the contract was void for want of mutuality either generally or as to the flasks ordered in excess of 12 carloads. (2) Whether the contract was assignable, and, if not, whether defendant is estopped from defending on that ground.[57]

1. The contract contains an agreement by the glass company to sell, and an agreement by the Koehler & Hinrichs Company to buy a definite quantity of flasks at a stipulated price, payable on a day certain. It provides for delivery of the flasks upon specifications to be furnished by the buyer within a stated time, and it contains the clause we have quoted, giving to the buyer the privilege of increasing the quantity of flasks.

As to the 12 carloads, it is quite clear that the promises were not all on one side, for there is an express agreement on the one hand to sell and on the other to buy. Each party could hold the other to the performance of its agreement. The promises were mutual, were made at the same time, and are incorporated in a bilateral contract. Such promises so made are a sufficient consideration for each other. 1 Dun. Dig. § 1758; Ellsworth v. S. M. Ry. Ex. Co., 31 Minn. 543–549, 18 N. W. 822; Bayne v. Greiner's Estate, 118 Minn. 350, 136 N. W. 1041; Page on Contracts, § 296.

Furthermore, the parties, by their acts after the contract was executed, treated it as one having mutuality of obligation. In March, 1916, the buyer sought to have it canceled. The seller offered to cancel it if paid $500, and used this language in its letter in reply to the request for cancellation:

"This contract is certainly a liability of the Koehler & Hinrichs Company in case our factory sees fit to enforce it."

Later it wrote that it preferred to furnish the flasks specified in the contract at the contract price, and did not wish to cancel it or release the buyer. No further attempt was made to do away with the contract, but, on the contrary, it was acted upon by the delivery to plaintiff in small lots of another carload of flasks. The conduct of the parties amounted to a practical recognition of the binding effect of the contract in so far as the sale of 12 carloads of flasks was involved, and we decline to hold that it was void for want of mutuality.

The court found that 3 carloads of flasks were delivered, leaving 9

[57] Part of the opinion, dealing with question (2), is omitted. The court held that the right to delivery of the glass was assignable, and was enforceable on tender of the cash.

to be delivered if there had been no increase in the quantity definitely specified in the contract. Thirteen carloads more were ordered, but not delivered, and damages were awarded for the failure to make delivery of that quantity, the court giving effect to the option clause in the contract. It is confidently asserted in defendant's behalf that this portion of the contract is unilateral and not supported by any consideration. We have examined the authorities cited to sustain this contention, but think it is unnecessary to go beyond our own decisions in disposing of the question. It has been before the courts on many occasions. There is some diversity of opinion concerning the principles involved and more in their application to specific cases. This court is now definitely committed to the rule that if the party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. Staples v. O'Neal, 64 Minn. 27, 65 N. W. 1083; Gregory v. Shapiro, 125 Minn. 81, 145 N. W. 791; Murphy v. Anderson, 128 Minn. 106, 150 N. W. 387; First Nat. Bank v. Corp. Securities Co., 128 Minn. 341, 150 N. W. 1084; Scott v. Stevenson Co., 130 Minn. 151, 153 N. W. 316. The rule has been approved by the United States Circuit Court of Appeals for this circuit. Conley, etc., Co. v. Multiscope, etc., Co., 216 Fed. 892, 133 C. C. A. 96.

The rule applies to the option given to the buyer in the contract now under consideration. It was bound to take and pay for 12 carloads of flasks. This obligation furnished the consideration not only for the seller's promise to furnish them, but also for its promise to furnish a greater quantity if ordered by the buyer in accordance with the terms of its option. The fact that some of the flasks were to be shipped to Chicago, presumably for resale at a profit in a territory not theretofore covered by plaintiff, is of no importance. The option gave the buyer "the privilege of increasing quantity as much as they may desire * * * during the period covered by this contract." We find nothing in the language employed indicating that it was the purpose of the parties to limit the quantity the buyer might order to the reasonable necessities of its established trade at St. Paul. * * *

Affirmed.[58]

[58] In accord: Waters-Pierce Oil Co. v. Progressive Gin Co., 59 Okl. 262, 159 Pac. 349 (1916), sale of 200 barrels gasoline with option on 200 barrels more; Cooper v. Lansing Wheel Co., 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341 (1892), promise to supply "what wheels we may want during the season" became irrevocable as soon as any specific order was given.

RAGUE v. NEW YORK EVENING JOURNAL PUB. CO.

(Supreme Court of New York, Appellate Division, 1914. 164 App. Div. 126, 149 N. Y. Supp. 668.)

Action by William J. Rague against the New York Evening Journal Publishing Company. From an order denying plaintiff's motion for judgment on the pleadings, he appeals. Reversed, and motion granted.

THOMAS, J. The plaintiff was earning $21 per week from the sale and distribution of the Evening Telegram. The defendant requested him to discontinue the distribution, with an offer to pay him therefor $10.50 per week as long as he abstained from such sale and distribution. The plaintiff, induced thereby, relinquished the same, and has not resumed it. The defendant for several months paid the sum stipulated, and then declined further payment.

The contract by its terms was not within the statute of frauds with reference to its completion within one year. Kent v. Kent, 62 N. Y. 560. It was not without consideration, as the plaintiff abandoned a valuable business. The duration of the contract was not unmeasured, as it would continue until plaintiff did an act, viz., resumed the sale of the Telegram. Harrington v. Kansas City Cable Ry. Co., 60 Mo. App. 223; Carter White Lead Co. v. Kinlin, 47 Neb. 409, 66 N. W. 536; McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663.

But it is urged that the contract failed in mutuality. There was all the mutuality that the nature of defendant's offer permitted. The plaintiff was not asked to promise, but to do an act. He made renunciation of profitable employment and was continuing it. That was exact acceptance of all that was tendered. The plaintiff did not promise, but he did the required thing. Mutuality does not depend on words alone. It is unimportant that the continuance of the renunciation depends upon plaintiff's will. If a master owe, or is claimed to owe, a servant damages for personal injury, and promise him employment in consideration of a release therefor, and the release be given and the employment undertaken, there is mutuality, although the servant may at his will cease working. Carter White Lead Co. v. Kinlin, supra. So when permanent employment is promised upon similar consideration.[59] Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289. There was similar decision in Smith v. St. Paul & Duluth R. Co., 60 Minn. 331, 62 N. W. 392; East Line & Red River R. R. Co. v. Scott, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663. If A. offer to pay B. $500 upon the consideration that the latter lay down a business, B. accepts by laying it down. The case does not differ in respect to mutuality if the offer be that B. relinquish the busi-

[59] In accord: Texas Cent. R. Co. v. Eldredge (Tex. Civ. App.) 155 S. W. 1010 (1913); Paducah Home Telephone & Telegraph Co. v. Ellerbrook, 182 Ky. 195, 206 S. W. 282 (1918).

ness in consideration of the payment of fixed installments, while the relinquishment continues and B. acts upon it. In either case, the offer, upon B.'s compliance, becomes an obligatory promise, based upon good consideration.

Both upon principle and authority the order should be reversed, with $10 costs and disbursements, and the motion for judgment granted, with $10 costs. All concur.[60]

WOOD v. LUCY, LADY DUFF-GORDON.

(Court of Appeals of New York, 1917. 222 N. Y. 88, 118 N. E. 214.)

CARDOZO, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in McCall Co. v. Wright, 133 App. Div. 62, 117 N. Y. Supp. 775; Moran v. Standard Oil Co., 211 N. Y. 187, 198, 105 N. E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to

[60] Cited and followed in Western Newspaper Union v. Kitchel, 201 Mich. 121, 166 N. W. 1021 (1918).

have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. Phœnix Hermetic Co. v. Filtrine Mfg. Co., 164 App. Div. 424, 150 N. Y. Supp. 193; W. G. Taylor Co. v. Bannerman, 120 Wis. 189, 97 N. W. 918; Mueller v. Mineral Spring Co., 88 Mich. 390, 50 N. W. 319. We are not to suppose that one party was to be placed at the mercy of the other. Hearn v. Stevens & Bro., 111 App. Div. 101, 106, 97 N. Y. Supp. 566; Russell v. Allerton, 108 N. Y. 288, 15 N. E. 391. Many other terms of the agreement point the same way. We are told at the outset by way of recital that:

"The said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon, has approved."

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficacy, as both parties must have intended that at all events it should have." Bowen, L. J., in The Moorcock, 14 P. D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion the authorities are ample. Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, 63 N. E. 550; Phœnix Hermetic Co. v. Filtrine Mfg. Co., supra; Jacquin v. Boutard, 89 Hun, 437, 35 N. Y. Supp. 496; Id., 157 N. Y. 686, 51 N. E. 1091; Moran v. Standard Oil Co., supra; City of N. Y. v. Paoli, 202 N. Y. 18, 94 N. E. 1077; McIntyre v. Belcher, 14 C. B. (N. S.) 654; Devonald v. Rosser & Sons, [1906] 2 K. B. 728; W. G. Taylor Co. v. Bannerman, supra; Mueller v. Mineral Spring Co., supra; Baker Transfer Co. v. Merchants' R. & I. Mfg. Co., 1 App. Div. 507, 37 N. Y. Supp. 276.

The judgment of the Appellate Division should be reversed, and the

order of the Special Term affirmed, with costs in the Appellate Division and in this court.

CUDDEBACK, MCLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., and CHASE and CRANE, JJ., dissent.

Judgment reversed, etc.[61]

VICKREY et al. v. MAIER et al.

(Supreme Court of California, 1913. 164 Cal. 384, 129 Pac. 273.)

Action by O. A. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

SHAW, J. Appeal from the judgment on the judgment roll alone.

The complaint is in three counts upon three contracts of similar form. The first is dated November 14, 1905, and is for the sale of 10 shares of the Maier Packing Company, a corporation, at $5,000. The second and third are dated, respectively, August 20, and November 10, 1906; the second being for 20 shares of said stock at $10,000, and the third for 30 shares at $15,000. A consideration of the first contract will be determinative of all questions presented, except that of the statute of limitations.

On November 14, 1905, plaintiffs subscribed for the 10 shares of stock, and paid $5,000 to said company therefor; that being the par value. The shares were issued to them on February 20, 1906, and they have ever since held and owned the same. Upon the date they subscribed the plaintiffs and defendants executed a written agreement as follows: "This agreement made and entered into this 14th day of November, 1905, by and between Simon Maier and John T. Jones, parties of the first part, and O. A. and B. L. Vickrey, party of the second part, witnesseth: That whereas said second party has subscribed for 10 shares of the capital stock of the Maier Packing Co., a corporation, the first parties are desirous of securing the first right to purchase said stock in the event second party may desire to sell the same: Now, therefore, said second party agrees that, before offering said stock for sale, he will first notify first parties and give them the first right to buy the same at the price offered by any bona fide intending purchaser. In consideration of which said first parties agree

[61] Other cases where the court found a counter promise by implication: Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S. W. 750 (1911), employment contract; American Publishing & Engraving Co. v. Walker, 87 Mo. App. 503 (1901); Doolittle v. Callender, 88 Neb. 747, 130 N. W. 436 (1911); Phelps v. La Salle Hotel Co., 209 Ill. App. 430 (1918); Lascelles v. Clark, 204 Mass. 362, 90 N. E. 875 (1910), guaranty contract; Massachusetts Biographical Society v. Russell, 229 Mass. 524, 118 N. E. 662 (1918); Newell v. Hill, 2 Metc. (Mass.) 180 (1840); Pordage v. Cole, 1 Wms. Saunders, 319 (1669); Whidden v. Belmore, 50 Me. 357 (1863).

Such an implication was denied in Sorrentino v. Bouchet (Sup.) 161 N. Y. Supp. 262 (1916).

and obligate themselves to pay or cause to be paid to second party a dividend of six per cent. per annum on said stock, payable quarterly, and that at any time after six months from date hereof, on ninety days' notice, they will purchase said stock at the price paid therefor and six per cent. per annum from date of payment of last dividend, but the party of the second part shall not be obligated to sell said stock at the price paid therefor."

Dividends of 6 per cent. per annum were regularly paid by said company on said stock down to and including the quarterly dividend due on July 3, 1909. In each of the last two counts the date "July 3, 1909," is, by what is obviously a clerical error, written July 3, 1910. We attach no importance to this misprision and disregard it entirely. No other dividends have been paid on the stock. On March 4, 1910, the plaintiffs gave to the defendants the following notice: "Messrs. Simon Maier and John T. Jones—Gentlemen: In accordance with the provisions contained in three certain agreements between yourselves upon the one part and the undersigned upon the other, of date of November 14, 1905, August 20, 1906, and November 10, 1906, respectively, at which times the undersigned purchased from the Maier Packing Company, a corporation, ten (10), twenty (20), and thirty (30) shares of its capital stock, respectively, making a total purchase of sixty (60) shares of the capital stock of the Maier Packing Company for the sum of thirty thousand ($30,000) dollars, we request and demand that you carry out the provisions of said agreements and each thereof by paying or causing to be paid to the undersigned all dividends now in arrears upon said stock at the rate of six (6) per cent. per annum, payable quarterly, and we further request and demand that you comply with the provisions of said agreements and each thereof by purchasing on or before ninety (90) days from date hereof said sixty (60) shares of stock and paying us therefor the price paid for the same, to wit, the sum of $30,000, and in addition thereto all said sums now unpaid on account of dividends."

On September 12, 1910, plaintiffs tendered to defendants the said shares of stock, and demanded that the defendants should pay to plaintiffs the price paid by the plaintiffs therefor, to wit, $5,000, and the further sum of $355.67 as interest on the $5,000, from the date of payment of said last paid dividend to the date of the demand. The defendants refused and still refuse to perform said agreement of November 14, 1905, and have not paid said sums or any part thereof. The prayer of the complaint is for judgment for $32,134.01, being the aggregate amount demanded upon the three contracts, including purchase price and dividends unpaid. The action was begun on the day of the tender and immediately thereafter.

The only defenses alleged in the answer are that there was no consideration for the agreements sued on, and that the action is barred by the provisions of section 337 of the Code of Civil Procedure, pre-

scribing four years as the period of limitation. No evidence was offered in support of either of the defenses, and the plaintiffs offered no evidence to prove a consideration. Upon the foregoing facts the court below gave judgment for the defendants.

The complaint states facts sufficient to constitute a cause of action. The agreement bound the defendants to perform two things: First, to pay, or cause to be paid, quarterly, a dividend on the stock at the rate of 6 per cent. per annum; second, to repurchase the stock at the price which the plaintiffs had paid therefor, with interest from the date of the payment of the last dividend. No dividend has been paid for the year beginning July 3, 1909. The dividends for that year on the 10 shares of stock covered by the first contract amounted to $300. The defendants had agreed to pay this sum to plaintiffs, and had failed to do so, although it was past due. It was a direct undertaking for the payment of money, and upon a breach thereof they were immediately liable. The plaintiffs were therefore at least entitled to recover the amounts of the quarterly dividends on all the stock due and remaining unpaid at the time the action was begun.

There is no merit in the claim that the agreement was without consideration. Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed, and, if necessary, we must assume that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. If the contract had not recited any consideration, the fact that it was in writing would therefore be sufficient evidence thereof. But the agreement, on its face, shows a consideration. It is a well-established rule of the law of contracts that a promise by one party may be a sufficient consideration for the promise of another; that where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, particularly where it is expressly so declared. Gallagher v. Equitable, etc., Co., 141 Cal. 707, 75 Pac. 329; Van Loben Sels v. Bunnell, 120 Cal. 682, 53 Pac. 266; 1 Parsons on Cont. *p. 449; 1 Page on Cont. § 296; 1 Beach on Cont. § 178. Here the plaintiffs agreed that if they chose to sell the stock they would give the defendants a preferred right to buy it over all other purchasers. The defendants deemed this a valuable thing, and in consideration therefor they agreed to pay dividends on the stock, and also to buy the stock at plaintiff's option at any time after 6 months, on 90 days' notice, at a stated price. Under the authorities there was a sufficient consideration.

[The court then proceeded to discuss the application of the statute of limitations, and held that it would not begin to run from the end of the six months period next succeeding the making of the contract, at which time the plaintiff's power of acceptance by giving notice

would first exist, but from the time when the defendant refused to perform his duty to pay after the end of the 90-day period and the tender of the stock.]

Judgment reversed.[62]

[62] "Mutuality" of legal duty is not necessary to the validity of a contract. A promise is enforceable, even though the promisee has the option of doing nothing further, provided he has already performed the agreed consideration for the promise. Hills v. Hopp, 287 Ill. 375, 122 N. E. 510 (1919), sale of stock with agreement to buy it back, if buyer should be dissatisfied; Murphy v. Hanna, 37 N. D. 156, 164 N. W. 32, L. R. A. 1918B, 135 (1917), securities delivered in return for promise to lend money as desired; Ziehm v. Frank Steil Brewing Co. of Baltimore City, 131 Md. 582, 102 Atl. 1005 (1917), debt to a third party guaranteed in return for promise to buy beer of promisee only, the latter making no promise to supply beer; Himrod Furnace Co. v. Cleveland & M. R. Co., 22 Ohio St. 451 (1872); Rague v. New York Evening Journal Pub. Co., 164 App. Div. 126, 149 N. Y. Supp. 668 (1914), ante; Western Newspaper Union v. Kitchel, 201 Mich. 121, 166 N. W. 1021 (1918); Underwood Typewriter Co. v. Century Realty Co., 220 Mo. 522, 119 S. W. 400, 25 L. R. A. (N. S.) 1173 (1909), ante; Eldorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S. W. 460 (1910); Nolle v. Mutual Union Brewing Co., 264 Pa. 534, 108 Atl. 23 (1919); and see cases on Acceptance by Act or Forbearance, ante, chap. I, sec. 4.

Further, a promise is not itself insufficient as consideration for a return promise merely because it is conditional even though there may be an option left to the promisor. Scott v. Moragues Lumber Co., 202 Ala. 312, 80 South. 394 (1918), mutual promises to charter a vessel in case defendant should buy one; Golden Cycle Min. Co. v. Rapson Coal Min. Co., 188 Fed. 179, 112 C. C. A. 95 (1911), sale of all the coal that buyer "may use" on its mine; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218 (1891).

A bilateral contract is not invalidated by the fact that one party retains the power of terminating it by giving a specified notice or by doing some other voluntary act. McMullan v. Dickinson Co., 63 Minn. 405, 65 N. W. 661, 663 (1896); Thomas v. Anthony, 30 Cal. App. 217, 157 Pac. 823 (1916); Pilkington v. Scott, 15 M. & W. 657 (1846); Merchants' Life Ins. Co. v. Griswold (Tex. Civ. App.) 212 S. W. 807 (1919).

A lease for which cash was paid is not invalidated by a provision giving the lessee the "option" of surrendering it at any time. Northwestern Oil & Gas Co. v. Branine (Okl.) 175 Pac. 533, 3 A. L. R. 344 (1918); Rich v. Doneghey (Okl.) 177 Pac. 86, 3 A. L. R. 352 (1918), where the court said: "The trial court held that the contract granting this present vested interest in the land was 'unilateral and void.' Strictly speaking, a unilateral contract is one in which there is a promise on one side only, the consideration on the other side being executed. Evidently the term was not used in that sense by the trial court, for such contracts are not void, but are equally as valid as bilateral contracts, consisting solely of mutual promises to do some future act, in which the consideration of the promise of one party is a promise on the part of the other. The term 'unilateral' is often used to express absence of mutuality. In the case of contracts made up solely of mutual promises, each the consideration for the other, where the promises of one party are so expressed as not to be absolutely binding on him, but to be performed only if such party so wills, or a promise on but one side and no consideration therefor, the one who makes the absolute promise in the one case, or the sole promise in the other, is not bound to perform. The reason sometimes given is that the contract is unilateral, or void for want of mutuality. The real reason is that there is not a sufficient consideration for the promise. 'Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise.' "

MURPHY v. HANNA et al.

(Supreme Court of North Dakota. 1917. 37 N. D. 156, 164 N. W. 32, L. R. A. 1918B, 135.)

Action by Michael Murphy, receiver of the Medina State Bank against L. B. Hanna and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

BIRDZELL, J.[63] * * * The complaint alleges an agreement between the Medina State Bank, on the one side, and the defendants, jointly and severally, on the other, whereby the bank should deliver such of its unpaid bills receivable as the defendant should elect to receive as collateral security, in consideration of which and of the promise to repay the defendants would advance to the plaintiff bank sufficient cash to meet all its obligations and enable it to continue its banking business. It is further alleged as the understanding of the parties at the time that the amount needed would be upward of $20,000. While the complaint is replete with allegations setting forth the inducement of the contract, and circumstances which, if proved, might be proper to consider in determining the amount of damages recoverable—allegations in aggravation of damages—the foregoing statement comprises all the allegations touching the terms of the contract entered into. Immediately following the foregoing is an allegation of at least a partial performance of the agreement set forth. It is alleged that in carrying out the terms of the agreement the defendant selected and the plaintiff delivered to them bills receivable of the approximate value of $20,000, for the purpose of furnishing collateral to such advances, which bills made up and constituted the assets of the bank that were of such character as to be readily convertible into cash. A careful examination of the allegations of the contract, construed in the light of the inducing matter, but separate and apart from the allegations as to what was done under it, leads us to conclude that as a wholly executory, bilateral contract it was not enforceable, by reason of a lack of mutuality of obligations. Viewed as an executory contract, it is clear that the State Bank of Medina bound itself to borrow no money from the defendants, either absolutely or conditionally. If the plaintiff bank had, after making the agreement above referred to, found another bank or an individual that would have been willing to advance the necessary cash upon more favorable terms than those alleged, or reasonably implied from those alleged, it could not, with reason, be contended that they would have been in any way liable to the defendants, had they borrowed money from such third party. Austin Real Estate & Abstract Co. v. Bahn, 87 Tex. 582, 29 S. W. 646, 30 S. W. 430; McMannus v. Bark, L. R. 5 Ex. 65. In the Texas case referred to, the creditor agreed to an extension of one

[63] Parts of the opinion are omitted.

week, in consideration of the promise of the debtor to pay within that time, and it was held that the promise of the creditor was without any consideration, for the reason that the debtor was not obliged to retain the money or to pay interest for any period.

The complaint in the case at bar states no fact from which it can reasonably be inferred that the State Bank of Medina became bound to borrow any money from the defendants, and in so far as it sought to hold the defendants liable for the repudiation of an obligation to loan money, resting upon a counter obligation to borrow, we find no such corresponding promise or obligation on the part of the plaintiff; nor is there any allegation from which it can be reasonably inferred that any other detriment was suffered, or consideration furnished by the defendants. In the case of Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218, so much relied upon by appellant in the case at bar, there was a proposal to furnish certain steamers with such coal as would be required for a stated period. The acceptance of the proposal bound the owners to purchase such coal as would be required in the operation of the vessels. Mutuality of obligation was present, in that the purchasers were bound by their acceptance to purchase the coal required from the sellers. The contract thus formed was thus mutually obligatory from the beginning, and while prospectively indefinite as to subject-matter, it nevertheless contained its own measure of definiteness as to quantity. The court applied the maxim "Certum est quod certum reddi potest," and held that damages were recoverable for breach of the contract.

There are many cases in the books in which it is held that damages may be recovered for breach of contract, where the measure of performance is indefinite, in the sense that exact quantities cannot be determined in advance, as where, for instance, the quantity is to be determined by the necessities of a business or the reasonable requirements of a factory. Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; Dailey v. Clark, 128 Mich. 591, 87 N. W. 761; Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529. But see Jenkins & Co. v. Anaheim Sugar Co. (D. C.) 237 Fed. 278 [reversed by 247 Fed. 958, 160 C. C. A. 658, L. R. A. 1918E, 293]. But in all such cases upon analysis it will be found that the contracts involved mutuality of obligation, in that both parties had restricted their contractual freedom by binding themselves mutually to the terms of an agreement involving a limitation of legal rights—the purchasers being as much bound to look to the particular source for the goods required as were the vendors to supply them. In this there was consideration and mutuality of obligation. In our opinion there is a clear distinction between a case where a merchant agrees to buy from a certain seller such a quantity of a certain kind of goods as he may require in the operation of his business, and an agreement by a borrower to borrow sufficient money to meet his existing obligations, the whole of which sum he could re-

turn at once without sustaining any liability whatsoever. The contract set forth in the complaint is of this character, and it is consequently lacking in the essentials necessary to make it a binding obligation for the loaning and borrowing of money. In so far as the complaint purports to state a cause of action for the breach of a wholly executory contract to loan money, and in so far as special damages are predicated upon the breach of such a contract, the complaint is demurrable, and the special damages are not recoverable.

But the foregoing considerations do not wholly dispose of the questions raised on this appeal. The complaint alleges more than a purely executory contract. It alleges, as hereinbefore stated, the circumstances in which the parties were negotiating, their purposes, and the objects which they had in view, as well as the doing of certain things by way of conforming to those purposes and realizing the objects. These allegations give rise to an additional inquiry to determine whether a cause of action in contract is stated. A contract may fail wholly as an executory agreement, carrying mutual obligations of the parties from the time it is made, and yet result in contractual obligations depending upon what is done in pursuance of it. Says Baron Parke in the case of Kenneway v. Treleavan, 5 M. & W. 498, 151 Eng. Rep. 211:

"But a great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests with one of the contracting parties. A guaranty falls under that class. When a person says, 'In case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you,' the party indemnified is not therefore bound to employ the person designated by the guaranty; but, if he do employ him, then the guaranty attaches, and becomes binding on the party who gave it."

[The court here referred to Offord v. Davies et al., 12 C. B. R. (N. S.) 748; Great Northern R. R. Co. v. Witham, L. R. 9 C. P. 16; Queen v. Demers, [1900] A. C. 103; 9 Cyc. 327; Willetts v. Sun Mutual Insurance Co., 45 N. Y. 45, 6 Am. Rep. 31; and Slade et al. v. Lexington, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201.]

In the case of Chicago & Great Eastern R. R. Co. v. Dane, 43 N. Y. 240, the defendant wrote a letter agreeing to receive and transport not exceeding 600 tons of freight, on account of the Chicago & Great Eastern Railroad Company, the addressee of the letter. The plaintiff railway company promptly answered the letter as follows: "In behalf of this company I assent to your agreement, and will be bound by its terms."

The court held that the word "agree" in the defendant's letter was equivalent to "offer," and that the plaintiff offeree had manifested an unqualified assent to the terms of the offer. No contract resulted, for the reason that the plaintiff had in no way bound itself by its acceptance. The court in speaking of the effect of the purported acceptance, said (page 242): "This amounted to nothing more than

the acceptance of an option by the plaintiff for the transportation of such quantity of iron by the defendants as it chose; and had there been a consideration given to the defendants for such option, the defendants would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having at its election not to require the transportation of any. * * * There being no consideration for the promise of the defendants, except this acceptance by the plaintiff, and that not binding it to furnish any iron for transportation unless it chose, it follows that there was no consideration for any promise of the defendants, and that the breach of such promise furnishes no foundation for an action."

The court further held that, though the offer and purported acceptance created no contractual obligation, the defendant would have been bound, had the plaintiff accepted defendant's proposition for any specific quantity not beyond that limited.

[The court here discussed Thayer et al. v. Burchard et al., 99 Mass. 508; Minnesota Lumber Co. v. Whitebreast Coal Co., supra, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; Jones v. Vance Shoe Co., 115 Fed. 707, 53 C. C. A. 289; and United Press v. N. Y. Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288.]

In the case at bar it is alleged that the defendants selected and the plaintiff turned over to them bills receivable to the value of about $20,000, and that this was done in pursuance of the agreement whereby the defendants had undertaken to loan money to the plaintiff bank. Even though the defendants' promise was not binding at the time it was made, by reason of a lack of a corresponding obligation on the part of the plaintiff to borrow money, yet they are in the position, as a result of the agreement (using this term in the sense of common understanding, rather than as referring to a legally binding contract) entered into, of offering to loan to the plaintiff money in exchange for collateral to be selected by the defendants and turned over by plaintiff. The plaintiff alleges a full compliance with the terms upon which the defendants were willing and offered to loan money, and it further alleges that the defendants repudiated their agreement and "refused to advance any money to said bank to enable it to continue in business."

We are of the opinion that a contractual relation between the Medina State Bank and the defendants sprang into existence by reason of the selection and acceptance by the defendants of the collateral security. In the absence of any express agreement or understanding, the defendants thereby became obligated to loan to the Medina State Bank such a sum of money as would ordinarily be loaned by one bank or individual to another upon such collateral security, under all the circumstances then existing and contemplated by the parties. It will be competent to show, however, with what mutual understanding, if any, the plaintiff bank parted with the securities which, it is alleged, were turned over to the defendants. It is, of course, self-evident that the defendants could, in no event, be held to have agreed to loan

a sum in excess of that for which the $20,000 of collateral selected by them was, under the arrangement alleged, considered by the parties to be adequate security, and the only damages which defendants could be holden for are those shown to have resulted from their failure to loan such amount of money. As this case is before us on a demurrer, we are, of course, wholly in the dark with respect to the actual facts in the case, and must accept the facts stated in the complaint as true, with reasonable inferences in their favor.

It is true that the complaint sets forth no specific promise to loan a definite sum of money; but we are satisfied that, if the evidence should clearly establish the facts alleged with reference to the understanding of the parties at the time, the jury would have a right to infer from such facts an agreement to advance what would be considered a reasonable sum, in view of all the circumstances, including the value of the securities turned over. This matter, however, must depend wholly upon the evidence to be adduced at the trial. It must be borne in mind that the transaction alleged is unusual, that it was made for a special purpose, and that defendants had an apparent interest in the accomplishment of the objects sought to be attained, chief of which was the continued existence of the bank. It is not only alleged that the assets turned over to the defendants were of the value of about $20,000, but it is also alleged that they constituted "the assets of [the] bank that were of the character that could be speedily converted into cash or made available to enable such bank to continue in business."

A contract may be somewhat ambiguous and indefinite, not merely as a result of words employed by the parties, but as a consequence of more or less equivocal acts as well. In such cases it is fundamental that, in measuring the obligation which one assumes by reason of his words or conduct, it is competent to consider the surrounding circumstances, in order that the intention of the parties may be applied and the obligation measured by the standard employed by the parties during their negotiations. Merriam v. United States, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; 9 Cyc. 587, 588. The allegations quoted above, if established, would, in our judgment, amount to what is termed by the Supreme Court of Massachusetts, in the case of the First National Bank v. Watkins, 154 Mass. 385, 28 N. E. 275, "an ordinary case of a unilateral contract growing out of the offer of one party to do something if the other will do or refrain from doing something else," and where it was held that: "If the party to whom such an offer is made acts upon it in the manner contemplated, either to the advantage of the offerer or to his own disadvantage, such action makes the contract complete." * * *

Reversed and remanded.

SECTION 5.—PERFORMANCE OF PRE-EXISTING LEGAL DUTY

(Including Promises of Such Performance)

REYNOLDS v. PINHOWE.

(In the King's Bench, 1595. Cro. Eliz. 429.)

Assumpsit. Whereas the defendant had recovered five pounds against the plaintiff; in consideration of four pounds given him by the plaintiff, that the defendant assumed to acknowledge satisfaction of that judgment before such a day; and that he had not done it. And it was thereupon demurred; for it was moved, that there was not any consideration; for it is no more than to give him part of the money which he owed him, which is not any consideration.—But all THE COURT held it to be well enough; for it is a benefit unto him to have it without suit or charge: and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.[64]

FOAKES v. BEER.

(In the House of Lords, 1884. L. R. 9 App. Cas. 605.)

Appeal from an order of the Court of Appeal.

On August 11th, 1875, the respondent recovered judgment against the appellant for £2,077 17s. 2d. for debt and £13 1s. 10d. for costs. On December 21st, 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms:

"Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in her Majesty's High Court of Justice, Exchequer Division, for the sum of £2,090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2,090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on July 1st and January 1st or within one calendar month after each of the said days respectively in every year until the whole of the

[64] S. c., Moore, K. B. 412, 1 Rolle. Abr. 28 (1595). This case was cited with approval by Justice Littledale in Wilkinson v. Byers, 1 Adol. & El. 106 (1834).

said sum of £2,090 19s. shall have been fully paid and satisfied, the first of such payments to be made on July 1st next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment."

The respondent having in June, 1882, taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on July 1st, 1882, due upon the judgment.

At the trial of the issue before Cave, J., it was proved that the whole sum of £2,090 19s. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of December 21st, 1876, he undertook to pay and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin Williams and Mathew, JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett, M. R., Lindley, and Fry, L. JJ.) reversed that decision and entered judgment for the respondent for the interest due, with costs.[65] * * *

Lord BLACKBURN.[66] My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on December 21st, 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after July 1st and January 1st in each ensuing year of £150, until the sum of £2,090 19s. was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19s. made within the next six months. This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all.

[65] 11 Q. B. Div. 221.

[66] The concurring opinions of Selborne, L. C., and of Lords Fitzgerald and Watson are omitted.

If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2,090 19s. was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a different construction on the words at the time; but I think the words "till the said sum of £2,090 19s. shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2,090 19s., subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500 or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In Coke, Littleton, 212b, Lord Coke says: "Where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. * * * If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites Pinnel's Case [5 Rep. 117a]. That was an action on a bond for £16, conditioned for the payment of £8 10s. on November 11th, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on October 1st, paid to the plaintiff £5 2s. 2d., which the plaintiff accepted in full satisfaction of the £8 10s. The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, be-

cause it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction.[67] But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material; so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved—viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision, except in Fitch v. Sutton [5 East, 230], as to which I shall make some remarks later, and in Down v. Hatcher [10 A. & E. 121], as to which Parke, B., in Cooper v. Parker [15 C. B. 828], said: "Whenever the question may arise as to whether Down v. Hatcher is good law, I should have a great deal to say against it," yet there certainly are cases in which great judges have treated the dictum in Pinnel's Case as good law.

[67] Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 (1891), debtor gave promissory notes for part, secured by a chattel mortgage, and the debt was held satisfied.

For instance, in Sibree v. Tripp [15 M. & W. 33, 37], Parke, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two—viz., payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

I will first examine the authorities. If a defendant pleaded the general issue, the plaintiff could join issue at once, and if the case was not defended get his verdict at the next assizes. But by pleading a special plea, the plaintiff was obliged to reply, and the defendant often caused the plaintiff, merely by the delay occasioned by replying, to lose an assize. If the replication was one to which he could demur he made this sure. Strangely enough it seems long to have been thought that if the defendant kept within reasonable bounds, neither he nor his lawyers were to blame in getting time in this way by a sham plea—that a chattel was given and accepted in satisfaction of the debt. The recognized forms were giving and accepting in satisfaction a beaver hat, Young v. Rudd [5 Mod. 86], or a pipe of wine [3 Chit. Plead. (7th Ed.) 92]. All this is now antiquated. But while it continued to be the practice, the pleas founded on the first part of the resolution in Pinnel's Case were very common, and that law was perfectly trite. No one for a moment supposed that a beaver hat was really given and accepted; but every one knew that the law was that if it was really given and accepted it was a good satisfaction. But special pleas founded on the other resolution in Pinnel's Case, on what I have ventured to call the dictum, were certainly not common. I doubt if a real defence of this sort was ever specially pleaded. When there really was a question as to whether a debt was satisfied by a payment of a smaller sum the defend-

ant pleaded the general issue, and if it was proved to the satisfaction of the jury that a smaller sum had been paid and accepted in satisfaction of a greater, if objection was raised the jury might, perhaps, as suggested by Holroyd, J., in Thomas v. Heathorn [2 B. & C. 482], find that the circumstances were such that the legal effect was to be as if the whole was paid down and a portion thrown back as a god's-penny. This, however, seems to me to be an unsatisfactory and artificial way of avoiding the effect of the dictum, and it could not be applied to such an agreement as that now before this House.

For whatever reason it was, I know of no case in which the question was raised whether a payment of a lesser sum could be satisfaction of a liquidated demand from Pinnel's Case down to Cumber v. Wane, 5 Geo. I [1 Sm. L. C. (8th Ed.) 357], a period of one hundred and fifteen years.

In Adams v. Tapling [4 Mod. 88], where the plea was bad for many other reasons, it is reported to have been said by the Court that: "In covenant where the damages are uncertain, and to be recovered, as in this case, a lesser thing may be done in satisfaction, and there 'accord and satisfaction' is a good plea." No doubt this was one of the cases which Parke, B., would have cited in support of his opinion that Down v. Hatcher [10 A. & E. 121] was not good law. The Court are said to have gone on to recognize the dictum in Pinnel's Case, or at least not to dissent from it, but it was not the ground of their decision. In every other reported case which I have seen the question arose on a demurrer to a replication to what was obviously a sham or dilatory plea.

Some doubt has been made as to what the pleadings in Cumber v. Wane [1 Str. 426] really were. I have obtained the record.[68] The plea is that after the promises aforesaid, and before the issuing of the writ, it was agreed between the said George and Edward Cumber that he, the said George, "daret eidem Edwardo Cumber quandm notam in script vocatam, a promissory note, manu propria ipsius Georgii subscript pr. solucon eidem Edwardo Cumber vel ordiñi quinque librarum," fourteen days after date, in full satisfaction and exoneration of the premises and promises, which said note in writing the said George then gave to the said Edward Cumber, and the said Edward Cumber then and there received from the said George the said note in full satisfaction and discharge of the premises and promises.

The replication is that "the said George did not give to him Edward any note in writing called a promissory note with the hand of him George subscribed for the payment to him Edward or his order of £5, fourteen days after date in full satisfaction and discharge of the premises and promises." To this there is a demurrer and judgment

[68] The reference is: Queen's Bench (Plea side) Plea Roll, 5 Geo. I. Trinity, ro. 173.

in the Common Pleas for the plaintiff "that the replication was good in law."

The reporter, oddly enough, says there was an immaterial replication. The effect of the replication is to put in issue the substance of the defence—namely, the giving in satisfaction; Young v. Rudd [5 Mod. 86], and certainly that was not immaterial. But for some reason, I do not stop to inquire what, Pratt, C. J., prefers to base the judgment affirming that of the Common Pleas on the supposed badness of the plea rather than on the sufficiency of the replication. It is impossible to doubt that the note, which it is averred in the plea was given as satisfaction, was a negotiable note. And therefore this case is in direct conflict with Sibree v. Tripp [15 M. & W. 23].

Two cases require to be carefully considered. The first is Heathcote v. Crookshanks [2 T. R. 24]. The plea there pleaded would, I think, now be held perfectly good, see Norman v. Thompson [4 Ex. 755]; but Buller, J., seems to have thought otherwise. He says: "Thirdly, it was said that all the creditors were bound by this agreement to forbear, but that is not stated by the plea. It is only alleged that they agreed to take a certain proportion, but that is a nudum pactum, unless they had afterward accepted it. In the case in which Cumber v. Wane was denied to be law, Hardcastle v. Howard (26 Geo. III, B. R.), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, the plea is clearly bad."

That decision goes entirely on the ground that accord without satisfaction is not a plea. I do not think it can be fairly said that Buller, J., meant by saying "that is a nudum pactum, unless they had afterward accepted it," to express an opinion that if the dividend had been accepted it would have been a good satisfaction. But he certainly expresses no opinion the other way.

In Fitch v. Sutton [5 East, 230] not only did the plaintiff not accept the payment of the dividend in satisfaction, but refused to accept it at all, unless the defendant promised to pay him the balance when of ability, and the defendant assented and made the promise required, so that but for the fact that other creditors were parties to the composition there could have been no defence. There was no point of pleading in that case, the whole being open under the general issue. And in Steinman v. Magnus [11 East, 390] it was pretty well admitted by Lord Ellenborough that the decision in Fitch v. Sutton would have been the other way, if they had understood the evidence as the reporter did. But though this misapprehension of the judges as to the facts, and the absence of any acceptance of the dividend, greatly weaken the weight of Fitch v. Sutton, still it remains that Lord Ellenborough, a very great judge indeed, did, however hasty or unnecessary it may have been to express such an opinion, say: "It is impossible to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration

for the relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest when of ability put the plaintiff in no better condition than he was before. It was expressly determined in Cumber v. Wane that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me in argument in Heathcote v. Crookshanks [2 T. R. 24] to have been denied to be law, and in confirmation of that Buller, J., afterward referred to a case (stated to be that of Hardcastle v. Howard [H. 26 Geo. III]), yet I cannot find any case of that sort, and none has been now referred to; on the contrary, the decision in Cumber v. Wane is directly supported by the authority of Pinnel's Case, which never appears to have been questioned."

I must observe that, whether Cumber v. Wane was, or was not denied to be law in Hardcastle v. Howard, it certainly was denied to be law in Sibree v. Tripp [15 M. & W. 23], and that, though it is quite true that Pinnel's Case, as far as regards the points actually raised in the case, has not only never been questioned, but is often assented to, I am not aware that in any case before Fitch v. Sutton, unless it be Cumber v. Wane, has that part of it which I venture to call the dictum ever been acted upon; and as I have pointed out, had it not been for the composition with other creditors, there could have been no defence in Fitch v. Sutton, whether the dictum in Pinnel's Case was right or wrong.

Still this is an authority, and I have no doubt that it was on the ground of this authority and the adhesion of Bayley, J., to it in Thomas v. Heathorn [2 B. & C. 477], that Barons Parke and Alderson expressed themselves as they did in the passages I have cited from Sibree v. Tripp. And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to Cumber v. Wane, in the second edition of his Leading Cases, that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was

no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Order appealed from affirmed, and appeal dismissed with costs.[69]
* * *

NASSOIY v. TOMLINSON.

(Court of Appeals of New York, 1896. 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695.)

VANN, J. On the sixth of April, 1887, the plaintiff sold the property of the defendants, under an agreement that he was to receive compensation for his services in making the sale, but there was a difference between them as to the amount. The sale was not completed until about June 20th, 1887, on which day Mr. Chauncey, who represented the defendants in all their dealings with the plaintiff, wrote to him as follows: "I heard to-day from Mr. Griffith that the sale to Weston was completed on Saturday. I send you a check for three hundred dollars (1 per cent. on $30,000), your commission on the sale. Please sign and return the enclosed voucher." There was a check for $300

[69] The American cases in accord with Foakes v. Beer are legion, in spite of much criticism of the rule. See Warren v. Skinner, 20 Conn. 559 (1850); Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 N. E. 198 (1908); Bender v. Been, 78 Iowa, 283, 43 N. W. 216, 5 L. R. A. 596 (1889); Call v. Pinson, 180 Ky. 367, 202 S. W. 883 (1918); Zinke v. Knights of Maccabees of the World, 275 Mo. 660, 205 S. W. 1 (1918); Decker v. George W. Smith & Co., 88 N. J. Law, 630, 96 Atl. 915 (1916); Sherman v. Pacific Coast Pipe Co., 60 Okl. 103, 159 Pac. 333, L. R. A. 1917A, 716 (1916); Clark v. Summerfield Co., 40 R. I. 254, 100 Atl. 499 (1917); Wheeler v. Wheeler, 11 Vt. 60 (1839). Also notes in 20 L. R. A. 785; 11 L. R. A. (N. S.) 1018; 21 L. R. A. (N. S.) 1005, L. R. A. 1917A, 719; 1 Cyc. 319, note 94.

Contra: Frye v. Hubbell, 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197 (1907); Clayton v. Clark, 74 Miss. 499, 21 South. 565, 22 South. 189, 37 L. R. A. 771, 60 Am. St. Rep. 521 (1896); Schuessler v. Lundstrom, 246 Fed. 439, 158 C. C. A. 503 (1917) (without discussion); Dreyfus & Co. v. Roberts, 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. Rep. 67, 5 Ann. Cas. 521 (1905), where a receipt in full is given.

At least ten states have nullified the rule of Foakes v. Beer by statute. 1 Cyc. 322.

A composition agreement between a debtor and two or more of his creditors, providing for a discharge upon payment of a lesser sum, is universally supported. A consideration may be found in the mutual promises of the creditors or in the debtor's surrender of his privilege of preferring one creditor over another. See Norman v. Thompson, 4 Ex. (W. H. & G.) 755 (1850); Good v. Cheesman, 2 B. & Ad. 328 (1831), and note, post, p. 984.

Query: Is the consideration required for the extinguishment of a legal duty identical with that required for the creation of such a duty by a promise? See, further, the cases dealing with Accord and Satisfaction, post, chapter V, section 6.

enclosed, payable to the order of the plaintiff, and also an unsigned receipt in these words: "Suspension Bridge, New York, June, 1887. Received of the Tomlinson Estate three hundred dollars, in full for commissions for sale to J. A. Weston of 66 acre lot, $300." Under date of June 23d, 1887, the plaintiff wrote to Mr. Chauncey, saying: "I don't know what you mean by sending me a check for $300. I want my five per cent. commission on the $30,000." No reply was made to this letter, although one was requested, and during the latter part of July or the first of August following, the plaintiff, who had in the meantime retained both check and voucher, called on Mr. Chauncey in the city of New York, and, as he testified on the trial, asked him what he meant by sending a check for $300 commission for selling the farm. I said that I wanted my five per cent. commission, as the understanding was between us. He said he wouldn't give one cent more, and I left him. * * * I knew there was a dispute between us, I claiming $1500 and he claiming that I was only entitled to three hundred dollars, and that his check paid that, and with the knowledge of that condition of affairs I kept the check from July, 1887, to January, 1888, and then endorsed it and drew the money, and sent him a receipt on account." The plaintiff never returned the blank voucher sent to him with the check, but in January, 1888, he endorsed the check and drew the money on it, and then, under date of January 19th, 1888, wrote to Mr. Chauncey stating that he enclosed a receipt for $300, as part payment for his services, and that he still claimed he was entitled to five per cent. commission and insisted on being paid at that rate. The receipt enclosed was for $300, "in part payment for commission." On January 24th, 1888, Mr. Chauncey wrote to the plaintiff acknowledging receipt of the letter and voucher, and stating that he should "consider this payment in full for all commissions." The plaintiff did not return or offer to return the money so paid him. When the plaintiff rested, as well as at the close of the evidence, the defendants asked the Court to direct a verdict in their favor on the ground that, upon the foregoing facts, which were not disputed, the plaintiff was not entitled to recover, but the motions were denied and the defendants excepted.

Two questions of fact were submitted to the jury: 1. Whether there was an agreement to pay plaintiff at the rate of five per cent. 2. Whether the plaintiff agreed to accept the $300 "in place of his claim for five per cent. commission." The jury were instructed to find for the plaintiff if they thought that the agreement to pay at that rate was made, and that the agreement to accept was not made, otherwise for the defendants. They rendered a verdict in favor of the plaintiff for $1,200. The judgment entered on the verdict was affirmed by the General Term upon its opinion written on a formal appeal, but then the record did not contain the proposed receipt in full. Nassoiy v. Tomlinson, 65 Hun, 491–493, 20 N. Y. Supp. 384.

The question presented by this appeal is whether the undisputed ev-

idence so conclusively established an accord and satisfaction as to leave no question of fact for the jury upon that subject. An accord and satisfaction requires a new agreement and the performance thereof. Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710. It must be an executed contract founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient. Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Morehouse v. Second National Bank, 98 N. Y. 503; 2 Parsons on Contracts (7th Ed.) 817, 820. If the claim is liquidated, the mere acceptance of a part, with the promise to discharge the whole, is not enough, for there is no new consideration. Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539. If the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt, furnishes a new consideration which is found in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. Such is the case before us, as appears from the testimony of the plaintiff, already quoted. He claimed that the defendants owed him the sum of $1,500, under an agreement to pay him at one rate, while the defendants claimed that they owed him but $300, under an agreement to pay him at another rate. The verdict of the jury upon this issue neither removed from the case the fact that a dispute had existed, nor affected its force, as otherwise the compromise of a disputed claim could never be made the basis of a valid settlement. We come, therefore, to the question whether there was an acceptance by the plaintiff of an offer by the defendants to pay the sum they conceded to be due in full satisfaction of the sum he claimed to be due. In order to determine this question, the letter of June 20th, 1887, with the check and receipt enclosed therewith, should be construed together, so as to see whether the offer was made upon a specified condition. When thus construed, we find the defendant saying to the plaintiff, in substance: "Here is a check for $300 to pay your commission on the sale; sign and return the enclosed voucher, in full of your commissions." As reflecting the intention of the parties, it is the same in effect as if the check had been written "in full," as was the case of Reynolds v. Empire Lumber Co., 85 Hun, 470, 33 N. Y. Supp. 111. The plaintiff understood the condition as his testimony shows, and he never signed or returned the voucher and did not use the check for nearly seven months. In the meantime he had an interview with the agent of the defendants and learned that they still adhered to their position of refusing to pay any more than the check sent "in full." After hesitating for five months longer, he used the check and sent the defendants a receipt on account, writing them that he claimed a balance. This declaration was ex post

facto and could have no effect unless acquiesced in by the defendants, but they promptly disclaimed and insisted that their debt was paid. We think that the undisputed evidence shows conclusively that the offer was made in settlement of the claim and that the plaintiff so understood it, when, by using the check he accepted the offer. The written evidence, the personal interview and the acts of the plaintiff permit no other conclusion. The circumstances do not admit of different inferences or present any question of fact, for the letter and receipt can have but one interpretation.

The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full," was not, when accepted, a payment in full. As was said in Hills v. Sommer, 53 Hun, 392, 394, 6 N. Y. Supp. 469, he was "bound either to reject" the check "or, by accepting it, to accede to the defendants' terms." The money tendered belonged to them, and they had the right to say on what condition it should be received. "Always the manner of the tender and of the payment shall be directed by him that maketh the tender or payment and not by him that accepteth it." Pinnel's Case, 5 Co. 117. The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was cum onere. When he endorsed and collected the check, referred to in the letter asking him to sign the enclosed receipt in full, it was the same in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was ipso facto an acceptance of the condition. The minds of the parties then met so as to constitute an accord, and, as was said by this Court in Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785, "the acceptance of the money involved the acceptance of the condition and the law will not permit any other inference from the transaction." We cannot distinguish the case in hand from the case last cited, where a check for $400 was mailed with a letter stating that it was sent as payment in full of an unliquidated demand for $670. The creditor accepted the check and used it, but "again sent his bill to the defendant, charging $670 for his services and crediting upon it $400 received by check." The debtor answered, calling attention to the condition upon which he had sent the check, and requesting the creditor "either to keep the money upon the condition named, or return it to him by first mail," but no reply was made, and the money was not returned. Upon these facts the Court held that "when a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim is cancelled, and no protest, declaration or denial on his part, so long as the condition is insisted upon by the debtor, can vary the result."

The principle that controlled that case must also control this, and the judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment reversed.[70]

HAY v. FORTIER.

(Supreme Judicial Court of Maine, 1917. 116 Me. 455, 102 Atl. 294.)

Action by George G. Hay against Mary A. Fortier. Case reserved. Judgment for plaintiff.

KING, J. The case made by the agreed statement is this: The defendant became a surety on a 15-day bond given by one Henry H. Sawyer to the plaintiff. The conditions of the bond were not complied with, and the defendant was notified of her liability under the bond and requested to make payment thereof. On February 4, 1915, the defendant's attorney wrote the attorney of the plaintiff as follows:

"I have seen Mrs. Fortier, who says it will be a great hardship to pay this entire amount at the present time as the other signers are worthless. She suggests * * * that she will pay you $100 next week, if the papers are regular, and settle the balance by payments, the whole bill to be paid before your April term of court. * * *"

To that the plaintiff, through his attorney, replied sending copies of the papers and saying:

"I am willing to accept $100 on account, providing you send same

---

70 In accord: Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687 (1895); Hull v. Johnson, 22 R. I. 66, 46 Atl. 182 (1900); Janci v. Cerny, 287 Ill. 359, 122 N. E. 507 (1919); Stanley-Thompson Liquor Co. v. Southern Colorado Merc. Co., 65 Colo. 587, 178 Pac. 577, 4 A. L. R. 471 (1919); and note in 14 L. R. A. (N. S.) 954; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117 (1904); Treat v. Price, 47 Neb. 875, 66 N. W. 834 (1896).

Contra: Demeules v. Jewel Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315 (1908); Isaacs v. Wishnick, 136 Minn. 317, 162 N. W. 297 (1917); Driscoll v. Sullivan, 186 Ind. 178, 115 N. E. 331 (1917). See, also, Whittaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915A, 949 (1913) and cases cited, post, p. 1009.

Where a claim is unliquidated and uncertain in amount, no definite sum being admitted as due, the payment and acceptance of a less sum than that claimed operates as a satisfaction, if so agreed. Alabama City, G. & A. R. Co. v. City of Gadsden, 185 Ala. 263, 64 South. 91, Ann. Cas. 1916C, 573 (1913); Root v. New Haven Trust Co., 82 Conn. 600, 74 Atl. 950 (1909); Minor v. Fike, 77 Kan. 806, 93 Pac. 264 (1908); Chapin v. Little Blue School, 110 Me. 415, 86 Atl. 838 (1913); Castelli v. Jereissati, 80 N. J. Law, 295, 78 Atl. 227 (1910); O'Brien v. American Agr. Chemical Co., 229 Fed. 387, 143 C. C. A. 507 (1916).

Payment by a third person of a lesser sum is valid consideration for a discharge of a liquidated debt, even though (it seems) the money paid is supplied by the debtor. Sigler v. Sigler, 98 Kan. 524, 158 Pac. 864, L. R. A. 1917A, 725 (1916); post, p. 1016; Marshall v. Bullard, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862 (1901); Bidder v. Bridges, 37 Ch. D. 406 (1887); Clark v. Abbott, 53 Minn. 88, 55 N. W. 542, 39 Am. St. Rep. 577 (1893); note in 23 L. R. A. 120. See Accord and Satisfaction, post, pp. 979–1020.

to me immediately and the balance on or before the first Tuesday of April. * * *"

The defendant paid the $100 forthwith, but no more. The plaintiff waited till long after the first Tuesday of April, and on June 1, 1915, brought an action of debt on the bond against the principal and all the sureties. Mrs. Fortier answered to that action at the return term thereof, and at a subsequent term, on November 3, 1915, by agreement, that action was "discontinued without costs and without prejudice," the counsel of the respective parties signing the docket entry to that effect. Why that action was thus discontinued does not appear in this case. On the following day, November 4, 1915, this action was brought against Mrs. Fortier, based upon a breach of her alleged special promise to pay the balance due under the bond before the April term of court, as stated in the correspondence referred to. The declaration is not made a part of the case, but the parties stipulate that it "is in due form." The defense is that the alleged promise on which the action is based was without a legal consideration and is therefore nonenforceable.

We think the agreed statement justifies the conclusion, that the defendant promised to pay at once $100, and the balance due under the bond before the April term of court, provided the plaintiff would forbear action on the bond, and that the plaintiff on his part, in consideration of such part payment at once, and the promise to pay the balance on or before the time specified, agreed to forbear, and did in fact forbear, action on the bond until after the time specified. And a promise to forbear and give time for the payment of a debt followed by actual forbearance for the time specified or for a reasonable time when no definite time is named, is certainly a sufficient consideration for a promise to pay the debt. Moore v. McKenney, 83 Me. 80, 90, 21 Atl. 749, 23 Am. St. Rep. 753.

On the other hand, it is obvious that the defendant by her special promise did not agree to do anything that she was not then legally bound to do. Her liability under the bond was then due and payable. She might then have been required to pay it all forthwith. And it is a well-recognized principle that the payment, or promise of payment, of money which is then due and payable by virtue of an existing valid contract of the promisor, is not in contemplation of law a sufficient consideration for any new contract. Wescott v. Mitchell, 95 Me. 377, 383, 50 Atl. 21; Dunn v. Collins, 70 Me. 230; Wimer v. Worth Township Poor Overseers, 104 Pa. 317; Mathewson v. Strafford Bank, 45 N. H. 104; Parmelee v. Thompson, 45 N. Y. 58, 6 Am. Rep. 33; Bedford's Ex'r v. Chandler, 81 Vt. 270, 273, 69 Atl. 874, 17 L. R. A. (N. S.) 1239, 130 Am. St. Rep. 1057; 6 R. C. L. 664. The defendant therefore contends that the plaintiff's promise to forbear action on the bond was without a legal consideration and not binding on him; in other words, that he could have brought action on the bond immediately after the part payment was made, in total disregard of his

promise to wait until the April term of court. We think that contention is sound, and well supported by authorities. In Warren v. Hodge, 121 Mass. 106, the court said:

"It is too well settled to require discussion or reference to authorities that an agreement to forbear to sue upon a debt already due and payable, for no other consideration than a payment of a part of the debt, is without legal consideration, and cannot be availed of by the debtor, either by way of contract or of estoppel."

But it does not follow, as the defendant claims, that this action against her is not maintainable, simply because the plaintiff's promise to forbear action on the bond could not have been enforced against him during the specified period of forbearance.

"If a contract, although not originally binding for want of mutuality, is nevertheless executed by the party not originally bound, so that the party asserting the invalidity of the contract has actually received the benefit contracted for, the latter will be estopped from refusing performance on his part on the ground that the contract was not originally binding on the other, who has performed." 6 R. C. L. 690.

Granting that the parties, through the correspondence referred to, entered into a bilateral contract, and that there was want of mutuality in that contract because the plaintiff was not bound to perform his part of it, nevertheless, he did fully perform the contract on his part, and the defendant received the full benefit contracted for. Having enjoyed the forbearance of the plaintiff from bringing action against her on the bond for the full period agreed upon, the defendant is now estopped from refusing performance on her part on the ground that the contract was not originally binding on the plaintiff, who did, nevertheless, perform it and she received the benefit thereof.

It is therefore the opinion of the court that this action is maintainable, and that the plaintiff is entitled to judgment against the defendant for $175.60 and costs, with interest from the date of the writ.

So ordered.

MORTON v. BURN & VAUX.

(In the King's Bench, 1837. 7 Adol. & El. 19.)

Assumpsit. The first count of the declaration stated that, whereas, before and at the time of making the promise, etc., to-wit, 12th April, 1834, the defendants were indebted to the plaintiff in £728. 2s. 6d., and interest thereon from 1st February, 1834, under and by virtue of a bond dated 14th July, 1832, and a certain indenture and deed of assignment thereof, dated 19th October, 1833; and that, according to the condition of the said bond, £228. 2s. 6d., part of the said sum of £728. 2s. 6d., ought to have been paid on the 1st February then last past; and thereupon, in consideration of the premises, and also in consideration that plaintiff would accept and receive payment of the

said sums of money on the days and times after-mentioned, and, in the meantime, give time to defendants for payment, the defendants undertook, etc., that the whole of the said £228. 2s. 6d., with interest from 1st February, 1834, should be paid to plaintiff on or before 1st of June then next, or, in default thereof, that defendants would sign a warrant of attorney to plaintiff to enter up judgment against them forthwith for the same; and that defendants would pay to plaintiff £50 quarterly, on 1st September, etc., in every year, until the further sum of £500 (residue of the said £728. 2s. 6d.), with interest at £5 per cent. per annum, should be fully paid and satisfied; and, in default of paying any of the last-mentioned instalments, defendants would execute a warrant of attorney to plaintiff forthwith to enter up judgment against them for the whole £500 and interest, or so much thereof as might then remain due; averment that plaintiff did forbear and give time to defendants for the payment of the said £728. 2s. 6d., and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants; and, although defendants paid plaintiff the said £228. 2s. 6d. and interest thereon, yet they did not nor would pay plaintiff £50 quarterly, on the days and times above mentioned in that behalf, but therein wholly made default; and a large sum of money of the said instalments, viz., £250, for five several sums of £50, respectively due on 1st September, 1835, etc., now is wholly due and in arrear, etc.; and, although defendants made default in payment of the respective sums on the days and times aforesaid, according to the tenor and effect, etc., of their said promise and undertaking, yet defendants did not nor would execute a warrant of attorney to enable plaintiff forthwith to enter up judgment against them for so much of the £500 and interest as then remained due, etc. There was a second count on an account stated, and for interest.

Pleas: 1. Non assumpsit. 2. To the first count, that there was not any good or valuable consideration for the promises in the first count mentioned; conclusion to the country. Issues on both pleas.

On the trial before Coleridge, J., at the Middlesex Sittings after Michaelmas Term, 1836, a verdict was found for the plaintiff. In Hilary Term last, F. Edwards obtained a rule nisi for arresting the judgment.

Cresswell and W. H. Watson now showed cause.

F. Edwards, contra. A detriment to the plaintiff or a benefit to the defendant is a good consideration; but here the agreement to forbear was not binding on the plaintiff; he therefore gave up nothing, and the defendant gained nothing. After the assignment the plaintiff might have sued in equity in his own name, or at law in the name of the obligee. And, again, the plaintiff's right is not strengthened by the parol agreement: the defendant was not less liable to these suits before the agreement than after; therefore he merely promised what he was before liable to do, which was no consideration for a promise

on the part of the plaintiff; Harris v. Watson (Peake N. P. C. 72). Now, if the plaintiff was not bound to perform his part of the agreement, the defendant could not be liable.

[PATTESON, J. That proposition seems too broad. Suppose I say, if you will furnish goods to a third person, I will guarantee the payment: there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me on my guaranty.] Here the contract could only be supported by a consideration perfect and definite at the time of the contract, and such that the party from whom it moved was, at the time, made incapable of retracting. This is the only principle upon which the mutual promises can constitute a consideration. * * * Again, if this were a good contract, the defendant would be liable to two actions on the same instrument; for there is nothing to prevent the original obligee, or an assignee of the present plaintiff, from suing the defendant on the bond at any time. [LITTLEDALE, J. That would be an action for a different cause from this: that would be on the bond; this is on the parol contract.]

Cur. adv. vult.

LORD DENMAN, C. J., in this term (June 12th) delivered the judgment of the court.

This is a motion in arrest of judgment. The question is, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors, is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

It was objected that there is no mutuality in the agreement; for that, if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond. And, further, that, if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law. We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality; for although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear according to his agreement, he would not be able to sue on the defendant's promise. He is obliged to aver, as he does in the present declaration, that he has forborne, which is a condition precedent to his suing.

As to the second objection, this is not a mere nudum pactum, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond; and they promise, in consideration of a detriment sustained by the plaintiff at their request, namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection the bond is in no respect varied by this agreement. The new contract entered into by the defendants with

the plaintiff leaves the bond just as it was before: it was forfeited before the agreement, and so it remains; and the agreement would be no answer to an action on it.

The cases on this subject are collected in Mr. Serjeant Williams' notes to Forth v. Stanton (1 Wms. Saund. 210), and to Barber v. Fox (2 Wms. Saund. 137), to which may be added Yard v. Eland (1 Ld. Raym. 368), and other cases collected in Comyns's Digest, Action on the Case upon Assumpsit, Consideration (B). They are all in favor of the action lying, with the exception of Potter v. Turnor (Palm. 185), which we think inconsistent, not only with the current of authorities, but with established principles.

For these reasons, we are of opinion that the rule to arrest the judgment in this case must be discharged.

Rule discharged.

GORING v. GORING.

(In the King's Bench, 1602. Yelv. 11.)

H. Goring was indebted to Smith in £205 upon simple contract; Smith made J. Goring his executor and died; J. Goring the executor agreed, and was contented to take of H. Goring for the £205, £150 and also agreed to take the £150 by £20 per annum, in consideration whereof H. Goring undertook, and promised to pay the said J. Goring the said £150 by £20 per annum, and for nonperformance of the promise J. Goring brought assumpsit against H. Goring; and upon non assumpsit pleaded, 'twas found against H. Goring. And Hide moved in arrest of judgment, that the consideration to take £150 for £205 is not sufficient, because for anything that appears, H. Goring remains still charged with the £205, and subject to the plaintiff's action for the £205 and therefore he ought to have shewn that he had discharg'd the defendant of the £205. But non allocat'; for the £205 being due to the plaintiff as executor of Smith, the action for it ought to be in the detinet; but now, by this agreement to take £150 of the defendant, and the defendant's promise to pay it, 'tis made the plaintiff's proper debt, and the action for it maintainable in his own name, without being named executor, and altho' (by YELVERTON, Justice) £150 is not any satisfaction of £205 because they are both of one nature, and it's otherwise of things collateral to the debt, as an horse, a cup, &c. yet in respect that the nature of the action is changed, it proves the nature of the debt to be changed; and therefore a good consideration: for if the executor is indebted to J. S. in £100 and J. S. comes to demand the money, in this case, as the debt now is, the executor is chargeable only in respect of the assets, and not otherwise; but if he promises to pay it at a day to come, 'tis now made his own debt, and to be satisfied by his own goods. And (PER CURIAM) the consideration alleged is sufficient for another reason; for although

the plaintiff has not shewn that he has discharged the defendant of the £205 yet if the defendant should be afterwards charged with it, he might have assumpsit against the plaintiff; for the plaintiff agreeing to take £150 for £205 is a promise on his part, and so one promise against another.

MELROY et al. v. KEMMERER.

(Supreme Court of Pennsylvania, 1907. 218 Pa. 381, 67 Atl. 699.)

Action by Emma E. M. Melroy and Thomas B. Bachman against Charles R. Kemmerer. Judgment for plaintiffs, and defendant appeals. Reversed.

At the trial the defendant testified that on December 6, 1920, he had paid the plaintiff 30 per cent. of the amount claimed, and that this was a good accord and satisfaction of the whole claim, because, at the time payment was made, palintiffs had dissuaded him from going into bankruptcy. The court gave binding instructions for plaintiffs. Verdict and judgment for plaintiffs for $2,217.32.

MITCHELL, C. J. It was said in Ebert v. Johns, 206 Pa. 395, 55 Atl. 1064, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic, and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day, or even an hour, before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind, such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction. Note to Cumber v. Wane, 1 Smith, Lead. Case. *357. And see a full collection of the more recent cases in the note to Fuller v. Kemp (138 N. Y. 231, 33 N. E. 1034) in 20 L. R. A. 785. The rule itself is founded on the want of consideration for the agreement. As a part can never be equal to the whole, payment of a part of a debt presently due gives the creditor nothing that he was not entitled to and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in Ebert v. Johns, 206 Pa. 395, 55 Atl. 1064, "to a merchant with a note coming due $5,000 before 3 o'clock today, which will save his commercial credit, may well be worth more than $20,000 to-morrow, after his note has gone to protest." If the debt is not due till to-morrow, the payment of the lesser sum under

all the cases will be a good accord and satisfaction; but if the debt was due yesterday, but the debtor can only pay part to-day, the benefit to the creditor of getting that part now, rather than the whole when it is too late, is just as great, and, whatever conclusion the scholastic logic and theoretical reasoning may lead to, the importance of the practical result is a matter for the creditor to decide for himself, and, having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts, so far as they could without sacrifice of the maxim of stare decisis, have brought the law into closer accord with modern business principles.

In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent. of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any express decision in this state on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy, and his payment of 30 per cent. instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt. A valuable consideration may consist in some right, interest, or benefit to one party, or some loss, detriment, or responsibility resulting actually or potentially to the other. Bouvier's Law Dict. "If there is any advantage to the creditor, the law will not weigh the adequacy of the consideration." Fowler v. Smith, 153 Pa. 639, 25 Atl. 744. The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chances of an uncertain dividend in bankruptcy. On the other hand, the debtor accepted the responsibility of paying a sum certain, whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt, without regard to the sufficiency of his present assets.

The decisions on this exact point in other states are not numerous, but the general trend is uniform to the result we have reached. In Hinckley v. Arey, 27 Me. 362, it was said by Tenney, J.: "In this case the plaintiff was informed that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law." It was accordingly held that the accord and satisfaction were good. The same ruling was made in Dawson v. Beall, 68 Ga. 328.

And in Curtiss v. Martin, 20 Ill. 557, 578, Engbretson v. Seiberling, 122 Iowa, 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. Rep. 279, and Rice v. London, etc., Mortgage Co., 70 Minn. 77, 72 N. W. 826, the courts went still farther and held the satisfaction valid where the debtor was insolvent or in failing circumstances, though there was no express intention to seek a discharge in bankruptcy. In the last-named case it was held that an agreement on behalf of the estate of a debtor supposed to be insolvent was good, though it turned out in fact that it was solvent. And in Pettigrew Co. v. Harmon, 45 Ark. 290, the principle that part payment by a third person makes the accord valid was held to govern, where the third person was one to whom the debtor had assigned his assets for the payment of his debts. On principle and on authority, therefore, the agreement in the present case was binding, and, there being no dispute on the material facts, the defendant's sixth point, asking for binding instructions, should have been affirmed.

Judgment reversed.[71]

McCOMB v. KITTRIDGE.

(Supreme Court of Ohio, 1846. 14 Ohio, 348.)

The note upon which suit is brought, was given by Moses Kimball, John Miller, Picket Latimer and the defendant Kittridge to James Gilruth, for $2,000, dated September 1st, 1836, payable November 26th, 1836, endorsed by said Gilruth to Hamlin and Ward, and by them to plaintiff.

The defence set up and relied upon in the special plea is, that Kittridge executed this note, as surety for Kimball, which fact was known to Gilruth at the execution and delivery of said note; that Gilruth, after the same fell due, to wit, on the 9th of February, 1837, contracted to give further time, and delay the payment of the same until the first of May, thereafter, in consideration of said Kimball executing to him a note for $34.44, payable on said 1st of May. That said note for $34.44 was executed, and a greater part thereof paid. That the time specified was actually given, and that said agreement was entered into without the knowledge or consent of the defendant.

The replication denies the making of any such agreement.

READ, J. The pleadings admit, and the proof shows, beyond doubt, that Kittridge was surety. Gilruth swears that the note was given for money loaned; that the whole negotiation was with Kimball, with whom he always dealt in relation to the demand—that the note continued his property until 18th of September, 1837. This was long after it was due, about ten months.

[71] Under similar circumstances a contract between a landlord and an insolvent tenant, decreasing the rent, was held valid in Sherman, Clay & Co. v. Buffum & Pendleton, 91 Or. 352, 179 Pac. 241 (1919).

The part of Gilruth's testimony upon which the defence mainly relies, is as follows: "On the 9th of February, 1837, the witness was at Norwalk when the note was given, and called upon Kimball for pay, who excused himself, and wanted delay; and it was proposed to pay him ten per cent. as a consideration for it.' The witness says: "I, have consented to take the proposed interest, it being expressly agreed that the notes should remain just as they were, instead of being renewed. I agreed to wait until the first of May following." "Kimball then calculated the extra four per cent. interest on the $2,000 till the first of May, and gave me his note for it, part of which was traded out in his store the third of August following." He further says, that the note of $34.44, of February 9, 1837, and due 12th of May, 1837, upon which he received from Kimball, August 3d, 1837, $24.63, he afterwards sold, with the payments credited to Latimer.

Now, the question arising upon the above state of facts, is, was here such an agreement to give further time upon a valid and binding consideration as will discharge the surety? It is an undoubted principle of law that, if the creditor, by agreement with the principal debtor, or by any other act, precludes himself at law from proceeding against the principal debtor, the surety is discharged. It is not questioned but that a binding agreement upon a valid consideration to give further time to the principal debtor, will discharge the surety. But it is considered in this case, that there was no valid consideration for the agreement to extend the time of payment of this note, from the 9th of February, 1837, to the 1st of May following; because the $34.44 note, the consideration of such agreement, was for a rate of interest larger than our statute allows to be collected. It is just as competent for the principals to a note to extend the time of payment for a specified period, as it was to fix the time of payment originally. If the lender of money, secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year—and the borrower precludes himself from getting rid of the payment of the interest, by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege,[72] at any time, of getting rid of the payment of interest, by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is also relinquished for such period. Here, then, are all the elements of a binding contract.

But it is said there is no consideration for the extension of time,

[72] That is, the power to terminate the duty to pay interest is a valuable power.

because the law gives six per cent. after the note is due. But the law does not secure the payment of this interest for any given period—or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of the time, as there was for the original loan. The consideration of the loan, on the part of the borrower, is the payment of interest. If there was no law limiting the amount of interest, the parties might contract for any rate they pleased. A contract to forbear the collection of a debt for a specified period, in consideration of the payment of a rate of interest beyond what the law allows, is founded upon a valid consideration. This would never have been doubted at all, if the law had not fixed the rate for which collection could be had. But, by limiting the rate of interest, the law does not declare that such rate is not a valuable consideration, but on the contrary declares that such rate is so fully valuable, that it will not permit a higher rate for the use of money or forbearance. The law would permit any amount to be paid for forbearance, if it were not for the fact that this would break down the whole policy of the law limiting the rate of interest; and that forbearance amounts to nothing more than a mere loan. The only doubt which has arisen from the fact in this case is, that, in countries where the law declares usurious contracts void, a contract to pay usurious interest is void; and hence, such a contract to pay, would form no consideration for an agreement to give time, or forbear the collection of a debt for a specified period. Such a contract with us is not wholly void, but the statute steps in and pares it down to the legal rate, and permits that to be collected. Hence, this $34.44 note is a good and valid contract for the payment of six per cent. interest—and hence, a good consideration to support the agreement to extend the time of payment of the $2,000, to the time contracted for; and the original parties, without the knowledge of the surety, having, by valid agreement, extended the time, the surety is discharged.

This view carries out the spirit of the statute respecting interest, secures it from the opportunity of violation, harmonizes with the decisions had under it, and rests, in our opinion, upon a solid foundation.[78]

[78] In accord: Chute v. Pattee, 37 Me. 102 (1854); Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128 (1895); Diehl v. McKinnon, 173 Iowa, 32, 155 N. W. 259, L. R. A. 1916C, 384 (1915), payee of note, aged 90 years, agreed to cancel note in return for promise of the maker to pay the annual interest reserved in the note as long as the payee should live. Cf. Bright v. Briscoe (Tex. Civ. App.) 202 S. W. 183 (1918).

See extended note in 52 L. R. A. (N. S.) 331, appended to the case of Maker v. Taft, 41 Okl. 663, 139 Pac. 970, 52 L. R. A. (N. S.) 328 (1914), discussing very many cases both in accord and contra.

The statute of limitations begins to run anew from the date of maturity of the new contract. First State Bank v. Bowman (Tex. Civ. App.) 203 S. W. 75 (1918).

STILK v. MYRICK.

*(In the Court of Common Pleas, 1810. 2 Camp. 317.)

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

Lord ELLENBOROUGH. I think Harris v. Watson (Peak, 72) was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.[74]

[74] In accord: Bartlett v. Wyman, 14 Johns. (N. Y.) 260 (1817).

DAVIS & CO. v. MORGAN.

(Supreme Court of Georgia, 1903. 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171.)

Action by A. M. Morgan against C. H. Davis & Co. Judgment for plaintiff, and defendants bring error. Reversed.

LAMAR, J. Davis & Co. employed Morgan for one year at $40 per month. After the contract had been in force for some time, Morgan received an offer of $65 per month from a company in Florida, and mentioned the fact to Davis, saying that of course he would not go without consent. Davis insists that he then said, if Morgan would stay out the balance of the term, and work satisfactorily, he would give him $120 at the end of the year. Morgan says that Davis stated, "I will add $10 a month from the time you began, and owe you $120 when your time is up." Davis & Co. discharged Morgan two or three weeks before the end of the term, because the latter had gone to Florida for several days without their consent. Morgan insists that he told Davis that he was going, and the latter made no objection. He claimed that he was discharged without proper cause, and brought suit for the extra compensation promised. The jury found a verdict in his favor, and, the court having refused to grant a new trial, Davis & Co. excepted.

If the promise contemplated that Davis & Co. were to pay Morgan $10 per month for that part of the year which had already passed, and as to which there had been a settlement, it was manifestly nudum pactum; for a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise. Gay v. Mott, 43 Ga. 254. And the result is practically the same whether Morgan or Davis was correct in the statement of the conversation. Both proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year. Morgan had agreed to work for 12 months at the price promised, and if during the term he had agreed to receive less, the employer would still have been liable to pay him the full $40 per month.[75] On the other hand, the employer could not be forced to pay more than the contract price. He got no more services that he had already contracted to receive, and according to an almost unbroken line of decisions the agreement to give more than was due was a nudum pactum, and void, as having no consideration to support the promise. The case is something like that of Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886, where the landlord agreed to give the tenant certain property if he would pay his rent promptly; and it was held

[75] In accord: Indiana Veneer & Lumber Co. v. Hageman, 57 Ind. App. 668, 105 N. E. 253 (1914); Grath v. Mound City Roofing Tile Co., 121 Mo. App. 245, 98 S. W. 812 (1907).

that such a promise was a gratuity, and void, as without consideration to support it. And see Tatum v. Morgan, 108 Ga. 336, 33 S. E. 940(2); Civ. Code 1895, § 3735. It is also within the principle of Stilk v. Myrick, 2 Campbell, 317, where Lord Ellenborough held that an agreement to pay seamen extra for what they were bound by their articles to do was void. And so in Bartlett v. Wyman, 14 Johns. 260, a similar ruling was made in a case where a master agreed to give more wages if the seamen would not abandon the ship. See, also, Ayres v. C. R. I. Ry. Co., 52 Iowa, 478, 3 N. W. 522. There are cases holding that a new promise is binding where one of the parties to a contract refuses to perform, and, to save a loss, the innocent party agrees to pay more than the original contract price, if the actor will perform as originally agreed. Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723. But even if that line of cases should not be disregarded as tending to encourage a breach of contract, they do not affect the rights of Morgan here, because he does not bring himself within their ruling. Had there been a rescission or formal cancellation (Vanderbilt v. Schreyer, 91 N. Y. 402) of the old contract by mutual consent, and if a new contract with new terms had been made; or if there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased wages it would have been enforceable. But, as it was, Morgan proved that Davis promised to pay more for the performance of the old contract than he had originally agreed. Such a promise was not binding.[76] * * *

Judgment reversed.[77]

[76] The court then discussed the sufficiency of moral obligation as a consideration.

[77] In accord: McDonough v. Saunders, 201 Alabama, 321, 78 South. 160 (1918); Feldman v. Fox, 112 Ark. 223, 164 S. W. 766 (1914); Main St. & A. P. R. Co. v. Los Angeles Traction Co., 129 Cal. 301, 61 Pac. 937 (1900); Benford v. Yockey, 63 Colo. 96, 164 Pac. 725 (1917); Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294 (1892); Runkle & Fouse v. Kettering, 127 Iowa, 6, 102 N. W. 142 (1905); Tudor v. Security Trust Co., 163 Ky. 514, 173 S. W. 1118 (1915); Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21 (1901); Bell v. Oates, 97 Miss. 790, 53 South. 491 (1910); Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844 (1890); Weed v. Spears, 193 N. Y. 289, 86 N. E. 10 (1908); Hoskins v. Powder Land & Irr. Co., 90 Or. 217, 176 Pac. 124 (1918); Smith v. Brown, 50 Utah, 27, 165 Pac. 468 (1917); Creamery Package Mfg. Co. v. Russell, 84 Vt. 80, 78 Atl. 718, 32 L. R. A. (N. S.) 135 (1911); Jackson v. Cobbin, 8 M. & W. 790 (1841). And see further, note in L. R. A. 1915B, 37 (vii).

MUNROE v. PERKINS.

(Supreme Judicial Court of Massachusetts, 1830. 9 Pick. 298, 20 Am. Dec. 475.)

Indebitatus assumpsit for work done, materials found, money paid, &c. brought against the defendant jointly with William Payne, who died after the action was commenced.

At the trial before the chief justice it appeared, that in 1821 the plaintiff was employed by Perkins and Payne to build a hotel at Nahant, which was begun in that year and finished in 1823.

The general defence was that, there was a special contract, and that the work had been paid for according to the terms of that contract.

For the purposes of this case it was admitted, that the amount of expenditures made and incurred by the plaintiff in and about the work, exceeded the amount of the payments made to him.

It appeared that in 1821, a number of persons associated themselves for the purpose of erecting a hotel at Nahant, and subscribed certain sums of money therefor; that Perkins and Payne were subscribers and were the agents of the association, which was to be incorporated as soon as possible, and which was incorporated accordingly in February, 1822.

The defendant offered in evidence an agreement under seal, dated October 24, 1821, wherein the plaintiff engages to build the hotel according to a certain drawing and description, and the defendant and Payne, in behalf of their associates, agree to pay the plaintiff therefor $14,500 as the work advances.

T. W. Sumner, a witness called by the defendant, testified that the work was executed upon the basis of the drawing and description referred to in the sealed contract; that there were some deviations, consisting of additional work; that this was considered as extra work, not included in the contract, and was paid for separately according to its full cost and value.

To prove a waiver of the special contract, the plaintiff introduced several witnesses. J. Alley testified, that in 1825 he said to the defendant, it was a pity Munroe had undertaken to build the hotel; to which the defendant replied, that Munroe would not lose any thing by it, and that they had agreed to pay him for every minute's work and for all he had purchased. J. Mudge testified, that in the spring of 1823 the plaintiff was indebted to the Lynn bank on a note for $1,100, which he wished to have renewed, but that the directors were not satisfied of his solvency; that in April of that year, the plaintiff came to the bank with Payne, who said he was the agent who attended to the business of the Nahant hotel in the absence of Perkins, who had gone to Europe; that he wanted to get from the bank some indulgence towards the plaintiff; that the corporation would leave the plaintiff as good as they found him; they would pay Munroe for all he should

lay out; that Munroe should not stop for want of funds; that he (Payne) knew Perkins's mind upon the subject; that the bills would be paid, and the plaintiff should not suffer. W. Johnson testified, that on the strength of this representation of Payne, the bank renewed the plaintiff's paper. W. Babb testified, that in May, 1822, the defendant asked the plaintiff how he got on; that the plaintiff said poorly enough; that the defendant told him he must persevere; the plaintiff said he could not without means; and the defendant repeated, you must persevere, and added, you shall not suffer, we shall leave you as we found you.

The defendant objected to this evidence, that it was insufficient in law to set aside the special contract; that it did not amount to a waiver of the original contract, but so far as it proved any thing, it was evidence of a new express promise, which was without consideration and from which no implied assumpsit could be raised. Also, that the conversation with Perkins at one time and with Payne at another, were not joint promises and created no joint cause of action, but that the liability, if there was any, was several.

A verdict was taken by consent, subject to the opinion of the court, for plaintiff.

Per Curiam. The verdict of the jury has established the fact, if the evidence was legally sufficient, that the defendant, together with Payne, made the promise declared on. The defence set up was, that the work was done and the materials were furnished on a special contract under seal, made by the defendant and Payne on behalf of themselves and other subscribers to the hotel; and such a contract was produced in evidence. The main question is, whether, there being this contract under seal, for a stipulated sum, an action lies on a general assumpsit for the amount which the building actually cost; which is more than the sum specified in the contract. It is said on the part of the plaintiff, that having made a losing bargain and being unwilling and unable to go on with the work, Perkins and Payne assured him that he should not suffer; and that the work was carried on and finished upon their engagement and promise that he should have a reasonable compensation without regard to the special contract. This engagement is to be considered as proved, if by law it was admissible to show a waiver of a special contract.

It is objected, that as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have been cited, to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, "Unumquodque dissolvitur eo ligamine quo ligatur." But like other maxims, this has received qualifications, and indeed was never true to the letter, for at all

times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c.

It is a general principle, that where there is an agreement in writing, it merges all previous conversations and parol agreements; but there are many cases in which a new parol contract has been admitted to be proved. And though when the suit is upon the written contract itself, it has been held that parol evidence should not be received, yet when the suit has been brought on the ground of a new subsequent agreement not in writing, parol evidence has been admitted.

In Ratcliff v. Pemberton, 1 Esp. 35, Lord Kenyon decided, that to an action of covenant on a charter-party, for the demurrage which was stipulated in it, the defendant might plead that the covenantee, who was the master and owner of the ship, verbally permitted the delay, and agreed not to exact any demurrage, but waived all claim to it. He laid down a similar rule in Thresh v. Rake, Id., 53; where however the contract does not appear to have been under seal.

In 2 Term R. 483, there were articles of partnership, containing a covenant to account at certain times; and upon a balance being struck, the defendant promised to pay the amount of the balance; it was held that assumpsit would lie upon this promise.

The case of Lattimore v. Harsen, 14 Johns. (N. Y.) 330, comes nearer the case at bar. There the plaintiffs had agreed to perform certain work for a stipulated sum of money, under a penalty. After they had entered upon the performance of it, they determined to leave off, and the defendant, by parol, released them from their covenant, and promised them, if they would complete the work, that he would pay them by the day. The court held, that if the plaintiffs chose to incur the penalty, they had a right to do so, and that the new contract was binding on the defendant.

In Dearborn v. Cross, 7 Cow. (N. Y.) 48, it is held, that a bond or other specialty may be discharged or released by a parol agreement between the parties, especially where the parol agreement is executed; and the case of Lattimore v. Harsen is there cited and relied on.

There are other decisions of like nature in the same court; as Fleming v. Gilbert, 3 Johns. (N. Y.) 528; Keating v. Price, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92; Erwin v. Saunders, 1 Cow. (N. Y.) 250, 13 Am. Dec. 520. In Ballard v. Walker, 3 Johns. Cas. (N. Y.) 64, it was held that the lapse of time between the making of the contract and the attempt to enforce it, was a waiver; which is going further than is necessary in the case before us, for here there is an express waiver.

In Le Fevre v. Le Fevre, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696, parol evidence was admitted to prove an alteration of the course of an aqueduct established by deed. In regard to the objection, that this evidence was in direct contradiction to the deed, Duncan, J. remarks, that "the evidence was not offered for that purpose, but to show

a substitution of another spot. If this had not been carried into effect, the evidence would not have been admissible; but where the situation of the parties is altered, by acting upon the new agreement, the evidence is proper; for a party may be admitted to prove by parol evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party."

The distinction taken in the argument, between contracts in writing merely and contracts under seal, appears by these authorities not to be important as it respects the point under consideration, and justice required in the present case, that the parol evidence should be received.

It was said that the promise of Payne cannot affect Perkins, and vice versa. But as they were joint actors, and as when one acted in the absence of the other, it was always with a joint view to the same object, they cannot be separated, but must be considered as joint promisors.

The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it.

Motion for new trial overruled.[78]

[78] In accord: Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122 (1885); Coyner v. Lynde, 10 Ind. 282 (1858); Lattimore v. Harsen, 14 Johns. (N. Y.) 330 (1817); Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723 (1882); Scanlon v. Northwood, 147 Mich. 139, 110 N. W. 493 (1907); John King Co. v. Louisville & N. R. Co., 131 Ky. 46, 114 S. W. 308 (1908); Evans v. Oregon & W. R. Co., 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455 (1910); McCabe Const. Co. v. Utah Const. Co. (D. C.) 199 Fed. 976 (1912); Flight v. Crasden, Cro. Car. 8 (1625). But cf. Widiman v. Brown, 83 Mich. 241, 47 N. W. 231 (1890); Vanderbilt v. Schreyer, 91 N. Y. 392 (1883). And in Parrot v. Mexican Cent. R. Co., 207 Mass. 184, 194, 93 N. E. 590, 34 L. R. A. (N. S.) 261 (1911), the court, after accepting the rule in Munroe v. Perkins, said: "While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it;" and it was held to be inapplicable where there had been no threat of breach by the plaintiff and no agreement of rescission by the defendant. To the same effect is Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21 (1901).

LINZ v. SCHUCK.

(Court of Appeals of Maryland, 1907. 106 Md. 220, 67 Atl. 286, 11 L. R. A. [N. S.] 789, 124 Am. St. Rep. 481, 14 Ann. Cas. 495.)

Action by Albinus Schuck against John Linz. From a judgment for plaintiff, defendant appeals. Affirmed.

BOYD, J.[79] The appellee sued the appellant on the common counts for a balance claimed to be due for work done and materials provided, etc., under the following circumstances: The appellant owned a house known as "No. 3038 Elliott street," at the corner of Canton street in Baltimore City, which was built without a cellar, was not plastered or partitioned off on the second story, and the rear was arranged for a stable. The appellee entered into a contract in writing with the appellant which states: "Cellar to be dug under the entire store to the partition wall between kitchen and store to a depth of 7 feet, and walls to be underpinned with good hard brick laid in cement, * * * cellar to be connected with sewer and cemented" and provides for work to be done in the kitchen, the second story of the house, and a number of other things not necessary to mention. It concludes, "I will do the work and furnish material for the sum of fifteen hundred dollars ($1,500)." The paper was drawn in the shape of an estimate or bid, but was accepted by the appellant, and the appellee identified it as his contract.

The appellee began the work in April, 1903. He gave the contract to build the cellar to a subcontractor who started to excavate. The appellee thus described the conditions of the ground: "The house stood on a hard crust about three feet thick, and the foundation of that house didn't extend through that hard crust. It was built on that crust, and the more we got through that the more we got into a swamp like—the bottom of an old creek, black muddy stuff and soft and they tried to dig and dig and it all ran into this place and finally a big lump would cave off and fall in every now and then, and they continued on that way to get a trench dug to connect the cellar with the sewer so we thought we could drain the place a little." His foreman notified him that the house was cracking, and he then got lumber and drove "lagging" in to hold the ground. He testified that he notified Mr. Preston, the building inspector of the city, who went there with one of his assistants, that they "took sticks and shoved them down in the ground about 14 feet deep, and that Mr. Linz was present upon this occasion." He also said that Mr. Preston told him no cellar could be made, and he should fill in what he had taken out, and he stopped the work. He further testified that the appellant called on him "off and on," and wanted to see "whether we couldn't make a cellar there; wouldn't it be possible in some way to overcome it even if a small cellar." They finally thought they "could

[79] Parts of the opinion are omitted.

make a little cellar to get some cellar there," and he said: "Let the thing lay, and we will drain the ground into the sewer, and maybe we can overcome it, provided you pay the additional cost and stand the consequences." He demanded a writing from the appellant, and he said "his word was as good as mine, and if I put a cellar there he would see I got pay for it; that he would pay for the additional work I was compelled to do to make a cellar." In another place he stated: "He says if I was able to get a cellar under there he would reimburse or pay me the additional cost, whatever it was to get a cellar there; that the house was no good to him without a cellar." In October we went to work again, dug out eight feet, then drove poles down eight feet long, used "concrete and cement in there to form our footing," and went to great expense and trouble to make the cellar, under the new arrangement.

The appellant introduced evidence which tended to show that some of the trouble about the cellar was owing to the negligent way in which the appellee's men did the work, and that the bad condition of the soil did not extend as deep as the appellee said it was, but there can be no doubt that the conditions were altogether different from what appeared upon the surface or what was anticipated. The appellee also testified that before he made the offer he "wanted to know how the ground was, and defendant took plaintiff in the cellar of his building" (which was on the opposite side of the street), "and he showed me he had a cellar dug there and it went all right, and the soil was nice and sound there on the other corner, and when I started I wouldn't have any trouble, and I made my figures on his say so." After the work was begun the owner of the adjoining property sued the appellant and the appellee for damages to her house sustained by reason of the excavation, and the suit was compromised by the appellant buying the house, and the appellee agreeing to put it in proper condition. That was No. 3036 Elliott street.

The principal question in the case is whether the plaintiff was entitled to recover for the additional costs and expenses incurred, by reason of those conditions, on the promise of the appellant to pay him for them. The precise question for our consideration is presented by the plaintiff's fifth prayer, which was granted. After referring to the written contract made in April or May, 1903, and the refusal of the plaintiff in June, 1903, to perform and complete said contract the prayer further submitted to the jury to find whether "said refusal on the part of the plaintiff was induced by substantial and unforeseen difficulties in the performance, which would cast upon the plaintiff additional burden not anticipated by the parties when the contract was made, and if they further find that after said refusal by the plaintiff the defendant, to induce the plaintiff to resume the work thus abandoned, promised him to see him through and to stand the consequences, and that, relying upon said promise, the plaintiff completed the work then their verdict may be for the plaintiff," etc. That prayer

seems to have followed quite closely the language used in King v. Duluth, M. & N. Ry. Co., 61 Minn. 487, 63 N. W. 1105, which case, notwithstanding unfavorable criticisms by some writers, in our opinion, announces a principle which is not only just and equitable, but is easily reconcilable with the general rule that a promise to do, or actually doing, that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance. In King v. Duluth, after stating that general rule, it is added: "In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration." The court then cited Ayers v. Railroad Co., 52 Iowa, 478, 3 N. W. 522, Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S. W. 844, Vanderbilt v. Schreyer, 91 N. Y. 392, and other cases, most of which are among those relied on by the appellant as sustaining and illustrating the general rule which the Supreme Court of Minnesota unhesitatingly and emphatically approved of. Indeed the court said that the doctrine of Munroe v. Perkins, 9 Pick. (Mass.) 305; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Byrant v. Lord, 19 Minn. 396 (Gil. 342), and Moore v. Locomotive Works, 14 Mich. 266, as it is frequently applied, did not commend itself to their judgment or sense of justice.

Those are some of a number of cases which have sustained actions for additional compensation on various theories—some on the ground of waiver, others on the ground that the party for whom the work was done had the election of suing the other party for damages for breach of contract or to make a new contract, and others that it was a modification of the original contract, etc. Chief Justice Start of the Minnesota court, in the course of the opinion, said: "It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but, where the promise to the one is simply a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But, where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and ob-

ligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule," etc. The opinion then goes on to say that on the other hand, when there are no unforeseen additional burdens which make the refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are one transaction the promise is without consideration and the case is within the general rule. It then holds that what unforeseen difficulties and burdens will make the refusal to perform equitable, so as to bring it within the exception to the general rule, must depend upon the facts of each particular case.

We have thus referred to, and quoted from, that case at unusual length, because the principles therein announced seem to us to be, not only well and clearly stated, but just, and founded on reasons that any court of justice should hesitate to reject, unless they conflict with some binding authority or established rule of law, which, in our judgment, they do not. When two parties make a contract, based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation. If the difficulties be unforeseen, and such as neither party contemplated, or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him. But we do not understand the authorities to sustain such a rule. On the contrary they hold that the parties can rescind the original contract, and then enter into a new one, by which a larger consideration for the same work and materials that were to be done and furnished under the first contract can be validly agreed upon. * * *

We are, however, of the opinion that this prayer can be sustained on the ground stated in King v. Duluth, etc., Ry. Co., supra, and other cases, which is, as expressed in that case, that "by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them." When there is such a strong moral obligation as there was in this case to give the appellee relief, it would be making an exceedingly technical distinction to hold that the promise would have been binding if the original contract would have been expressly rescinded, but that it is not binding because there was no express or actual rescission, although the facts show that it was undoubtedly intended by the parties that neither should be held to the terms of the original contract. Of course it will be borne in mind that

the court in King v. Duluth, etc., Ry. Co., only applied the principle announced to cases where the refusal to perform was equitable and fair, and the difficulties were substantial, unforeseen, and not within the contemplation of the parties when the original contract was made. The opinion also excluded from the application of the principle mere "inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact." * * *

Judgment affirmed.[80]

SCHWARTZREICH v. BAUMAN-BASCH, Inc.

(Supreme Court of New York, Appellate Term, 1918. 105 Misc. Rep. 214, 172 N. Y. Supp. 683.)

Appeal by plaintiff from an order and judgment of the City Court of the City of New York respectively setting aside the verdict of a jury and dismissing the complaint.

BIJUR, J. Plaintiff, an employee, sued his employer, the defendant, for breach of a written contract of employment, made October 17, 1917, to continue for twelve months, beginning November 22, under which plaintiff was to receive a salary of $100 per week. It appeared on the trial that on August 31, 1917, a written contract in all respects identical with the one sued upon had been made between the parties. except that the weekly salary was therein fixed at $90.

The trial was conducted with great care and exactness by both court and counsel, and the court in charging the jury repeatedly impressed upon it that "the test question is whether by word or by act, either prior to or at the time of the signing of the $100 contract, these parties mutually agreed that the old contract from that instant should be null and void."

The jury having brought in a verdict in favor of the plaintiff, the court, upon a motion of the defendant to set the verdict aside, "particularly on the ground that there is no evidence in the case of mutual consent or agreement to cancel the first contract at the time or prior to the execution of the second contract," ultimately granted the motion and dismissed the complaint under a reservation of power made at the trial, saying "that there was not sufficient evidence that the first

80 In accord: King v. Duluth, M. & N. Ry. Co., 61 Minn. 482, 63 N. W. 1105 (1895); Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209 (1887).

Where there is unexpected difficulty or expense, due to the conduct of the defendant himself, or where the work done by the plaintiff was changed in its character, location, or amount by the defendant, there is ample consideration for the new promise to pay increased compensation. United Steel Co. v. Casey (C. C. A.) 262 Fed. 889 (1920). There the court further said: "Where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time the contract was made, and the promisee measures up to the right standard of honesty and fair dealing, and [the promisor] agrees, in view of the changed conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity."

contract was canceled upon the making of the second one to warrant the jury's finding."

The contending parties agree fairly well on the substantive law applicable to the case. It is conceded that "a promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract." Carpenter v. Taylor, 164 N. Y. 171, 177, 58 N. E. 53; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224; Seybolt v. N. Y., L. E. & W. R. R., 95 N. Y. 562, 47 Am. Rep. 75; Vanderbilt v. Schreyer, 91 N. Y. 392. It is true that appellant urges that the mere making of a subsequent agreement covering the same subject matter necessarily supersedes a prior agreement to the same effect (citing Housekeeper Pub. Co. v. Swift, 97 Fed. 290, 38 C. C. A. 187, and McCabe Const. Co. v. Utah Const. Co. [D. C.] 199 Fed. 976), but I cannot find in the opinions in those cases that the question whether under such circumstances there is any consideration for the second contract was raised or suggested. The principle itself is too well established to be questioned. It has been applied to a case of an increase of salary similar to the one under consideration in Cosgray v. N. E. Piano Co., 10 App. Div. 351, 41 N. Y. Supp. 886.

On the other hand, in a leading case in this state (Vanderbilt v. Schreyer, supra, 91 N. Y. 392), it is said on page 402: "It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen, 14 John. 330." To the same effect is Stewart v. Keteltas, 36 N. Y. 388; Hart v. Lauman, 29 Barb. 410, 415, 416. And the question whether the earlier agreement had been canceled was expressly submitted to the jury and answered in the negative in Harris v. Carter, 3 El. & Bl. 559.

It is not necessary, as I view it, in the instant case to determine whether in order to sustain the second agreement the cancellation of the first must have taken place before the second was physically signed. My own opinion is that the time of signing the second contract is in this connection immaterial. A written agreement in order to become effective must be "delivered." The delivery may be informal and inartificial, provided the intent is sufficiently demonstrated. Dietz v. Farish, 79 N. Y. 520; Sarasohn v. Kamaiky, 193 N. Y. 203, 215, 86 N. E. 20. Similarly, the cancellation or, as it is sometimes called, the "rescission," of an agreement may be evidenced by implication quite as effectively as by express words. Hart v. Lauman, supra. And whether it has taken place may be determined by all the circumstances in evidence which affect it. Matter of Chamberlain, 146 App. Div. 583, 131 N. Y. Supp. 245, affirmed 204 N. Y. 665, 97 N. E. 1103.

It seems to me, therefore, that if after the second agreement had actually been signed the parties had canceled the earlier one, and the

circumstances indicated the intent to redeliver or make effective the second agreement, there is no reason why that result might not validly be achieved. This nice question, however, need not be decided in the instant case, for, as I read the record, there was evidence upon which the jury might properly have based its finding that it was the intention of the parties to and that they actually did cancel the first contract before the execution of the second agreement.

Plaintiff testified that he delivered the earlier contract to defendant's president Bauman, at the time of the signing of the later one, and Bauman said to him, "You do not want this contract any more because the new one takes its place." Bauman testified that the first contract was not handed to him at the signing of the second contract, but that plaintiff tore off the signatures to the old contract in his presence, to which he made no objection, and that this was done "after I gave him the new contract; he tore the signatures off." As defendant-respondent interprets this testimony: "According to the plaintiff's version, after the second contract was signed plaintiff offered to Mr. Bauman his copy of the first contract, and Mr. Bauman refused to accept it. According to defendant's version, after the contract was signed plaintiff offered Mr. Bauman his copy of the first contract; he refused to accept it, and thereupon plaintiff tore off the signatures at the bottom of his copy. Upon neither version of this occurrence can an agreement binding on the defendant be spelled out to cancel and rescind the first contract."

There might be some force in this contention if it could be successfully maintained that the only way to cancel an agreement was to return to the respective signatories the duplicates thereof, or to tear off the signatures, or even if such cancellation could be evidenced by those circumstances alone. The mere statement of the proposition, however, suffices for its own refutation. The question submitted to the jury was, "Did the parties prior to the signing of the second agreement cancel the first?" It is conceded that the second agreement was drawn up by the defendant's president in the plaintiff's presence and was thereupon signed by both parties. Bauman testified:

"Q. And was it your understanding at the time that you signed the paper and gave him one copy of it that you were giving him a contract for the year ending November, 1918 (the same term as was covered by the prior agreement)? A. That is right. Q. Did you receive any other paper at that time? A. No, sir. Q. Now, are you positive about that? A. Positive. Q. Didn't you say to Mr. Schwartzreich (plaintiff) at that time that he should give you a paper that you had signed before? A. I did. Q. Did he give it to you? A. Not at that time * * * Later he gave it to me.

"The Court: Q. Was that contract of August?

"Plaintiff's Counsel: A. That was the contract of August."

The testimony of Bauman that at the time of execution of the second contract he demanded from plaintiff the surrender of plaintiff's

copy of the old agreement is not explained upon, and cannot be reconciled with any other theory than that Bauman understood that the parties had previously agreed that the first contract be canceled. I am, indeed, inclined to believe that this evidence is well nigh conclusive to that effect, but in any event it furnished, together with the balance of the testimony, ample ground for the finding of the jury, which I also think was correct.

The order setting aside the verdict and the judgment dismissing the complaint should be reversed and the verdict and judgment reinstated, with costs to appellant.

MULLAN, J. (dissenting). Of course it goes without saying that the parties could have canceled the old contract and subsequently have made a new one. It is equally plain that they observed the formalities usual in making a contract, that is to say, they performed all the necessary gestures and gave promise for promise, and made what would have been, except for the rule of law under discussion, the clearest example of a good contract. But were the parties capable, at the time, of making that particular contract? The answer to that question depends upon the answer to the primary question, whether, when the second contract was made, the first contract was at an end.

A true cancellation of a contract leaves the parties to it in statu quo ante; that is, it leaves them in the same situation in respect of the subject-matter of the canceled contract as if they had never seen or heard of each other. An agreement to cancel a contract is itself just as truly a contract as the contract it terminates, and its effect is to put an end to the contract not merely that the contractors may thereby be enabled to enter into a new contract with each other, but to leave them in perfect freedom to refuse to enter into any further contractual relationship with each other. Now, it may be theoretically possible for parties to a contract genuinely to terminate it by agreement, thereby intending to be free to refuse to deal with each other again, and then immediately and genuinely to change their minds and remake the contract that was canceled, with a change of terms in favor of one party only. It is more reasonable, however, to assume that at least some few moments must elapse between the time when two given minds shall agree to cancel an existing contract and the time when those same two minds shall decide to reinstate it or again make one very like it. In the world of the realities lightning fast changes of the kind that must have taken place to make the second contract good do not occur, and I feel quite safe in saying dogmatically that no such sudden revulsion occurred here; nor indeed do I understand that such an absurdity is claimed. Can it be seriously urged that the defendant was willing that the plaintiff should have any moment of freedom from the old contract—such freedom I mean as to give the plaintiff the right to seek employment from some one other than the defendant? I think it is very clear that the parties never intended

to be free from each other, and that the new contract was a mere substitution for the old one, and that is precisely what the rule that refuses validity to a promise to pay more for what the promisee has already obligated to do was intended to prevent.

There is nothing in this case that distinguishes it from the many cases in the books in which the ancient rule of law referred to was applied. The tearing up of one writing and the delivery of another writing in its stead are unimportant evidentiary details. Whenever the question of the rule's applicability has arisen one contract has been in legal effect destroyed and another contract, valid but for the rule, has been substituted for it. Quite obviously, the physical tearing of a piece of paper accomplishes nothing more than does an oral agreement to cancel; and I see no importance in the particular chronological order in which the various physical gestures occurred. Indeed, it seems to me that the entire argument of the appellant amounts to nothing more than a mere magnification of the value of immaterial details and misses the real meaning and purpose of the doctrine we are dealing with. That the courts have shown no disposition to authorize any departure from the rule is shown in a comparatively recent case (Weed v. Spears, 193 N. Y. 289, 86 N. E. 10), where it was said:

"Thus the only question presented in this case is whether a new promise by a party to do less than he has already agreed to do is a sufficient consideration for the promise of another party to do more than he is obliged to do. It seems to me that the negative answer to that question is so plain that there is no opportunity for doubt.

"Brief reference will be made to some of the arguments advanced in behalf of the respondents in favor of a different answer.

"It is said that mutual promises are a consideration for an executory agreement, and that the respondents having performed their executory agreement it will be a perversion of the rules of law to permit the defendant now to escape performance on his part. Of course there is no doubt that under ordinary circumstances mutual promises are a consideration one for the other, and such was undoubtedly the effect and value of the mutual promises of these parties contained in the original written agreement.

"The trouble with the last mutual promises relied on by the respondent is that they afford no consideration to the appellant when measured by the obligations already resting upon the parties."

The view I take makes it unprofitable to discuss any of the cases cited by my learned brother except Lattimore v. Harsen, 14 Johns. 330 and Harris v. Carter, 3 El. & Bl., 559. In the Lattimore case the new contract that was held valid entirely changed the obligations of both parties, and so, of course, the rule in question had no applicability. It is true that in the English case the trial judge before making his decision asked for a special verdict from the jury, but just what he expected them to pass upon I cannot conceive, for there, as here, there

was no hiatus between the two engagements, only one party was advantaged by the change, and there was nothing to decide but a question of law. For the reasons stated I vote to affirm.

Judgment and order reversed, with costs to appellant.

EVANS v. OREGON & W. R. CO. et al.

(Supreme Court of Washington, 1910. 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. [N. S.] 455.)

Action by J. S. Evans against the Oregon & Washington Railroad Company and others. From a judgment for plaintiff against defendants M. W. Dibble and another, they appeal. Affirmed.

Gose, J. Prior to August 12, 1907, the appellants entered into a contract with the respondent Oregon & Washington Railroad Company for grading a part of its roadbed in Lewis county. On that date the appellants entered into a written contract with the respondent, Evans, by which they sublet to him a portion of the work. The respondent, Evans, commenced work under his contract, but, finding that the compensation agreed upon was inadequate, abandoned the work. The following day, at the instance of the division engineer of the railroad company, a Mr. Abbott, Evans and Abbott went to see the appellant Dibble, and informed him that Evans was dissatisfied, and had quit work. Evans then complained of the refusal of the appellants to pay a certain bill, and further said to them that he did not want to resume work because he had struck gumbo, and could not make anything. Abbott insisted that he should go on with the work, and stated in the presence of the appellant Dibble that, if he would continue and complete the work, "we will see that the bills are paid and you get a reasonable wage." Dibble was present, but said nothing further than to discuss the bill. The respondent Evans then resumed and completed the work, and, upon the refusal of the parties to pay a portion of the bills and his wages, brought this suit against his corespondent and the appellants to enforce the oral contract. At the close of his testimony, a motion for a nonsuit was granted as to the railroad company and denied as to the appellants. There was a verdict and judgment in favor of the respondent Evans against the appellants, and they have appealed.[81]

The first point suggested by the appellants is that the oral contract, if made, was without consideration, and not enforceable. It is insisted that neither the promise to do, nor the doing of that which the promissor is by law or subsisting contract bound to do, is a sufficient consideration to support a contract in his favor. We cannot assent to this view of the law. We think the better rule is that, where a party has breached his contract and refused to perform it, it is optional with the

[81] The court found that there was sufficient evidence that Dibble promised to pay the extra sum to sustain the verdict. Part of the opinion is omitted.

adverse party to sue him for damages or waive the breach, treat the contract as abrogated, and enter into a new contract with the delinquent party. It would seem to be elementary that parties competent to contract can abrogate or rescind the contract and enter into a new contract touching the same subject-matter to be performed, in the same or a different way, upon a different consideration. In the case at bar the appellants had contracted to do certain work, and it was important to them that the work that Evans had agreed to perform should go forward. When he abandoned the work, they had the election to hold him answerable in damages or to make a new contract with him. They chose the latter course, and cannot now be heard to say that the contract was nudum pactum.

This position has abundant support in the authorities. "Where the contractor refuses to perform his contract, and the builder promises to pay him additional compensation in consideration of the continued performance of the contract, the authorities are not in accord on the question whether the promise for additional compensation is supported by a sufficient consideration. The prevailing rule seems to be, however, that such a promise is valid as an abandonment of the original contract and the creation of a new contract." 30 Am. & Eng. Enc. Law (2d Ed.) p. 1197. * * * It must be conceded, however, that the courts are not agreed upon this question, and judges of the highest ability have announced the view urged by the appellants. The view we have taken will permit greater freedom in contracting, and is, we think, more in harmony with the fundamental conception of contracts. * * *

The judgment is affirmed.

SHERWOOD v. WOODWARD.

(In the Queen's Bench, 1599. Cro. Eliz. 700.)

Assumpsit. Whereas he sold to the defendant's son certain weights of cheese; the defendant, in consideration the plaintiff would deliver the said cheese to his said son, assumed, that if the son did not pay for them, then he would; and for non-payment the action was brought. Upon non assumpsit pleaded, and found for the plaintiff, it was moved by Godfrey in arrest of judgment, that this was not any consideration; for it is no more than what the law appoints, to deliver that which he sold, the property whereof is in the son by the sale.—But GAWDY and FENNER held it to be a good consideration; for it is an ease to the bargainee to have them without suit, which peradventure otherwise he could not have had. And although the bargainee may take them in this case, the bargainor is not bound to deliver them; and there is a new act done by him upon this agreement, and it is an ease to the vendee; and 12 Hen. VII is, that to deliver the goods of the party himself at another place, is a good accord. Wherefore, cæteris justitiariis absentibus, they adjudged it for the plaintiff.

BAGGE v. SLADE.

(In the King's Bench, 1614. 3 Bulst. 162.)

In a writ of error to reverse a judgment given against him in an action upon the case for a promise. In the town Court of Yevell, in commitatu Sommerset. The error assigned and insisted upon was this, because there wanted a good consideration to raise the promise, and so no cause of action.

COKE, C. J. The case was this, two men were bound in a bond for the debt of a third man; the obligation being forfeited, so that they both of them were liable to pay this. The plaintiff here in this writ of error said to the other, "Pay you all the debt, and I will pay you the moiety of this again," the which he paid accordingly, and so made his request to have a repayment made to him of the moiety according to his promise, which to do he refused. Upon this he brought his action upon the case against the plaintiff upon his promise, and upon non assumpsit pleaded, he had a verdict and judgment, and upon this judgment a writ of error was brought. In this case and in the declaration there is a good consideration set forth, the party's own contract here shall bind him, he hath no remedy for the money paid, but when this is paid, here is good assumpsit grounded upon a good consideration for repayment of the moiety by the plaintiff.

HAUGHTON, J. Notwithstanding this contract he is still least in danger of the first bond.

COKE. I have never seen it otherwise, but when one draws money from another that this should be a good consideration to raise a promise.

DODDERIDGE, J. If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise.

COKE agreed with him herein, also if a man be bound to another by a bill in £1,000 and he pays unto him £500 in discharge of this bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said bill of £1,000, this £500 is no satisfaction of the £1,000, but yet this is good and sufficient to make a good promise, and upon a good consideration, because he had paid money, £500, and he had no remedy for this again.

Another matter was moved, that the entry of the judgment was not good, the same being in this manner, Ideo consideratum fuit, adtunc, and ibidem hic ad eandem Curiam, quod prædictus querens recuperet.

The whole Court agreed this judgment to be well entered, and that the consideration here is good, and sufficient to raise the promise, and accordingly the rule of the Court was quod judicium affirmetur.

Judgment affirmed per curiam.

SHADWELL v. SHADWELL.

(In the Court of Common Pleas, 1860. 30 L. J. C. P. 145.)

The declaration stated that the testator, in his lifetime (in consideration that the plaintiff would marry Ellen Nicholl), agreed with and promised the plaintiff, who was then unmarried, in the terms contained in a writing in the form of a letter, addressed by the said testator to the plaintiff, which writing was and is in the words, letters, and figures following—that is to say:

Gray's Inn, August 11, 1838.

"My Dear Lancey: I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require.

"Your ever affectionate uncle, Charles Shadwell."

Averment that the plaintiff did all things necessary, and all things necessary happened, to entitle him to have the said testator pay to him eighteen of the said yearly sums of £150 each respectively, and that the time for the payment of each of the said eighteen yearly sums elapsed after he married the said Ellen Nicholl, and in the lifetime of the said testator, and that the plaintiff's annual income derived from his profession of a Chancery barrister never amounted to 600 guineas, which he was always ready and willing to admit and state to the said testator, and the said testator paid to the plaintiff twelve of the said eighteen yearly sums which first became payable, and part, to wit, £12 of the thirteenth; yet the said testator made default in paying the residue of the said thirteenth yearly sum, which residue is still in arrear and unpaid, and in paying the five of the said eighteen yearly sums which last became payable, and the said five sums are still in arrear and unpaid.

Fourth plea, that before and at the time of the making of the supposed agreement and promise in the declaration mentioned, the said marriage had been and was without any request by or on the part of the testator touching the said intended marriage, but at the request of the plaintiff, intended and agreed upon between the plaintiff and the said Ellen Nicholl, of which the testator before and at the time of making the supposed agreement and promise also had notice, and the said marriage was after the making of the supposed agreement and promise duly had and solemnized as in the declaration mentioned, at the request of the plaintiff, and without the request of the testator. And the defendants further say, that save and except as expressed and contained in the writing set forth in the declaration, there never was any consideration for the supposed agreement and promise in the declaration mentioned, or for the performance thereof.

Fifth plea, to part of the claim of the plaintiff, to wit, to so much thereof as accrued due in and after the year 1855, the defendants say that although the supposed agreement and promise in the declaration mentioned were made upon the terms then agreed on by the plaintiff and the testator, that the plaintiff should continue in practice and carry on the profession of such Chancery barrister as aforesaid, and should not abandon the same; yet that after the making of the said agreement and promise, and before the accruing of the supposed causes by this plea pleaded to and in the declaration mentioned, or any part thereof, the plaintiff voluntarily, and without the leave or license of the testator, relinquished and gave up and abandoned the practice of the said profession of a Chancery barrister, which before and at the time of the said making of the said supposed agreement and promise, he had so carried on as aforesaid; and although the plaintiff could and might, during the time in this plea and in the declaration mentioned, have continued to practice and carry on that profession as aforesaid, yet the plaintiff, after such abandonment thereof, never was ready and willing to practise the same as aforesaid, but practised only as a revising barrister—that is to say, as a barrister appointed yearly to revise the list of voters for the year, for the county of Middlesex, according to the provisions of the statutes in that behalf, by holding open courts for such revision at the times and places in that behalf provided by the said statutes.

Second replication to the fourth plea, that the said agreement declared on was made in writing, signed by the said testator, and was and is in the words, letters, and figures following, and in none other—that is to say [setting out the letter as in the declaration above]. Averment that the plaintiff afterward married the said Ellen Nicholl, relying on the said promise of the said testator, which at the time of the said marriage was in full force, not in any way vacated or revoked and that he so married while his annual income derived from his profession of a Chancery barrister did not amount, and was not by him admitted to amount, to 600 guineas.

Second replication to the fifth plea, that the said agreement declared on was in writing, signed by the testator, and was and is in the words, letters, and figures set out in the next preceding replication, and in none other, and that the terms upon which it is in the fifth plea alleged that the said agreement and promise were made were no part of the agreement and promise declared on, and the performance of them by the plaintiff was not a condition precedent to the plaintiff's right to be paid the said annuity.

Demurrers to the replications to the fourth and fifth pleas. Joinder in demurrer.

Erle, C. J., now delivered the judgment of himself and Keating, J. The question raised by the demurrer to the replication to the fourth plea is, whether there was a consideration to support the action on the promise to pay an annuity of £150 per annum. If there be such a

consideration it is a marriage; therefore the promise is within the Statute of Frauds, and the consideration must appear in the writing containing the promise—that is, in the letter of August 11th, 1838—and in the surrounding circumstances to be gathered therefrom, together with the averments on the record. The circumstances are that the plaintiff had made an engagement to marry Ellen Nicholl, his uncle promising him to assist him at starting, by which, as I understand the words, he meant on commencing his married life. Then the letter containing the promise declared on is said to specify what the assistance would be—namely, £150 per annum during the uncle's life, and until the plaintiff's professional income should be acknowledged by him to exceed 600 guineas; and a further averment, that the plaintiff, relying upon his promise, without any revocation on the part of the uncle, did marry Ellen Nicholl. Then, do these facts show that the promise was in consideration, either of the loss to be sustained by the plaintiff, or the benefit to be derived from the plaintiff to the uncle at his, the uncle's request? My answer is in the affirmative. First, do these facts show a loss sustained by the plaintiff at the uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss; yet, as between the plaintiff and the party promising an income to support the marriage, it may be a loss. The plaintiff may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss if the income which had been promised should be withheld; and if the promise was made in order to induce the parties to marry, the promise so made would be, in legal effect, a request to marry. Secondly, do these facts show a benefit derived from the plaintiff to the uncle at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood, and the interest in the status of the nephew which the uncle declares. The marriage primarily affects the parties thereto; but in the second degree it may be an object of interest with a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request, if the promise of the annuity was intended as an inducement to the marriage; and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage. This is a consideration averred in the declaration, and it appears to me to be expressed in the letter, construed with the surrounding circumstances. No case bearing a strong analogy to the present was cited, but the importance of enforcing promises which have been made to induce parties to marry has been often recognized, and the cases of Montefiori v. Montefiori and Bold v. Hutchinson are examples. I do not feel it necessary to add anything about the numerous authorities referred to in the learned arguments addressed to us, because the

decision turns on a question of fact, whether the consideration for the promise is proved as pleaded. I think it is, and therefore my judgment on the first demurrer is for the plaintiff. The second demurrer raises the question, whether the plaintiff's continuing at the bar was made a condition precedent to the right to the annuity. I think not. The uncle promises to continue the annuity until the professional income exceeds the sum mentioned, and I find no stipulation that the annuity shall cease if the professional diligence ceases. My judgment on this demurrer is also for the plaintiff, and I should state that this is the judgment of my Brother KEATING and myself, my Brother BYLES differing with us.

BYLES, J. I am of opinion that the defendant is entitled to the judgment of the Court on the demurrer to the second replication to the fourth plea. It is alleged by the fourth plea that the defendant's testator never requested the plaintiff to enter into the engagement to marry, or to marry, and that there never was any consideration for the testator's promise, except what may be collected from the letter itself set out in the declaration. The inquiry, therefore, narrows itself to this question, Does the letter itself disclose any consideration for the promise? The consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff, I think the letter discloses no consideration. It is in these words [his Lordship read it]. It is by no means clear that the words "at starting" mean "on marriage with Ellen Nicholl," or with any one else. The more natural meaning seems to me to be "at starting in the profession," for it will be observed that these words are used by the testator in reciting a prior promise, made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration that the annuity is not, in terms, made to begin from the marriage, but, as it should seem, from the date of the letter. Neither is it in terms made defeasible if Ellen Nicholl should die before marriage.

But even on the assumption that the words "at starting" mean "on marriage," I still think that no consideration appears sufficient to sustain the promise. The promise is one which, by law, must be in writing; and the fourth plea shows that no consideration or request, dehors the letter, existed, and, therefore, that no such consideration or request can be alluded to by the letter. Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration, but marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is, or may be a detriment to the plaintiff; but detriment to the plaintiff is not enough, unless it either be a benefit to the testator or be treated by the testator as such, by having been suffered at his request. Suppose a defendant to promise a plaintiff, "I will give you £500 if you break your leg," would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an

involuntary mischief, would it have been a binding promise if the testator had said, "I will give you £100 a year while you continue in your present chambers" ? I conceive that the promise would not be binding for want of a previous request by the testator.

Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point, Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied are the words, "I am glad to hear of your intended marriage with Ellen Nicholl." But it appears from the fourth plea that that marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement as an accomplished fact. No request can, as it seems to me, be inferred from them.

And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice or both together, were intended to cause the marriage, or did cause it, so that the marriage can be said to have taken place at the testator's request, or, in other words, in consequence of that request? It seems to me, not only that this does not appear, but that the contrary appears; for the plaintiff before the letter had already bound himself to marry by placing himself not only under a moral, but under a legal obligation to marry, and the testator knew it. The well-known cases which have been cited at the bar in support of the position that a promise, based on the consideration of doing that which a man is already bound to do, is invalid, apply to this case; and it is not necessary, in order to invalidate the consideration, that the plaintiff's prior obligation to afford that consideration should have been an obligation to the defendant. It may have been an obligation to a third person. See Herring v. Dorell [8 Dowl. P. C. 604] and Atkinson v. Settree [Willes, 482]. The reason why the doing what a man is already bound to do is no consideration, is not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive.

But whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging, in the replication to the fourth plea, that he married relying on the testator's promise; but he shrinks from alleging that though he had promised to marry before the testator's promise to him, nevertheless, he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance to his duty who yet is prepared to do his duty without those encouragements. At the utmost, the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word. It appears to me, for these reasons, that this letter is no more than

a letter of kindness, creating no legal obligation. In their judgment on the other portions of the record I agree with the rest of the Court.

Judgment for the plaintiff.

VANDERBILT v. SCHREYER.

(Court of Appeals of New York, 1883. 91 N. Y. 392.)

RUGER, C. J.[82] This was an action to foreclose a mortgage for $5,000 given September 5th, 1873, by one James Dunseith and wife to John Schreyer, and by him assigned to the plaintiff on May 5th, 1874.

Schreyer was made a party defendant, and it was sought to charge him with the payment of any deficiency that might arise upon a sale of the mortgaged premises, upon the ground that he had guaranteed the payment of the mortgage debt.

Schreyer answered, and after admitting the assignment and the guaranty of payment alleged by way of defence, that on February 2d, 1874, the plaintiff entered into a contract with George Gebhardt and Matthew L. Ritchie for the erection by him of certain buildings for them upon certain lots in the city of New York, for which he was to receive $8,175, to be paid as follows: "When the said houses are topped out, a payment of $5,000 by assignment of a bond and mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West Forty-Second Street, New York City," and the balance, amounting to $3,175, when the houses should be fully completed. Vanderbilt commenced performance of his contract and continued until he became entitled to the assignment of the $5,000 mortgage. Schreyer thereupon offered to assign it to the plaintiff, but the latter refused to accept an assignment unless Schreyer would also guarantee payment. The defendant refused to do this, and Vanderbilt then suspended work upon the buildings for about two months. The defendant then under protest, and believing, as he alleges, that he was acting under compulsion, executed the assignment with the guaranty in question. The plaintiff then completed his contract and received the balance of the consideration. The answer further states "that it was neither under said contract or otherwise made a condition of the plaintiff's accepting the assignment of said mortgage that this defendant or any other person should guarantee the payment thereof," and further "that no consideration ever passed to him or his principals for such guaranty, and the same was and is null and void."

Upon the trial of the action at Special Term the plaintiff produced and proved the mortgage in question, and also an assignment from defendant to plaintiff in the usual form, but containing the following clause: "And I hereby guarantee the payment of said bond and mort-

[82] Part of the opinion is omitted.

gage for $5,000 and interest from May 5, 1874, by due foreclosure and sale." The assignment and guaranty were sealed and executed in the presence of a subscribing witness. The plaintiff thereupon rested, and the defendant offered to prove in substance the facts alleged in his answer, which offer was objected to and excluded upon the ground that such answer did not set up facts constituting a defense. The defendant excepted to such ruling. The court thereupon held that said guaranty was absolute and ordered judgment against Schreyer for the deficiency which had previously been ascertained by a sale of the premises. An appeal was taken to the General Term, which reversed the judgment and directed a dismissal of the complaint upon the ground that Schreyer was improperly made a defendant, because the guaranty in question was in effect a guaranty of collection only, and that no right of action arose thereon until after the amount of the deficiency had been ascertained by a judicial sale of the mortgaged premises.

We differ in our conclusion from that reached by both of the courts below.[83] * * *

A more serious question however arises under the exception taken to the rulings of the special term excluding the evidence offered by the defendant to prove the facts stated in his answer, showing that the guaranty was without consideration.

In considering this question the allegations in the answer must be assumed to be true, and that the defendant would have proved them if he had not been precluded by the rulings of the court from doing so. The answer, while perhaps inartificially drawn, certainly alleged all of the facts necessary to show that neither Gebhardt and Ritchie, nor the plaintiff, had received any consideration for the guaranty in question. This he should have been allowed to prove. The production of the assignment in evidence, purporting to be executed "for value received," and being under seal was prima facie evidence only of a valuable consideration. It was not conclusive and could be disproved if it was in the defendant's power to do so. 3 Rev. St. (6th Ed.) 672, § 124; Bookstaver v. Jayne, 60 N. Y. 146; Anthony v. Harrison, 14 Hun, 198, affirmed in this court, 74 N. Y. 613.

The incorporation of this guaranty into the assignment for which there was a consideration does not affect the question. It was not essential to the assignment and was, so far as its legal effect was concerned, a separate instrument, and must be supported upon a sufficient consideration or treated as nudum pactum.

It is quite clear that the plaintiff had no right to demand this guaranty by the terms of his original contract with Gebhardt and Ritchie. That was satisfied by a mere naked transfer of his interest in the mortgage.

[83] The court here held that the promise was a conditional guaranty of collection, but that under the procedural statutes the guarantor was properly joined in the foreclosure suit.

It was held in Van Eps v. Schenectady, 12 Johns. 436, 7 Am. Dec. 330, that an agreement to execute a deed of lands was satisfied by the execution of a deed, without warranty or covenants. So it has been held that a party has no right to impose any conditions to the performance of a contract, except those contained in the contract itself. Furnace Co. v. French, 34 How. Prac. 94. It being clear that Vanderbilt had no legal right to require, as a condition to the fulfillment of his contract, the performance of an act not required by the contract, it is difficult to see what benefit he has bestowed or what inconvenience he has suffered in return for the undertaking assumed by the defendant. He promises to do only that which he was before legally bound to perform. Even though it lay in his power to refuse to perform his contract, he could do this only upon paying the other party the damages occasioned by his nonperformance, and that in contemplation of law would be equivalent to performance. He had no legal or moral right to refuse to perform the obligation of the contract into which he had upon a good consideration voluntarily entered.

There is no evidence in support of a claim that this guaranty was given as a compromise of any dispute arising with reference to the obligations of the plaintiff under his contract with Gebhardt and Ritchie. The case is not, therefore, brought within the cases in which a promise has been upheld on the theory that it was made in settlement of a controversy over disputed claims. The authorities seem quite uniformly to show the inadequacy of the consideration alleged for the guaranty in question. In Geer v. Archer, 2 Barb. 420, the defendant visited the plaintiff to pay her an installment upon a mortgage given by him a few weeks before on a purchase of land. She complained that she had not received the fair value of her land upon such purchase. The defendant offered to give her his note for $200 to satisfy her complaints. She replied that she would be satisfied with that, whereupon the note in question was given. It was held that this note was void for want of consideration. So where land was sold and described in the deed as containing a certain quantity, and a deficiency was afterward discovered, it was held that there was no obligation on the grantor to compensate the grantee for such deficiency, and a promise to pay the same was without consideration. Smith v. Ware, 13 Johns. 257; Ehle v. Judson, 24 Wend. 97.

Pollock states the rule as follows: That "neither the promise to do a thing, nor the actual doing of it, will be a good consideration if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party." Pol. Cont. 161; Crosby v. Wood, 6 N. Y. 369; Deacon v. Gridley, 15 C. B. 295. "Nor is the performance of that which the party was under a previous valid, legal obligation to do a sufficient consideration for a new contract." 2 Pars. Cont. 437. * * * A promise to pay an attorney additional compensation to attend as a witness, after he has been duly subpœnaed, is

without consideration. The attorney did nothing except what he was legally bound to do. Smithett v. Blythe, 1 Barn. & Adol. 514.[84]

It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of Lattimore v. Harsen, 14 Johns. 330.

It necessarily follows from these authorities that the plaintiff had no right to impose, as a condition to the performance of his contract, that the payment of said mortgage should be guaranteed. Although the defendant was not a party to the original contract and the consideration and contract between him, Gebhardt and Ritchie does not appear, yet we must assume that he acted at the request of Gebhardt and Ritchie, and was required only by such contract to execute such an assignment as Gebhardt and Ritchie had contracted to give. The answer, at all events, sets up that he received no consideration from any one for the guaranty sued upon.

The answer also alleges that the sole consideration received for this guaranty was the performance by the plaintiff of his contract with Gebhardt and Ritchie.

We think this answer sets forth a defense to the action, and inasmuch as the defendant has been erroneously deprived of the opportunity of proving it, if in his power to do so, that a new trial should be ordered.

The judgment therefore of the general term dismissing the complaint should be reversed, and its order reversing the judgment ordered against the defendant at circuit affirmed, and a new trial ordered, with costs to abide the event.

All concur, except ANDREWS and DANFORTH, JJ., not voting.

Judgment accordingly.

McDEVITT v. STOKES.

(Court of Appeals of Kentucky, 1917. 174 Ky. 515, 192 S. W. 681, L. R. A. 1917D, 1100.)

Action by Mike McDevitt against W. E. D. Stokes. Defendant's demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

SETTLE, C. J.[85] In this action instituted by the appellant Mike McDevitt, in the court below he sought to recover of the appellee, W. E. D. Stokes, the sum of $800 alleged to be the balance due him of a $1,000 claim which appellee agreed to pay him in the event he won with a mare called "Grace," to be driven by him, the celebrated Ken-

[84] In accord: Dodge v. Stiles, 26 Conn. 463 (1857). But a promise to pay an expert a large sum for investigating and then testifying is enforceable. Barrus v. Phaneuf, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619 (1896).

[85] Part of the court's discussion of the authorities has been omitted.

tucky Futurity race of the Kentucky Trotting Horse Breeders' Association at Lexington in October, 1910. In the opinion of the circuit court the facts alleged in the petition did not show a sufficient consideration to support the agreement on the part of appellee to pay the $1,000, for which reason the general demurrer filed by the latter to the petition was sustained. The appellant declining to plead further, the petition was dismissed, and from the judgment entered in conformity to these rulings he prosecutes this appeal.

The facts constituting appellant's cause of action, fully set forth in the petition, are substantially as follows: At the trotting meeting of the Kentucky Trotting Horse Breeders' Association, held at the city of Lexington in October, 1910, the mare Grace, owned by one Shaw, was entered in the Kentucky Futurity race to be driven by the appellant, McDevitt, a driver of great skill and experience, who was then in Shaw's employ. The Kentucky Futurity race is one of the most noted races among trotting horsemen in the United States, and the winning of it greatly increases the value of the winning horse and also the value of the sire, dam, and brothers and sisters of the winner. The purse offered in the race in question was $14,000, to be divided as follows: To the winner $10,000; to the second horse $2,000; to the third horse $1,000; to the fourth horse $500; to the owner of the dam of the winner $300; to the owner of the dam of the second horse $100; to the owner of the dam of the third horse $75; to the owner of the dam of the fourth horse $25. At the time this race occurred, and for some years prior thereto, the appellee, Stokes, controlled and managed a large stock farm near Lexington, together with a number of valuable race horses, bred and reared thereon, and had formed for operating the business a corporation known as the "Patchen Wilkes Stock Farm," of which he owns practically all the stock and is the president and manager. Among the horses then owned by this corporation was Peter the Great, the sire of the mare Grace, Orianna, her dam, Vladimir, a yearling, and Kilpatrick, a colt, her full-brothers. As appellee named the mare Orianna as the dam of Grace, entered to win the Kentucky Futurity race, he, or the corporation of which he is president, was entitled, in the event of the latter's winning it, to receive $300 out of the purse of $14,000, going to the winner. In addition, the value of each of the four horses, Peter the Great, Orianna, Vladimir and Kilpatrick, owned by the corporation of which he is president, would be greatly increased by Grace winning the race. It is alleged in the petition that, influenced by the foregoing considerations, appellee agreed to pay appellant the sum of $1,000 if he would drive and win the Kentucky Futurity with the mare Grace, to which the latter agreed; drove the mare and won the race; that by reason thereof appellee, or the corporation of which he is president, received, of the $14,000 purse won $300, as owner of Orianna, the dam of Grace, and the value of Peter the Great, the sire of Grace, was increased $10,000,

that of Orianna, her dam, $5,000, and that of Vladimir and Kilpatrick, her brothers, $5,000 each.

It is insisted for appellant that the above-enumerated benefits received by appellee from the winning of the trotting race by the mare Grace, which resulted in large measure from his skill in driving her, constitutes a sufficient consideration for the promise and undertaking of appellee to pay him the $1,000. This contention ignores consideration of another element of the alleged contract between the parties which, in our minds, is conclusive of its invalidity, viz. that appellant, because of his employment by Shaw, the owner of the mare Grace, was already both morally and legally bound to perform the service required of him by the alleged contract he made with appellee; hence its performance, as legally required by his contract with Shaw, would inevitably have resulted in the benefits received by appellee, in the absence of the alleged contract made by the latter to pay therefor. To hold that appellant would not have won the race with Grace but for the agreement of appellee to pay him the $1,000 if he would do so would be to say that he would have been recreant to the obligation arising out his employment by Shaw, an inference not justified by anything appearing in the petition.

We find no fault with the argument of appellant's counsel that a consideration which is either of benefit to the promisor or detriment to the promisee will be regarded sufficient to uphold the contract between the parties; nor are we inclined to depart from any principle announced in the cases of Talbott v. Stemmons, 10 Ky. Law Rep. 33, Ryan v. Tribble, 60 S. W. 633, 22 Ky. Law Rep. 1447, Moayon v. Moayon, 114 Ky. 864, 72 S. W. 33, 24 Ky. Law Rep. 1641, 60 L. R. A. 415, 102 Am. St. Rep. 303, Van Winkle v. King, 145 Ky. 693, 141 S. W. 46, First State Bank, etc., v. Morton, 146 Ky. 293, 142 S. W. 694, and Shadwick v. Smith, 147 Ky. 160, 143 S. W. 1027, relied on in the brief of counsel. The contracts discussed and passed on in those cases rest upon no such facts as are presented by the contract in the instant case, nor do they, or any of them, conflict with the conclusions at which we have arrived.

It will be found from an examination of those cases that the benefit resulting to the promisor, constituting the consideration of the contract, was some legal right acquired of the promisee to which he would not otherwise have been entitled, or that the detriment resulting to the promisee, constituting the consideration of the contract, was the waiver or loss of some legal right in return for the promise he would otherwise have availed himself of. Our meaning will be better explained by the following excerpt from Page on Contracts, vol. 1, § 274, in which the author, in discussing the meaning of the words "valuable consideration," says:

"The use of 'benefit' and 'detriment' in this connection needs explanation. While correct if properly understood, it is liable to mis-

construction. 'Benefit' does not refer to any pecuniary gain arising out of the transaction, nor 'detriment' to any pecuniary loss. It is not possible to wait until the transaction is concluded and the books balanced to see whether the consideration existed originally. 'Benefit' as used in this rule means that the promisor has, in return for a promise, acquired some legal right to which he would not otherwise have been entitled; 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he would otherwise have been entitled to exercise." * * *

In 9 Cyc. at page 347, it is said:

"A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. This legal obligation may arise from (1) the law independent of contract, or it may arise from (2) a subsisting contract. * * * Where a party is under duty created or imposed by law to do what he does, or promises to do, his act or promise is clearly of no value and is not a sufficient consideration for a promise given in return."

Obviously the rule stated must also obtain where the promise is made by a third party to induce the promisee to carry out an existing contract which he has with another. Indeed, this was declared to be the law by this court as far back as 1822 in Ford v. Crenshaw, 1 Litt. 68, doubtless the first case involving the question decided in this jurisdiction. Instead of reciting the voluminous facts or commenting upon the opinion, we here give the conclusions reached by the court, which are correctly and with admirable clearness expressed in the first paragraph of the syllabus, as follows:

"Where a man has, by his own contract, become morally and legally bound to do an act, he cannot maintain an action on the promise of a third person, afterwards made, to pay him for doing it." * * *

It is apparent from the facts alleged in the petition and the application to them of the principle announced by the authorities, supra, that the petition fails to state a cause of action against appellee. The latter was, it is true, benefited by the winning of the Kentucky Futurity purse by the mare Grace, driven by appellant, but the benefit was purely incidental and one to which he was entitled regardless of appellant's undertaking with him to win the race or of his, appellee's, promise to pay him the $1,000 if he would do so. As appellant under his contract with his employer, Shaw, was in duty bound to do what he claims appellee agreed to pay him to perform, it is evident that he neither assumed any added responsibility nor sustained any loss by reason of his undertaking with appellee that he would cause the mare Grace to win the race; and no liability was legally imposed upon appellee by his promise to pay him for the service rendered.

This conclusion makes it unnecessary for us to decide whether the contract was contrary to public policy; hence that question is not

passed on. It follows from what has been said that the action of the circuit court in sustaining the demurrer was not error. Wherefore the judgment is affirmed.[86]

ABBOTT v. DOANE.

(Supreme Judicial Court of Massachusetts, 1895. 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465.)

Contract upon a promissory note for $500, dated December 27th, 1892, payable in three months after date to the order of the plaintiff, and signed by the defendant. The answer set up want of consideration. At the trial in the Superior Court, before Bond, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The facts appear in the opinion.

ALLEN, J.[87] The plaintiff had given his accommodation note to a corporation, which had had it discounted at a bank, and left it unpaid at its maturity. The defendant, being a stockholder, director, and creditor of the corporation, wishing to have the note paid at once for his own advantage, entered into an agreement with the plaintiff whereby he was to give to the plaintiff his own note for the amount, and the plaintiff was to furnish money to enable the defendant to take up the note at the bank. This agreement was carried out, and the defendant now contends that his note to the plaintiff was without consideration, because the plaintiff was already bound in law to take up the note at the bank.

It is possible that, for one reason or another, both the bank and the plaintiff may have been willing to wait a while, but that the defendant's interests were imperilled by a delay, and indeed required that the note should be paid at once, and that the corporation, whose duty it was primarily to pay it, was without present means to do so. Since the defendant was sane, sui juris, was not imposed upon nor under duress, knew what he was about, and probably acted for his own advantage, it would certainly be unfortunate if the rules of law required

[86] In accord: Johnson's Adm'r v. Sellers' Adm'r, 33 Ala. 265 (1858); Arend v. Smith, 151 N. Y. 502, 45 N. E. 872 (1897); Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224 (1889); Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 N. E. 873 (1893); Reynolds v. Nugent, 25 Ind. 328 (1865); Schuler v. Myton, 48 Kan. 282, 29 Pac. 163 (1892); Putnam v. Woodbury, 68 Me. 58 (1878); Sherwin v. Brigham, 39 Ohio St. 137 (1883); Gordon v. Gordon, 56 N. H. 170 (1875); Wimer v. Overseers of Poor of Worth Tp., 104 Pa. 317 (1883); Davenport v. First Congregational Soc., 33 Wis. 387 (1873); Hanks v. Barron, 95 Tenn. 275, 32 S. W. 195 (1895); Marinovich v. Kilburn, 153 Cal. 638, 96 Pac. 303 (1908).

See Williston, 8 Harv. L. Rev. 32–38; 27 Harv. L. Rev. 503; Ames, 12 Harv. L. Rev. 519–521; Beale, 17 Harv. L. Rev. 71; Corbin, "Does a Pre-existing Duty Defeat Consideration" (1918) 27 Yale L. Jour. 362.

If under a contract one has an alternative or option and gives this up for a new promise, there is a sufficient consideration. Thomson v. Way, 172 Mass. 423, 52 N. E. 525 (1899).

[87] Part of the opinion is omitted.

us to hold his note invalid for want of a sufficient consideration, when he has had all the benefit that he expected to get from it.

In this Commonwealth it was long ago decided that, even between the original parties to a building contract, if after having done a part of the work the builder refused to proceed, but afterward, on being promised more pay by the owner, went on and finished the building, he might recover the whole sum so promised. * * *

But when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him is requested to do so by a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract.

Take an illustration. A. enters into a contract with B. to do something. It may be to pay money, to render service, or to sell land or goods for a price. The contract may be not especially for the benefit of B., but rather for the benefit of others; as, e. g., to erect a monument, an archway, a memorial of some kind, or to paint a picture to be placed where it can be seen by the public. The consideration moving from B. may be executed or executory; it may be money, or anything else in law deemed valuable; it may be of slight value as compared with what A. has contracted to do. Now A. is legally bound only to B., and if he breaks his contract nobody but B. can recover damages, and those damages may be slight. They may even be already liquidated at a small sum by the terms of the contract itself. Though A. is legally bound, the motive to perform the contract may be slight. If after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene. and enter into a new agreement with A., by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money, and give their note or notes therefor, and A. accordingly does what he had before agreed to do, but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfill their promise. They have got what they bargained for, and A. has done what otherwise he might not have done, and what they could not have compelled him to do. * * *

Without dwelling further on the reasons for the doctrine, it seems to us better to hold, as a general rule, that if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement in consequence of

such request and promise by C. is a good consideration to support C.'s promise.

Exceptions overruled.[88]

DE CICCO v. SCHWEIZER et al.

(Court of Appeals of New York, 1917. 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816.)

Action by Attilio De Cicco against Joseph Schweizer and others. From a judgment of the Appellate Division, First Department (166 App. Div. 919, 152 N. Y. Supp. 1106), modifying and affirming a judgment of the trial term in favor of plaintiff, the defendant named appeals. Affirmed.

CARDOZO, J.[89] On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy:

"Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli: Now in consideration of all that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day of January, 1902."

Later articles provided that "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity. That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment

[88] In accord: Scotson v. Pegg, 6 H. & N. 295 (1861). And see, further, Merrick v. Giddings, 1 Mackey (D. C.) 394 (1882); Champlain Const. Co. v. O'Brien (C. C.) 117 Fed. 271 (1902); Donnelly v. Newbold, 94 Md. 220, 50 Atl. 513 (1901); Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365 (1886); Humes v. Decatur Land Improvement & Furnace Co., 98 Ala. 461, 473, 13 South. 368 (1893), distinguishing Johnson's Adm'r v. Sellers' Adm'r, 33 Ala. 265 (1858).

[89] The concurring opinion of Crane, J., is omitted.

of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A. is under a contract with B., a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C., a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C. in return for a new promise by A., and a promise by C. in return for performance by A. Some jurists hold that there is consideration in both classes of cases. Ames, Two Theories of Consideration, 12 Harv. L. Rev. 515; 13 Harv. L. Rev. 29, 35; Langdell, Mutual Promises as a Consideration, 14 Harv. L. Rev. 496; Leake, Contracts, p. 622. Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance. Beale, Notes on Consideration, 17 Harv. L. Rev. 71; 2 Street, Foundations of Legal Liability, pp. 114, 116; Pollock, Contracts (8th Ed.) 199; Pollock, Afterthoughts on Consideration, 17 Law Quarterly Review, 415; 7 Halsbury, Laws of England, Contracts, p. 385; Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465. Others hold that there is no consideration in either class of cases. Williston, Successive Promises of the Same Performance, 8 Harv. L. Rev. 27, 34; Consideration in Bilateral Contracts, 27 Harv. L. Rev. 503, 521; Anson on Contracts (11th Ed.) p. 92.

The storm center about which this controversy has raged is the case of Shadwell v. Shadwell, 9 C. B. (N. S.) 159; 99 E. C. L. 158, which arose out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before Erle, Ch. J., and Keating and Byles, JJ. The first two judges held the promise to be enforceable. Byles, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking. Neither of the two opinions in Shadwell v. Shadwell can rule the case at bar. There are elements of difference in the two cases which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void. Arend v. Smith, 151 N. Y. 502, 45 N. E. 872; Vanderbilt v. Schreyer, 91 N. Y. 392; Seybolt v. N. Y., L. E. & W. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Robinson v. Jewett, 116 N. Y. 40, 22 N. E. 224. If that is the true nature of this promise, there was no consideration. We

have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral. Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85. The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49. When it came to her knowledge, she had the right to adopt and enforce it. Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; Lawrence v. Fox, 20 N. Y. 268. In doing so, she made herself a party to the contract. Gifford v. Corrigan, supra. If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (Miller v. McKenzie, supra), action on the faith of it put her in the same position as if she had been in form the promisee. That she learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A. to B. to induce him not to break his contract with C., and a like promise to induce him not to join with C. in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B. solely, and not to B. and C. jointly. Pollock, Contracts (8th Ed.) p. 199; Williston, 8 Harv.

L. Rev. 36. The criticism has been made that in such circumstances there ought to be some evidence that C. was ready to withdraw. Williston, supra, pp. 36, 37. Whether that is true of contracts to marry is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment. Smith v. Chadwick, 9 App. Cas. 187, 196; Smith v. Land & House Corp., 28 Ch. D. 7, 16; Voorhis v. Olmstead, 66 N. Y. 113, 118; Fottler v. Moseley, 179 Mass. 295, 60 N. E. 788. "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." Blackburn, L. J., in Smith v. Chadwick, supra. The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of

performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made animo contrahendi. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." Holmes, Common Law, p. 292; Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 579, 12 Sup. Ct. 84 (35 L. Ed. 860). "Nothing is consideration that is not regarded as such by both parties." Philpot v. Gruninger, 14 Wall. 570, 577 (20 L. Ed. 743); Fire Ins. Ass'n v. Wickham, supra. But here the very formality of the agreement suggests a purpose to effect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. Phalen v. U. S. Trust Co., 186 N. Y. 178, 181, 78 N. E. 943, 7 L. R. A. (N. S.) 734, 9 Ann. Cas. 595. It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. McNutt v. McNutt, 116 Ind. 545, 19 N. E. 115, 2 L. R. A. 372; Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. Rep. 709, 10 Ann. Cas. 563. It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

BRIDGE v. CAGE.

(In the Common Pleas, 1605. Cro. Jac. 103.)

Action on the case in an assumpsit. Whereas an executor sued execution by an elegit, the defendant, ut amicus executoris, in consideration that the sheriff would execute the writ, and of sixpence given to him by the plaintiff, being under-sheriff of Cambridgeshire, promised to give the plaintiff sixty pounds; and alledges in fact, that he executed the writ; and thereupon brought the action.

After verdict for the plaintiff, it was moved, that it was not any consideration to maintain the action; for the sheriff by his duty and oath ought to execute the writ; and therefore to have a promise of consideration for executing it is not lawful; and it is quasi extortion, and therefore ill and unlawful. And although it was alledged that this sum promised him is no more than what the statute of 29 Eliz. c. 4. allows him to take for his fees, yet that will not help the case; for that statute only excuseth him for his taking fees, if it be no more than what the statute permits; whereas the common law did not permit him to take any thing for the executing writs.

WARBERTON said, although the statute tolerates it, that it is not punishable (as the usury of ten pounds per one hundred pounds is tolerated); yet it hath been oftentimes adjudged, that for such fees he hath not any remedy by an action.

GAWDY said, it is not reasonable, that for the executing of a writ by elegit (where peradventure the land is not worth forty shillings) he should have sixpence for every pound of the debt; and here the giving of sixpence is no sufficient consideration, being joined with the other which is unlawful.—Wherefore it was adjudged for the defendant.

GRAY v. MARTINO.

(Supreme Court of New Jersey, 1918. 91 N. J. Law, 462, 103 Atl. 24.)

Action by Stephen Gray against Theresa D. Martino. Judgment for plaintiff on trial without a jury, and defendant appeals. Reversed.

MINTURN, J. The plaintiff occupied the position of a special police officer in Atlantic City, and incidentally was identified with the work of the prosecutor of the pleas of the county. He possessed knowledge concerning the theft of certain diamonds and jewelry from the possession of the defendant, who had advertised a reward for the recovery of the property. In this situation he claims to have entered into a verbal contract with defendant whereby she agreed to pay him $500 if he could procure for her the names and addresses of the thieves. As a result of his mediation with the police authorities the diamonds and jewelry were recovered, and plaintiff brought this suit to recover the promised reward. The district court, sitting without a jury,

awarded plaintiff a judgment for the amount of the reward, and hence this appeal.

Various points are discussed in the briefs, but to us the dominant and conspicuous inquiry in the case is, Was the plaintiff during the period of this transaction a public officer, charged with the enforcement of the law? The testimony makes it manifest that he was a special police officer to some extent identified with the work of the prosecutor's office, and that position upon well-settled grounds of public policy required him to assist at least, in the prosecution of offenders against the law.

The services he rendered in this instance must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo.

The cases on the subject are collected in a footnote to Somerset Bank v. Edmund, 10 Ann. Cas. p. 726 (76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. [N. S.] 1170), the headnote to which reads:

"Public policy and sound morals alike forbid that a public officer should demand or receive, for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law."

This rule of public policy has been relaxed only in those instances where the Legislature for sufficient public reason has seen fit by statute to extend the stimulus of a reward to the public without distinction, as in the case of United States v. Mathews, 173 U. S. 381, 19 Sup. Ct. 413, 43 L. Ed. 738, where the Attorney General, under an act for "the detection and prosecution of crimes against the United States," made a public offer of reward sufficiently liberal and generic, to comprehend the services of a federal deputy marshal. Exceptions of that character upon familiar principles serve to emphasize the correctness of the rule, as one based upon sound public policy.

The judgment below for that reason must be reversed.[90]

RYAN v. DOCKERY.

(Supreme Court of Wisconsin, 1908. 134 Wis. 431, 114 N. W. 820, 15 L. R. A. [N. S.] 491, 126 Am. St. Rep. 1025.)

Proceedings by Edward Ryan to establish a claim against the estate of Eliza Ryan, deceased, contested by Patrick Dockery, administrator. From a judgment granting insufficient relief, claimant appeals. Affirmed.

The appellant, Edward Ryan, filed a claim in the county court against the estate of his deceased wife, Eliza Ryan, for care, support, and nursing of said wife from the time of their marriage, August 4, 1900, up to the time of her death, February 28, 1905. The complaint

[90] In accord: Pool v. City of Boston, 5 Cush. (Mass.) 219 (1849); Thacker v. Smith, 103 Kan. 641, 175 Pac. 983 (1918).

as filed in county court was substantially upon quantum meruit, and the claim was allowed in that court at the sum of $1,000. The administrator appealed, and in the circuit court an amendment to the complaint was allowed, by which it was alleged that just prior to the marriage of the parties, and on the same day, the deceased agreed with the claimant that, in consideration of his services in caring for, supporting, and nursing her, she would leave him all her property upon her death, should he survive her; and that she failed to perform such promise, to the claimant's damage in the sum of $1,750. It appeared on the trial that Eliza Ryan was a widow with a small property and living alone at the time of the alleged promise, and was blind, and consequently in need of some one to care for her. The jury by special verdict found (1) that before the marriage a contract was made between the parties by which the claimant agreed to take care of, support, nurse, and see to the comfort of deceased during her life, and the deceased agreed to pay therefor by giving him what property she might leave at her death for his use during his life; (2) that said agreement was not made as part of their contract to marry or as a consideration for the marriage; (3) that the support, nursing, and care were not such as the parties contemplated should result from the marriage relation; and (4) that claimant fully performed the contract on his part. Upon motion the court held that the negative answer to the second question was wholly unsupported by the testimony, and that said question should be answered in the affirmative, but allowed the answer to the third question to stand. The court further held that as a part of the consideration was Ryan's promise to marry the deceased, which was void because not in writing, the entire contract was void; but that it would serve to rebut the presumption that the services rendered were to be gratuitous. Hence the court concluded that there might be a recovery for the reasonable value of the services, but, there being no proof as to what the services were worth, the claimant could recover only nominal damages and costs. Judgment in accordance with this conclusion was rendered, and the claimant appeals.

WINSLOW, C. J. (after stating the facts as above). We think that the court was entirely right in changing the answer to the second question of the verdict; but, as a verdict for the defendant should have been directed upon the undisputed evidence, neither this question nor the other detail errors claimed by the plaintiff are important.

One consideration alone disposes of the plaintiff's claim adversely to him. The law requires a husband to support, care for, and provide comforts for his wife in sickness, as well as in health. This requirement is grounded upon principles of public policy. The husband cannot shirk it, even by contract with his wife, because the public welfare requires that society be thus protected so far as possible from the burden of supporting those of its members who are not ordinarily expected to be wage earners, but may still be performing some of the

most important duties pertaining to the social order. Husband and wife may contract with each other before marriage as to their mutual property rights, but they cannot vary the personal duties and obligations to each other which result from the marriage contract itself. Schouler, Domestic Relations (5th Ed.) § 171; 21 Cyc. 1242. It results from this that, when the plaintiff promised to care for, nurse, and support the deceased after marriage, he promised only to do that which the law required him to do in any event and neither the doing of what one is in law bound to do nor the promising so to do is any consideration for another's promise. I Page on Contracts, § 311; Post v. Campbell, 110 Wis. 378, 85 N. W. 1035. The alleged promise of the deceased was therefore nudum pactum. The plaintiff simply performed duties required of him by law as a husband which he could not avoid or contract away, and there can be no recovery either upon express contract, nor will the law imply a contract.

Judgment affirmed.[91]

HARTLEY v. INHABITANTS OF GRANVILLE.

(Supreme Judicial Court of Massachusetts, 1913. 216 Mass. 38, 102 N. E. 942, 48 L. R. A. [N. S.] 392, Ann. Cas. 1915A, 725.)

Action by Harry S. Hartley against the Inhabitants of Granville. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

RUGG, C. J. This is an action to recover the amount of a reward which the selectmen of the defendant in 1909 offered "to any person furnishing evidence that will convict the person or persons who" had set recent fires in that town. The plaintiff was duly elected and qualified as a constable of the defendant town for that year. There was no evidence tending to show that any regular compensation was paid to the plaintiff as constable, or that he had any special arrangement with the defendant for pay, or that his duties were any other than such as by the common and statute law of the commonwealth are incumbent upon constables.

The general duties of such an officer are to be vigilant to preserve the peace, to prevent the commission of crime, and to arrest all offenders in his town who might be arrested without warrant, and to procure warrants in other instances of crime committed. The quaint description of his duties given in early definitions is "to keep the king's peace." To keep the peace in its broad sense means to quell riots and disturbances of every nature, to prevent the commission of crime and to see that offenders in their several districts are arrested and prosecuted. They possess somewhat extensive powers. See 1 Blackstone's Com. 356. But in our country communities constables as such are not

[91] In accord: Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308, Ann. Cas. 1912A, 327 (1910). Query: Did not the contract create a duty in the plaintiff before he assumed such a duty by the marriage?

expected nor required to devote a considerable portion of their time to the work of their office. In this regard they stand on a basis quite different from the members of an organized police force. It is matter of common knowledge that the country constable in this commonwealth is elected oftentimes from among those who labor regularly to earn a livelihood for themselves and their families, but whose character, courage or reputation for physical prowess are such as to make them efficient conservators of the public peace. The theory on which the office now is based (apart from the functions of serving papers) is that a number of competent men scattered through the territory of each of the country towns, charged with such duties, is an important factor in making them safe for residence by law-abiding people.

The office of constable is an ancient one, but its duties have been modified from time to time by custom and statute. The constable is a public officer. Any person elected to the office is liable to a forfeit of money if he refuses to serve. R. L. c. 25, § 97. He is not entitled to compensation for services rendered to the town in the performance of general duties as peace officer, at all events in the absence of special contract. Riopel v. Worcester, 213 Mass. 15, 99 N. E. 478. The theory of the law is that those chosen to such office by their fellow citizens will accept and execute the office either from a sense of public duty or under the compulsion arising from the pecuniary forfeit entailed by a refusal, and not from hope of money gain. Farnsworth v. Melrose, 122 Mass. 268. These considerations reinforce the conclusion that the obligation is not incumbent upon the constable to give up his ordinary occupation and spend substantial time in search for evidence which may or may not lead to the detection of criminals, nor perform the work commonly done by detectives. The general rule with reference to peace officers is well settled that a promise or reward for additional compensation to a public officer for services rendered in the performance of his duty cannot be enforced, either as being without consideration or contrary to public policy. Pool v. Boston, 5 Cush. 219; Dunham v. Stockbrige, 133 Mass. 233; Davies v. Burns, 5 Allen, 349; Brophy v. Marble, 118 Mass. 548. This rule is based upon sound considerations and ought not to be narrowed in any respect. But it is also true that a contract to pay a public officer for services rendered outside and not inconsistent with his official duty is valid and may be enforced. A reward offered for such service is also enforceable. Studley v. Ballard, 169 Mass. 295, 296, 47 N. E. 1000, 61 Am. St. Rep. 286, and cases there cited. Neville v. Kelly, 12 C. B. N. S. 740; Russell v. Stewart, 44 Vt. 173; Kasling v. Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797; Bronnenberg v. Coburn, 110 Ind. 169, 11 N. E. 29; Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324; Kinn v. First Nat. Bank, 118 Wis. 537, 546, 95 N. W. 969, 99 Am. St. Rep. 1012; Burkee v. Matson, 114 Minn. 233, 130 N. W. 1025, 34 L. R. A. (N. S.)

924.[92] The many cases cited and relied on by the defendant are not in conflict with this principle. Most of them follow either the authority or reasoning of Pool v. Boston, ubi supra, and relate to facts which bring them within its rule.

There was evidence in the case at bar that the plaintiff spent substantial time in the performance of purely detective work in the investigation and collection of evidence in consequence of the offer of reward outside the service rendered in serving the warrant and doing in other respects what the law required him to do by virtue of his office as constable. The case on its facts is rather close to the line, but it cannot be said that the finding of fact made by the judge was not warranted. This being so, no error was made in the ruling of law.

Exceptions overruled.[93]

TOLHURST et al. v. POWERS.

(Court of Appeals of New York, 1892. 133 N. Y. 460, 31 N. E. 326.)

FINCH, J.[94] We agree with the prevailing opinion of the General Term that there was no consideration to support the promise of Powers to pay Ball's debt to the plaintiffs. The latter originally constructed a dynamo, for which Ball became indebted to them, and after all payments he remained so indebted when the machine was ready for delivery. The builders, of course, had a lien upon it for the unpaid balance, but waived and lost their lien by a delivery to Ball without payment. He, being then the owner and holding the title free from any incumbrance, sold the dynamo to Crane on a contract apparently contingent upon the successful working of the machine. It did not work successfully, and was sent back to plaintiffs to be altered with a view of correcting its imperfections. At this point occurred the first intervention of the defendant Powers. He had not then obtained, so far as the case shows, any interest in the machine, and the complete title was either in Crane or Ball or in both; but when the plaintiffs hesitated about entering upon the new work until their charges for it should be made secure, Powers agreed to pay them. The true character of that promise is immaterial, for when the work was done Powers did pay according to his contract. Thereafter Ball and Powers requiring a delivery of the dynamo, the plaintiffs undertook or threatened to retain the possession till the original debt should be paid. That they had no right to do. Their primary lien was lost by the delivery, and they acquired no new one by reason of

[92] Also in accord: England v. Davidson, 11 A. & E. 856 (1840); McCandless v. Allegheny Bessemer Steel Co., 152 Pa. 139, 25 Atl. 579 (1893).

[93] In Reif v. Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731 (1882), a fireman was held entitled to a reward offered for rescuing the body of defendant's wife; his duty not requiring him to risk his life in that way.

[94] Part of the opinion is omitted.

the repairs which were paid for. Such refusal to surrender the possession was an absolute wrong without any color of right about it. After demand their refusal was a trespass, and according to their own evidence the sole consideration for the promise which they claim that Powers made to pay the old debt of Ball was their surrender of possession. To that they were already bound, and parted with nothing by the surrender. They gave up no right which they had against any one, but extorted the promise by a threat of what would have been, if executed, a wrongful conversion. Doing what they were already bound to do furnished no consideration for the promise.[95] * * *

SECTION 6.—PAST CONSIDERATION

(Must the Promise be the Inducing Cause of the Consideration?)

MOORE v. WILLIAMS.

(In the King's Bench, 1586. Moore, K. B. 220.)

Between Moore and Williams the case was that Williams, being the lessee for years the reversion belonging to Moore, was sued in ejectment [by a third person] and in defense of his title had spent a large sum of money, and therefore he came to Moore and told him that he had spent much money and asked contribution or other payment. Moore replied that in consideration of this he should have another certain lease after the expiration of his term, as he requested. The term expired and Williams asked for a new lease. Moore would not execute a new lease, and Williams brought an action on the case in assumpsit. It was held not maintainable because the consideration was executed before the promise was made.[96] * * *

HARFORD AND GARDINER'S CASE.

(In the King's Bench, 1588. 2 Leon. 30.)

In an action upon the case, the plaintiff declared, that the defendant in consideration that the father of the plaintiff had employed his service about the business of the testator of the defendant, to the great profit of the testator; and in consideration of love and affec-

[95] In accord: Cowper v. Green, 7 M. & W. 633 (1841); Fink v. Smith, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750 (1895).

[96] Part of the report is omitted. In accord: Hunt v. Bate, Dyer, 272 (1568); Hayes v. Warren, 2 Strange, 933 (1732); Jeremy v. Goochman, Cro. Eliz. 442 (1596).

tion that the testator bore to the plaintiff, promised to give unto him £100. CURIA. Love is not a consideration, upon which an action can be grounded; the like of friendship. WRAY. If the plaintiff declares, that the defendant in consideration that he was indebted unto the plaintiff in divers sums of money, and promised to pay him £100 it is not good for the incertainty; also the consideration here, was past and executed before the promise made, and nothing is done by the son. And afterwards judgment was given against the plaintiff.[97]

BABINGTON v. LAMBERT.

(In the King's Bench, 1617. Moore, K. B. 854.)

In an action on the case on assumpsit in consideration that the defendant had received £24 from divers persons to the use of the plaintiff he promised to pay this to the plaintiff on a certain day. Verdict was for the plaintiff. It was moved in arrest of judgment that the declaration was not good because it did not state from what particular persons the money had been received. But the whole court was against this, because the consideration is executed, and so not traversable. Judgment for plaintiff.[98]

JANSON v. COLOMORE.

(In the King's Bench, 1617. 1 Rolle, 396.)

Janson brought an action on the case against Colomore and alleged that the defendant being indebted to him on an account was found to be in arrears a certain amount, and in consideration thereof promised to pay the said amount at a certain future day, and for breach of this promise action was brought. After verdict for the plaintiff it was moved in arrest of judgment that an action on the case does not lie, for the reason that the contract was prior to the promise sued upon and was executed, and this promise to pay at a future day cannot turn it into an executory contract.

HAUGHTON said that the action lies, because when the defendant was found to be in arrears he then and there promised, so that at the

[97] That love and affection or blood relationship will not operate as consideration, see Wright v. Threatt, 146 Ga. 778, 92 S. E. 640 (1917) and note in L. R. A. 1918C, 541; Maynard v. Maynard, 105 Me. 567, 75 Atl. 299 (1909); Fink v. Cox, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191 (1820), where a father gave his son a promissory note for $1,000 as a mere gift, because this son was not as wealthy as his brother; Dougherty v. Salt, 227 N. Y. 200, 125 N. E. 94 (1919), aunt gave note for $3,000 to nephew.

[98] The duty of an executor to pay claims against the estate when there are sufficient assets was held to be a sufficient consideration for a promise by him to pay such a claim out of his own money. Hawkes v. Saunders, Cowper, 289 (1782); Atkins v. Hill, Cowper, 284 (1775).

instant the arrears were determined the debt became definite and certain, and upon this the express assumpsit made at the same time is good. This was conceded to be correct by CROKE and DODDERIDGE and the latter said that Slade's case established the rule that every executory debt includes an assumpsit.[99] (The discussion of another point is omitted.)

SIDENHAM AND WORLINGTON'S CASE.

(In the Common Pleas, 1585. 2 Leon. 224.)[1]

In an action upon the case upon a promise, the plaintiff declared, that he at the request of the defendant, was surety and bail for J. S. who was arrested in the King's Bench, upon an action of £30 and that afterwards, for the default of J. S. he was constrained to pay the £30 after which, the defendant meeting with the plaintiff, promised him for the same consideration, that he would repay the £30 which he did not pay, upon which the plaintiff brought the action; the defendant pleaded, non assumpsit, upon which issue was joyned, which was found for the plaintiff. Walmsley, Serjeant, for the defendant, moved the Court, that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration, as if one giveth me a horse, and a month after, I promise him £10 for the said horse, he shall never have debt for the £10 nor assumpsit upon that promise; for there is neither contract, nor consideration, because the same is executed.

[99] In accord: Hodge v. Vavisor, 1 Rolle's Rep. 413 (1616); Howlet's Case, Latch, 150 (1626); Barton v. Shurley, 1 Rolle's Abr. 12, pl. 16 (1639). Cf. Hopkins v. Logan, 5 M. & W. 241 (1839).

The account stated is sufficient consideration without alleging out of what facts the account grew. Bard v. Bard, Cro. Jac. 602 (1620); Egles v. Vale, Cro. Jac. 69 (1603); Homes v. Savill, Cro. Car. 116 (1628).

In Slade's Case, 4 Coke, 92b. Yelv. 21, Moore, K. B. 433, 667 (1602), it was held after a tremendous struggle that where a legal debt existed the form of action known as assumpsit would lie, and that even if no promise had been made in terms the law would "imply" a promise. The effect of this decision, and probably its purpose also, was to deprive debtors of the ancient defense known as "wager of law," a defense available in the action of debt, but not in assumpsit, a defense that had come to be used dishonestly. If assumpsit would lie to collect a past debt in the absence of an express promise, a fortiori it would lie if such a promise is made.

"No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from his debtor." Turner v. McFee, 61 Ala. 468, 472 (1878): Paine v. Benton, 32 Wis. 491 (1873); Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161 (1884): Williams v. Silliman, 74 Tex. 626, 12 S. W. 534 (1889).

Of course, the existing debt of A. is not a consideration for the promise of B. to pay it. Ward v. Barrows, 86 Me. 147, 29 Atl. 922 (1893). Nor is it a consideration for the promise of the debtor himself to pay part of it in advance of the due date. Young v. Ward, 33 Me. 359 (1851).

[1] Also reported in Godbolt, 31; Cro. Eliz. 42.

ANDERSON, This action will not lie; for it is but a bare agreement, & nudum pactum, because the contract was determined, and not in esse at the time of the promise; but he said, it is otherwise upon a consideration of marriage of one of his cosins; for marriage is always a present consideration. WINDHAM agreed with ANDERSON, and he put the case in 3 H. VII. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold.

PERIAM, Justice, conceived, that the action did well lie; and he said, that this case is not like unto the cases which have been put of the other side; for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, and the promise, and the sale, ought to meet together, for a contract is derived from con and trahere, which is a drawing together, so as in contracts every thing which is requisite, ought to concur and meet together, viz. the consideration of the one side and the sale or the promise on the other side; but to maintain an action upon an assumpsit, the same is not requisit, for it is sufficient, if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day: for in an action upon the case, upon a promise, the declaration is laid, that the defendant, for, and in consideration of £20 to him paid, (postea scil.) that is to say, at a day after super se assumpsit, and that is good; and yet there the consideration is laid to be executed; and he said, that the case in Dyer, 10 Eliz. 272, would prove the case: for there the case was, that the apprentice of one Hunt, was arrested when his master Hunt was in the country, and one Baker, one of the neighbours of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt; afterwards Hunt the master, returning out of the country, thanked Baker for his neighbourly kindness to his apprentice, and promised him, that he would repay him the sum which he had paid for his servant and apprentice: and afterwards upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case, that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case, it was holden by all the justices, that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant.

RHODES, Justice, agreed with PERIAM; and he said, that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him £20 for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a servant hath wages given him, and his master, ex abundanti, doth

promise him £10 more after his service ended, he shall not maintain an action for that £10 upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices, and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff, and they much relied upon the case of Hunt and Baker, 10 Eliz. Dyer, 272. See the case there.[2]

RIGGS v. BULLINGHAM.[3]

(In the Common Pleas, 1600. Cro. Eliz. 715.)

Assumpsit. Whereas he was seised in fee of the advowson of Beckingham in the county of Lincoln; in consideration that he, at the defendant's request, by his deed, dedisset et concessisset to the defendant the first and next avoidance of the said church, the defendant, 22 August, 37 Eliz. assumed to pay to the plaintiff £100, &c. Upon non assumpsit pleaded, it was found for the plaintiff, and damages assessed to £100. And, after verdict, it was moved in arrest of judgment, that this consideration is past, and therefore not sufficient to ground an assumpsit; for there is not any time of the grant alleged; and it might have been divers years before the assumpsit made: and being a thing executed and past, no assumpsit afterwards can be good: and in proof thereof, Dyer, 272. Hunt v. Bates was cited.—But all THE COURT resolved to the contrary; for the grant being made at his request, it is a sufficient consideration, although it were divers years before; especially being to the defendant himself, the consideration shall be taken to continue. But if the grant had been to a stranger, and not at the defendant's request, it had peradventure been otherwise. * * *

BOSDEN v. SIR JOHN THINNE.

(In the King's Bench, 1603. Yelv. 40.)

The plaintiff declar'd, quod cum ad specialem instantiam of the defendant, he had procur'd credit for one Flud for two pipes of wine amounting to £51 and Flud super credentiam & per medium of the plaintiff, at the request of the defendant emisset of one Roberts two pipes of wine for £51 and superinde the plaintiff with Flud enter'd into bond of £100 to Roberts for payment of the said £51 at a day to come, which was not paid at the day; And thereupon Roberts sued

[2] Service rendered by the plaintiff at the request of a third person is no consideration for a subsequent promise by the defendant to pay therefor. Thorner v. Field, 1 Bulst. 120 (1612); Dearborn v. Bowman, 3 Metc. (Mass.) 155 (1841), service at request of Democratic committee in a campaign in which defendant was candidate; Royer v. Kelly, 174 Cal. 70, 161 Pac. 1148 (1916).

[3] A small part of the report, dealing with another question, is omitted.

the plaintiff upon the bond, and recover'd, and had a capias against him, whereby he fuit coactus to pay Roberts £67 de solutione of which £67 causa præallegata he notified to the defendant, who in consideratione præmissorum promised to pay the plaintiff the £67 at Michaelmas; and shewed the failure of payment of the £67 at the day, &c. And upon non assumpsit pleaded, it was found against the defendant. And Yelverton moved in arrest of judgment, that the action, upon the matter shewn, does not lie, because the consideration was past, and executed before the promise, and the defendant had no profit by it, but all the benefit was to Flud a stranger; like the case 10 Eliz. Dy. 272, where J. S. was bail for the servant upon an arrest, and signified all to the master after the bail enter'd into, who promised to save him harmless; and although the bail was condemn'd yet no assumpsit lay against the master, because the consideration was past before the promise: and it seems that upon the first request only to give credit to Flud for two pipes of wine, no assumpsit lies; for a bare request does not imply any promise: as if I say to a merchant, I pray trust J. S. with £100 and he does so, this is of his own head, and he shall not charge me, unless I say, I will see you paid, or the like. And it seems likewise, that the promise shall not have relation to the first request of giving credit to Flud; because the entreaty for the credit was but for two pipes of wine amounting to £51 and the promise is for £67 and so they differ in the sums; as if I request J. S. to enter into bond for J. D. for £10 and I will see him paid; now if J. S. enters into bond of £20 for the payment of £10 for J. D. which £20 is recover'd against him, he shall not charge me on my promise but with £10. But non allocatur per FENNER, GAWDY and POPHAM; for altho' upon the first request only assumpsit does not lie, yet the promise coming after shall have reference to the first request; and although the request was but for two pipes of wine amounting to £51 that Flud might have credit for that; yet when Roberts, who sold the wine, would not take (as appears) security but by bond of £100 for payment of £51 and all this matter is signified afterwards to the defendant, who agrees to it, and promises to pay the £67 this shall charge him; because it has its essence and commencement from the first request made by the defendant. As (per GAWDY) if I request one to marry my cousin, who does so, and afterwards tells me of it, and thereupon I promise him £100 this is a good promise to charge me, altho' the marriage was past, which is the consideration; because now the promise shall have reference to the request, which was before the marriage. Vide this case, Dy. 272. b. The same law (by him) if I entreat one to be bail for my servant, and he thereupon becomes bail, and is condemn'd, and afterwards tells me of it, and I promise him to save him harmless, it is good, and he shall recover his damage in toto; wherefore judgment was given for the plaintiff. But YELVERTON, Justice, was contra clearly.

LAMPLEIGH v. BRAITHWAIT.

(In the Common Bench, 1616. Moore, K. B. 866.)[4]

In assumpsit it was alleged that Braithwait having killed a man requested the plaintiff to endeavour to obtain a pardon, by reason whereof the plaintiff went to Royston to the King to obtain the pardon, and in consideration that he had made this endeavour the defendant promised him £100. This declaration was demurred to because the consideration was executed before the promise was made. NICHOLS, WINCH, and HOBART held that the action was well brought, because there is alleged a request before the acts were performed, and where there is such a precedent request an assumpsit made after the execution of the consideration is binding. * * *

EASTWOOD v. KENYON.

(Court of Queen's Bench, 1840. 11 Adol. & El. 438.)

Assumpsit. The declaration stated, that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned; that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law surviving; that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death, mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased; that from

[4] Also reported in Hob. 105, 1 Brownl. & Gouldsb. 9, q. v. Part of the report is omitted here.

There were many cases in accord during this period, and a few contra. American cases in accord are Stuht v. Sweesy, 48 Neb. 767, 67 N. W. 748 (1896); Pool v. Horner, 64 Md. 131, 20 Atl. 1036 (1885); Paul v. Stackhouse, 38 Pa. 302 (1861); In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902); Silverthorn v. Wylie, 96 Wis. 69, 71 N. W. 107 (1897); Raipe v. Gorrell, 105 Wis. 636, 81 N. W. 1009 (1900).

In Bradford v. Roulston, 8 Irish C. L. Rep. 468 (1858), the court said: "It is clearly established that, where a past consideration, that is, a thing previously done by the plaintiff at the request of the defendant, is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is nudum pactum, on the ground that the whole consideration is exhausted by the promise which the law implies. [See, also, Trask v. Weeks, post; Hopkins v. Logan, 5 M. & W. 241 (1839).] * * * But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request."

and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff, executor as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof; that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own monies, and did advance, a large sum, to wit £140, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the controul and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of £140 to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the controul and management of the property to the said agent on behalf of the said Sarah Sutcliffe; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or award whatever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said £140. That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, &c., for monies so expended and borrowed by him as aforesaid; and it also then appeared, that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That there-

upon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not, nor would then, or at any other time pay or discharge the amount, &c., but wholly refused, &c.

Plea: non assumpsit.

On the trial before Patteson, J., at the York Spring Assizes, 1838, it was objected on the part of the defendant that the promise stated in the declaration, and proved, was a promise to pay the debt of another within the Statute of Frauds, 29 Car. II, c. 3, § 4, and ought to have been in writing; on the other hand it was contended that such defence, if available at all, was not admissible under the plea of non assumpsit. The learned Judge was of the latter opinion, and the plaintiff had a verdict, subject to a motion to enter a verdict for the defendant.

Cresswell, in the following term, obtained a rule nisi according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In Trinity vacation, 1839.

Alexander and W. H. Watson shewed cause.

[They argued on the basis of moral obligation because of the faithful management by the plaintiff and the pecuniary benefit to the defendant and his wife. Cresswell in reply, said that moral obligation is sufficient only in cases of infancy, bankruptcy, and the statute of limitations as stated in the note to Wennall v. Adney, 3 Bos. & P. 249. He admitted that the defendant might be bound if his wife had been so bound prior to their marriage.]

Lord DENMAN, C. J.[5] * * * The second point arose in arrest of judgment—namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole, had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right

[5] Part of the opinion is omitted.

of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of Wennall v. Adney [3 Bos. & P. 249], and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts, as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; Loyd v. Lee [1 Stra. 94]; debts of bankrupts revived by subsequent promise after certificate, and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. Barnes v. Hedley [2 Taunt. 184] decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. Lee v. Muggeridge [5 Taunt. 36] upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this Court in Cooper v. Martin [4 East, 76] where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessaries furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 Bosanquet & Puller above referred to, and which has been very generally thought to contain a correct statement of the law. The case of Barnes v. Hedley is fully consistent with the doctrine in that note laid down. Cooper v. Martin also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a

court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed that Lord Ellenborough in giving his judgment says: "The plaintiff having done an act beneficial for the defendant in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case the law will imply a request, and the fact of the promise has been found by the jury;" and undoubtedly the action would have lain against the defendant while an infant, inasmuch as it was for necessaries furnished at his request, in regard to which the law raises an implied promise. The case of Lee v. Muggeridge must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. It should, however, be observed that in that case there was an actual request of the defendant during coverture, though not one binding in law; but the ground of decision there taken was also equally applicable to Littlefield v. Shee [2 B. & Ad. 811], tried by Gaselee, J., at N. P., when that learned judge held, notwithstanding, that "the defendant having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon." After time taken for deliberation this Court refused even a rule to show cause why the nonsuit should not be set aside. Lee v. Muggeridge was cited on the motion, and was sought to be distinguished by Lord Tenterden, because there the circumstances raising the consideration were set out truly upon the record; but in Littlefield v. Shee the declaration stated the consideration to be that the plaintiff had supplied the defendant with goods at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord Tenterden added that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of Lee v. Muggeridge, where the doctrine is wholly unqualified.

The eminent counsel who argued for the plaintiff in Lee v. Muggeridge spoke of Lord Mansfield as having considered the rule of nudum pactum as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to Wennall v. Adney shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in Littlefield v. Shee. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of Mitchinson v. Hewson [7 T. R. 348] shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.

If the subsequent assent of the defendant could have amounted to a ratihabitio, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the defendant was in no way connected with the property or with the plaintiff, when the money was expended. If the ratification of the wife while sole were relied on, then a debt from her would have been shown, and the defendant could not have been charged in his own right without some further consideration, as of forbearance after marriage, or something of that sort; and then another point would have arisen upon the Statute of Frauds which did not arise as it was, but which might in that case have been available under the plea of non assumpsit.

In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England.

Lampleigh v. Brathwait [Hob. 105] is selected by Smith [1 Sm. L. C. 67] as the leading case on this subject, which was there fully discussed, though not necessary to the decision. Hobart, C. J., lays it down that "a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference;" a difference brought fully out by Hunt v. Bate [Dyer, 272a], there cited from Dyer, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which the plaintiff had done without

request of the defendant, was held to be made without consideration; but a promise to pay £20 to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding.

The distinction is noted, and was acted upon, in Townsend v. Hunt [Cro. Car. 408], and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield, and then under circumstances not inconsistent with this ancient doctrine when properly explained.

Upon the whole, we are of opinion that the rule must be made absolute to arrest the judgment.

Rule to enter verdict for defendant, discharged.

Rule to arrest judgment absolute.[6]

ALLEN v. BRYSON.

(Supreme Court of Iowa, 1885. 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358.)

Both parties are attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant. Trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

SEEVERS, J.[7] * * * 3. The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, that a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our

[6] A case similar in several essentials is Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930 (1907).

[7] Parts of the opinion are omitted.

opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time, or for other reasons, cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded. These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a moral obligation to pay anything, in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Williams v. Hathaway, 19 Pick. (Mass.) 387; Dawson v. Dawson, 12 Iowa, 515; McCarty v. Hampton Building Ass'n, 61 Iowa, 287, 16 N. W. 114. * * *

Reversed.[8]

EDSON v. POPPE.

(Supreme Court of South Dakota, 1910. 24 S. D. 466, 124 N. W. 441, 26 L. R. A. [N. S.] 534.)

Action by George F. Edson against William Poppe. Judgment for plaintiff, and defendant appeals. Affirmed.

McCoy, J.[9] The plaintiff recovered judgment upon the verdict of a jury in the circuit court. The case was tried upon the following complaint: That the defendant at all the times hereinafter named was the owner of the following described premises situated in Turner county, S. D., to wit (describing the land); that at all the times herein named George Poppe was in possession of said premises as the tenant of defendant; that during the year 1904 this plaintiff, at the in-

[8] In accord: Gooch v. Gooch, 70 W. Va. 38, 73 S. E. 56, 37 L. R. A. (N. S.) 930 (1911); Gooch v. Gooch, 178 Iowa, 902, 160 N. W. 333, L. R. A. 1917C, 582 (1916); Stoneburner v. Motley, 95 Va. 784, 30 S. E. 364 (1898). See 53 L. R. A. 353, note.

In Moore v. Elmer, 180 Mass. 15, 61 N. E. 259 (1901), Holmes, J., said: "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for."

[9] Part of the opinion is omitted.

stance and request of said George Poppe, drilled and dug upon said premises a well 250 feet deep, and obtained water in said well, and placed casing therein; that the reasonable value of the digging and casing of said well was and is the sum of $250; that said well was and is a valuable improvement upon the said premises, and greatly adds to the value thereof, and has been used by the occupants of said premises since the said digging thereof, with the knowledge and consent of defendant; that on or about the 5th day of August, 1905, the defendant, at the said premises, after having examined the said well, and in consideration of the said well to him, and of the improvement it made upon said premises, expressly ratified the acts of his said tenant in having said well drilled, and then and there promised and agreed to pay plaintiff the reasonable value of the digging and casing of the said well as aforesaid; that defendant has since refused, and still refuses to pay plaintiff anything for said well. Wherefore, etc. To the said complaint defendant made the following answer: Denies generally and specifically each and every allegation in said complaint, except such as is hereinafter specifically admitted. Defendant admits that he is the owner of the said premises as stated in the complaint. At the opening of the trial, and upon the offer of testimony on the part of plaintiff, defendant objected to the introduction of any evidence, for the reason that the complaint did not state a cause of action, in that the consideration alleged in the contract is a past consideration, and no consideration for any promise, if any was made, and no consideration for the promise alleged. The objection was overruled, and defendant excepted. This ruling of the trial court is assigned and now urged as error, but we are of the opinion that the ruling of the learned trial court was correct.

It seems to be the general rule that past services are not a sufficient consideration for a promise to pay therefor, made at a subsequent time, and after such services have been fully rendered and completed; but in some courts a modified doctrine of moral obligation is adopted, and it is held that a moral obligation, founded on previous benefits received by the promisor at the hands of the promisee, will support a promise by him. 9 Cyc. 361; Doty v. Wilson, 14 Johns. (N. Y.) 378; Oatfield v. Waring, 14 Johns. (N. Y.) 188; Glenn v. Savage, 14 Or. 567, 13 Pac. 442. The authorities are not so clear as to the sufficiency of past services, rendered without previous request, to support an express promise; but, when proper distinctions are made, the cases as a whole seem to warrant the statement that such a promise is supported by a sufficient consideration if the services were beneficial, and were not intended to be gratuitous. Trimble v. Rudy, 53 L. R. A., note p. 373, and cases cited. In Drake v. Bell, 26 Misc. Rep. 237, 55 N. Y. Supp. 945, a mechanic, under contract to repair a vacant house, by mistake repaired the house next door, which belonged to the defendant. The repairing was a benefit to the latter, and he agreed to pay a certain amount therefor. It was held that the promise rested

upon sufficient consideration. Gaynor, J., says: "The rule seems to be that a subsequent promise, founded on a former enforceable obligation, or on value previously had from the promisee, is binding." In Glenn v. Savage, 14 Or. 567, 13 Pac. 442, it was held that an act done for the benefit of another without his request is deemed a voluntary act of courtesy, for which no action can be sustained, unless after knowing of the service the person benefited thereby promises to pay for it. In Boothe v. Fitzpatrick, 36 Vt. 681, it is held that if the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the defendant's benefit, the promise is binding though made upon a past consideration. In this case the court held that a promise by defendant to pay for the past keeping of a bull, which had escaped from defendant's premises and been cared for by plaintiff, was valid, although there was no previous request, but that the subsequent promise obviated that objection; it being equivalent to a previous request. The allegation of the complaint here is that the digging and casing of the well in question inured directly to the defendant's benefit, and that, after he had seen and examined the same, he expressly promised and agreed to pay plaintiff the reasonable value thereof. It also appears that said well was made under such circumstances as could not be deemed gratuitous on the part of plaintiff, or an act of voluntary courtesy to defendant. We are therefore of the opinion that, under the circumstances alleged, the subsequent promise of defendant to pay plaintiff the reasonable value for digging and casing said well was binding, and supported by sufficient consideration. We are also of the opinion that the instructions based on this complaint, and in particular as to the validity of the subsequent promise of defendant, properly submitted the issues to the jury. * * *

Finding no error in the record, the judgment of the circuit court is affirmed.[10]

SHARP v. HOOPES.

(Supreme Court of New Jersey, 1906. 74 N. J. Law, 191, 64 Atl. 989.)

Action by Lewis H. Hoopes against Joseph T. Sharp. Judgment for plaintiff, and defendant appeals. Reversed.

REED, J. Hoopes, the plaintiff below, sued to recover commission as a real estate agent for securing a tenant for a house belonging to Sharp. Mr. Hoopes met a lady who wished to rent a house. He seems

[10] In accord: Spencer v. Potter's Estate, 85 Vt. 1, 80 Atl. 821 (1911); Hicks v. Burhans, 10 Johns. (N. Y.) 242 (1813); Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100 (1870); Hatch v. Purcell, 21 N. H. 544 (1850); Wilson v. Edmonds, 24 N. H. 517 (1852); Montgomery v. Downey, 116 Iowa, 632, 88 N. W. 810 (1902); Boothe v. Fitzpatrick, 36 Vt. 681 (1864); Seymour v. Town of Marlboro, 40 Vt. 171 (1868); Landis v. Royer, 59 Pa. 95 (1868); Wright v. Farmers' Nat. Bank, 31 Tex. Civ. App. 406, 72 S. W. 103 (1903).

to have known that Mr. Sharp had a house for rent. He went to the residence of a daughter of Mr. Sharp and there saw Mrs. Sharp, the wife of the defendant below, and got from her the amount of rental asked for the house. He then took the prospective tenant, Mrs. Johnson, to the house, then in the occupation of another tenant, and exhibited the same to Mrs. Johnson. Mr. Hoopes never saw or communicated with Mr. Sharp but afterwards Mrs. Johnson saw Sharp and rented the property directly from him. There had, therefore, been no employment of Hoopes by Sharp directly or indirectly in the transaction.

The trial court charged the jury that there was no evidence of any employment of Hoopes by Sharp, so that question was not passed upon by the jury. The court told the jury that the only point for their consideration was whether Mr. Sharp, after the renting, confirmed and ratified Hoopes' acts and agreed to pay him a commission therefor. The only testimony upon which a promise or ratification rested is that of the plaintiff. He says that after the renting he met Mr. Sharp, and "I told him I understood the house was rented by the party I introduced, and of course I expected a commission. He, Sharp, told me to see Mrs. Johnson, and if she would not pay, he supposed he would have to." Mr. Sharp admits the conversation, but says the language was that "If Mrs. Sharp put it in Hoopes' hands, he supposed he would have to pay it." The language of Mr. Sharp, if conceded to have been as Hoopes asserts, did not ratify any contract of employment, because no one had employed Hoopes, purporting to represent Sharp. The language, if it amounted to a promise to pay at all, which is not admitted, did not ratify any contract, but was a new promise to pay Hoopes for service previously rendered, without any request expressed or implied. Such a promise was devoid of any consideration to support it. In Lampleigh v. Brathwait, 1 S. L. C. marg. p. 264, it was resolved that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. The same doctrine is asserted in Eastwood v. Kenyon, 11 Adol. & Ell. 438, also reported in 6 Eng. Rul. Cases, p. 23, and notes thereto. There must have been, at the time of the promise, some perfect or imperfect legal liability to support the promise. A mere moral liability will not furnish a consideration. Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Chamberlin v. Whitford, 102 Mass. 448; Freeman v. Robinson, 38 N. J. Law, 383, 20 Am. Rep. 399.

The judgment should be reversed.

ROSCORLA v. THOMAS.

(In the Queen's Bench, 1842. 3 Q. B. 234.)

Assumpsit. The declaration stated that, whereas heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price, etc., to wit, etc., defendant promised plaintiff that the said horse did not exceed five years old, and was sound, etc., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, etc.

Pleas: 1. Non assumpsit. Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner, etc.; conclusion to the contrary. Issue thereon.

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, Bompas obtained a rule nisi for arresting the judgment on the first count.

Lord Denman, C. J., in this term (May 30th) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of £30, the defendant promised that it was sound and free from vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to Wennall v. Adney [3 Bos. & P. 249], and in the case of Eastwood v. Kenyon [11 A. & E. 438]. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.[11]

EDMONDS' CASE.

(In the Common Pleas, 1587. 3 Leon. 164.)

In an action upon the case against Edmonds, the case was, that the defendant being within age, requested the plaintiff to be bounden for him to another, for the payment of £30 which he was to borrow for his own use; to which the plaintiff agreed, and was bounden, ut supra, afterwards, the plaintiff was sued for the said debt, and paid it; and afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed him that he might not be damnified so to pay £30 it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff: upon which promise, the action was brought. And it was holden by the Court, that although here was no present consideration upon which the assumpsit could arise; yet the Court was clear, that upon the whole matter the action did lie, and judgment was given for the plaintiff.[12]

[11] In accord: Hatchell v. Odom, 19 N. C. 302 (1837); Watson v. Roode, 30 Neb. 264, 46 N. W. 491 (1890); Davis & Co. v. Morgan, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171 (1903), ante, 344; Kimbro v. Wells, 112 Ark. 126, 165 S. W. 645 (1914), two hours after sale of a business the seller added a written promise not to compete; Warren v. Weaver, 78 N. H. 108, 97 Atl. 748 (1916); Sommers v. Myers, 69 N. J. Law, 24, 54 Atl. 812 (1903); Baltimore Refrigerating & Heating Co. of Baltimore City v. Wetzel, 162 Fed. 117, 89 C. C. A. 117 (1908); and see notes in 53 L. R. A. 358, 26 L. R. A. (N. S.) 523. Contra: Brickell v. Hendricks, 121 Miss. 356, 83 South. 609 (1920).

In Meginnes v. McChesney, 179 Iowa, 563, 160 N. W. 50, L. R. A. 1917E, 1060 (1916), the court held that a promissory note given as added compensation for services as a nurse, who had already received the agreed salary, was not enforceable being "utterly without consideration."

[12] Also reported as Barton and Edmund's Case, 4 Leon. 5.

In Stone v. Withepoole, Owen, 94 (1588), it was held that a promise by the executor of an infant to pay a debt of the infant was not binding.

By the Roman law (Dig. 39, 5, 19, § 4), where a loan had been made to a

WILLIAMS v. MOOR.

(In the Court of Exchequer, 1843. 11 Mees. & W. 256.)

Debt for work and materials, for goods sold and delivered, for interest, and for money due on an account stated.

Plea, infancy.

Replication, that the defendant, before the commencement of the suit, to wit, on the 10th day of December, 1837, attained his full age of twenty-one years, and before the commencement of the suit, to wit, on the 27th September, 1839, in writing then signed by him, assented to and ratified and confirmed the said contract in the declaration mentioned, and then agreed to pay the plaintiff the said moneys therein mentioned.—Verification.

To this replication the defendant demurred on the following grounds, viz., that an action on an account stated did not lie against an infant; that the replication stated that the defendant was an infant at the time of stating the account, and that an infant, though he state an account cannot be sued upon it; that an infant could not ratify such a contract after he came of age or be liable in consequence of such subsequent ratification on an account stated by him when he was a minor; that the action should have been brought in assumpsit, and not debt: that an infant is not liable for interest.

Joinder in demurrer.

PARKE, B. This was an action of debt on the common counts for work and materials, and for goods sold and delivered, with a count on an account stated.

Plea, that at the time of making the alleged contracts, defendant was an infant. Replication, that, after defendant attained his age of twenty-one years, and before the commencement of the suit, he ratified and confirmed the said contract. To this replication there was a demurrer, on the ground that an account stated by an infant is absolutely void, and that no subsequent ratification of it, after the infant has attained his age of twenty-one years, will set it up, so as to enable the other party to the account to sue upon it. It is not necessary that we should decide what is the precise legal operation of the ratification by a party who has attained his age of twenty-one years, of a contract entered into during his minority; whether it is to be treated as an act giving validity to an otherwise invalid contract, or as a new contract voluntarily entered into after the party has obtained the capacity of contracting, the consideration being the moral duty arising from the previous transactions. The course of pleading in this case. following that which was adopted in Cohen v. Armstrong, 1 M. &

slave or an infant, a new promise by the borrower after emancipation, was valid, and was not regarded as a donation, but as based upon causa. "Si quis servo pecuniam crediderit, deinde is liber factus eam expromiserit: non erit donatio, sed debiti solutio. Idem in pupillo, qui sine tutoris auctoritate debuerit, dicendum est, si postea tutore auctore promittat."

Selw. 724, Thornton v. Illingworth, 2 B. & Cr. 824, and Hartley v. Wharton, 9 Ad. & El. 934, (which last, like the present, was an action of debt,) would rather seem to indicate that the effect of ratification is to set up and give validity to the otherwise invalid contract—to remove the bar of infancy. On the other hand, that which is pointed out by the Court of King's Bench, in the above mentioned case of Cohen v. Armstrong, as the old form of pleading, would lead to the inference that in such a case as the present the liability of the defendant arises wholly on a new contract, made after he has attained his age of twenty-one years. [See what was said by Lord Mansfield, in Hawkes v. Saunders, Cowp. 290, and by Lord Holt in Heyling v. Hastings, 1 Ld. Raym. 389; and see Comberbach, 381.]

Whichever form of pleading is adopted, and whatever be the precise legal nature of ratification, it is clear that on a declaration for goods sold and delivered only, without any count on an account stated, the ratification by the defendant after he has attained his majority will entitle the plaintiff to recover.

But the argument on behalf of the defendant was, that the case is different in an action on an account stated; for that an account stated by an infant is not merely voidable, but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract.

The contract of an infant for goods sold and delivered (not being necessaries) is as completely void as his contract on an account stated, if by the word "void" is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract as well as on the other. But if by "void" is meant incapable of being ratified, then we can discover neither principle nor authority for the distinction relied on.

The principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a meritorious character, by which in good conscience he ought to be bound; and there seems nothing in the liability on an account stated to take that out of this general principle. It was indeed argued for the defendant, that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get any thing valuable; that he has no quid pro quo. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of transactions between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers. This, in the case of an adult, is a sufficient consideration to create a debt; and we can discover no reason why it should not have the same

effect in the case of an infant, supposing him to adopt and ratify it after he comes of age.

If an infant, having had dealings with an adult, meets and settles accounts with him during his infancy, in the ordinary way, and a balance is struck and vouchers destroyed, he does that which certainly creates no legal liability on his part. But if on attaining his age of twenty-one years, he is satisfied of the fairness of the settlement, there seems to us to be just the same reason why he should be permitted to confirm that settlement and render himself liable for the balance, as there is for enabling him to make himself liable on any other contract entered into during his infancy. The same principle applies as in the case of work and labour, or goods sold and delivered.

Neither do the cases cited by the defendant at all bear out his proposition. It is undoubtedly shown very clearly, by the early authorities, to which we were referred, that an infant cannot state on account so as to bind himself. But so neither can he render himself liable on any other contract not for necessaries.

The case of Trueman v. Hurst, 1 T. R. 40, was an action of assumpsit on an account stated—plea infancy—replication, that the promises were for necessaries. The replication was held bad on demurrer, and on very satisfactory grounds; for an account stated cannot possibly be itself described as coming under the head of necessaries: and the question, whether the items of which the account consists be made up of necessaries, is by the very statement of account itself excluded from the view of the Court, although that is in truth on such a replication the only question to be decided. The Court therefore most properly held that replication bad. Exactly the same observation applies to the case of Bartlett v. Emery, referred to by Mr. Justice Buller, and mentioned in the note to Trueman v. Hurst. But in neither of those cases was the point raised, whether an account stated was void against an infant in any sense which would render it impossible for him to set it up by ratification after he came of age. The authorities referred to, therefore, certainly do not bear out the proposition of the defendant; and we have already stated that we do not think it rests on any sound principle of law.

The general doctrine is, that a party may, after he attains his age of twenty-one years, ratify, and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract. Judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

His Lordship afterwards added: "Whether this replication amounts in fact to a new assignment, or is improperly pleaded by way of replication, is not in question, as it is not pointed out as a ground of special demurrer." [18]

[18] In Edmunds v. Mister, 58 Miss. 765 (1881), the court said: "It is an anomaly in pleading that the plaintiff declares upon the original contract,

MERRIAM et al. v. WILKINS et al.

(Supreme Court of New Hampshire, 1833. 6 N. H. 432, 25 Am. Dec. 472.)

Assumpsit for goods sold and delivered. The cause was tried in the common pleas, at September term, 1833, and a verdict taken for the plaintiffs, subject to the opinion of this court, on the following case.

The goods mentioned in the declaration were sold, and delivered to the defendants by the plaintiffs, but at the time of the sale Erastus Wilkins was an infant, under the age of twenty-one years. But to obviate the objection of his infancy the plaintiffs proved, that, after the commencement of this action, and after Erastus arrived at the age of twenty-one years, he declared that he would not take advantage of his infancy in the action.

RICHARDSON, C. J., delivered the opinion of the court.

We are of opinion that this action cannot be sustained against Erastus Wilkins. In Wright v. Steele, 2 N. H. 51, it was decided, that a promise made after the commencement of the action, and after the minor arrived at the age of twenty-one years, might be considered as a waiver of the defence of infancy so that the contract might be considered as valid from the beginning. But this view is sustained by no other authority, and cannot be reconciled with what must now be considered as settled principles of law on this subject.

It was supposed in that case that there was a close analogy between the case of a debt taken out of the statute of limitations by a new promise, and a contract of an infant ratified by a promise made after he comes of age; and that this analogy was close enough to sustain that decision. But there is, in truth, no analogy between the two cases. In the case of the statute of limitations the new promise does not create a new cause of action, but shields an old one from the operation of the statute.

But in the case of infancy there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. 2 B. & C. 824, Thornton v. Illingworth; 1 Pick. (Mass.) 202, Ford v. Phillips.

The contract of an infant to pay for goods, sold and delivered to him, is, unless the goods are necessaries, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them, made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an

and to a plea of infancy replies the new promise, while all the authorities declare that the recovery is not upon the original contract, but upon the new promise; and yet undoubtedly the anomaly exists."

action from the beginning. There is no legal cause of action until the contract is ratified.

In this case the plaintiffs may enter a nolle prosequi as to the infant, and take judgment on the verdict against the other defendant.[14]

EDGERLY v. SHAW.

(Supreme Court of New Hampshire, 1852. 25 N. H. 514, 57 Am. Dec. 349.)

Assumpsit upon a promissory note, made by the defendant while an infant, payable to John Barker, or order, and by him indorsed to the plaintiff, without recourse. The declaration follows the usual form of declaring upon indorsed notes.

The plaintiff called Barker to prove a new promise after the defendant became twenty-one years of age. * * * He testified that while he held and owned the note, he told the defendant, who is a joiner, that he was about having some work done, and he wished the defendant would come and pay him. The defendant answered that he was then engaged to others, but that at the end of six weeks he would come and work for him at a dollar a day, and thus pay him, or else he would pay him in money, but he never did any work for Barker. The defendant objected that this promise would not enable the plaintiff to maintain the suit, and a verdict was taken for the plaintiff, subject to the opinion of the court upon the exception.

Gilchrist, C. J.[15] The executory contract of an infant may be ratified or confirmed by an express promise, or by such acts as evince an intention to be bound by it. Hoit v. Underhill, 9 N. H. 436, 32 Am. Dec. 380; Aldrich v. Grimes, 10 N. H. 194. But a mere acknowledgment is not enough. Hale v. Gerrish, 8 N. H. 376; Millard v. Hewlett, 19 Wend. (N. Y.) 301; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325. The case of a promissory note rests on the same ground as other executory contracts. It is not void, because it may be confirmed; but it is invalid, that is, without binding force, until it is confirmed. Merriam v. Wilkins, 6 N. H. 432, 25 Am. Dec. 472; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Aldrich v. Grimes, supra; Reed v. Bachelder, 1 Metc. (Mass.) 559. The executory contracts of an infant are said to be voidable, but this word is used in a sense entirely different from that in which it is applied to the executed contracts of an infant. In the latter case, the contract is binding until it is avoided by some act indicating that the party

[14] "Accord: Thornton v. Illingworth, 2 B. & C. 824 (1824); Ford v. Phillips, 1 Pick. (Mass.) 202 (1822); Freeman v. Nichols, 138 Mass. 313 (1885); Hyer v. Hyatt, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977 (1827). Contra: Wright v. Steele, 2 N. H. 51 (1819); Best v. Givens, 3 B. Mon. (Ky.) 72 (1842)." Kales' Cases on Persons, 132.

[15] Part of the opinion is omitted.

refuses longer to be bound by it. In the former case, it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified.

In the present case, the proof relied on to show a ratification, is of an express promise. It is, therefore, unnecessary to refer to any of the other modes of ratification which are discussed in the books. An express promise to pay a debt or perform an agreement, contracted or entered into during minority, may be partial, qualified or conditional. And the effect of such promises as a ratification of a previous agreement, is by no means the same.

As to the absolute promise, no question can arise. The partial promise, or the promise to pay or perform a part of the original debt or agreement, is binding only to the extent of the new promise, and is not a ratification of the original debt, but a new and distinct promise, though founded upon the original consideration.

A new promise may be qualified in various ways. It may bind the promisor to pay the debt at a different time or place from those originally stipulated. It may be a promise to pay, not in money, but in specific articles, or in personal services. These cases cannot be distinguished, in principle, from that last stated. They are new contracts, not ratifications of the old ones.

When a contract which requires confirmation is confirmed, it takes effect from its date, or from the time of making it. But this cannot be the case as to an agreement which contains new stipulations, not comprised in the original agreement. Among the many advantages of an observance of the rules of pleading, is to be remarked the precision with which they indicate the exact point in controversy. And in whatever form the question may arise, we can see at once the material points involved, by supposing the questions to be raised by the pleadings. When infancy is pleaded to a declaration upon a contract, the replication, if the plaintiff would avail himself of a ratification or new promise, [should be] that the defendant, after the making of the said promises in the declaration mentioned, and before the commencement of the suit, to wit, on, &c., attained his age of twenty-one years, and after he had so attained, &c., and before the commencement of the suit, to wit, on, &c., assented to, and then and there ratified and confirmed the said promises in the declaration mentioned, &c. 2 Ch. Pl. 595; Story's Pl. 150. The rejoinder is, that the defendant did not, after he attained the age of twenty-one years, and before the commencement of the suit, assent to, ratify and confirm the said promises in the declaration mentioned, or either of them, in manner and form, &c. 2 Ch. Pl. 659; Story's Pl. 150. Upon these pleadings, it is apparent that the point to be tried and determined is merely whether the defendant confirmed the promises declared on. Evidence that he made any other or different agreement, would not support the replication, any more than it would support the

original declaration. In such cases, it is clear that the new contract is valid, and it has never been denied that the original consideration is sufficient to support it; but being a new and different contract, it must be stated and declared on according to the facts and the evidence to sustain it.

Within the class of qualified promises in renewal of contracts entered into by an infant, are the cases of new promises, to be performed upon a condition or a contingency. They are distinguishable from other cases of qualified promises, by the nature of the qualification. So long as the contingency remains, or the condition is unperformed, they are qualified contracts, governed by the same rules as the class last referred to. They may be declared upon and an action maintained upon them, but the contract offered in evidence is not that originally made. It differs from it in substantial particulars. If the plaintiff declare upon the original cause of action, and allege a confirmation of the original contract, he will fail, because his proof will show a new and distinct contract, and not an affirmance of the old one. The evidence would, in fact, prove a refusal to ratify the original agreement. If the defendant promise to pay in goods, it will be equivalent to saying, "I will not pay you in money, but I will pay you in goods," thus proposing to substitute a new contract for the old one. If he should say, "I will pay you in three years," or "when I am able," he will, in substance, decline to pay when the plaintiff requests it.

If a new promise be made to pay or perform a contract made under age, upon a contingency or a condition, no action will lie until the happening of the contingency or the performance of the condition, for the old contract will not until that time have been confirmed, and the new agreement is distinct from it; and of that, in the case supposed, there will then have been no breach. When the contingency has happened, or the condition is fulfilled, the new contract becomes absolute, the original contract is ratified, and the plaintiff may declare upon it, or upon the new agreement. If he declare upon the original contract, and infancy be pleaded, he may reply a confirmation, and upon proper evidence he will be entitled to recover. Or he may declare upon the new promise, and set it forth with the necessary averments; and upon sufficient proof, will be entitled to recover in that case. * * *

In Thompson v. Lay (1826) 4 Pick. (Mass.) 48, 16 Am. Dec. 325, Parker, C. J., states the law thus: "A ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened or been complied with before an action can be sustained. I ratify and confirm my promise, provided I receive a certain legacy, or if I succeed to a certain estate, or if I recover a certain sum of money, or if I draw a prize in a certain lottery, would make a conditional promise or ratification sufficient to make the defendant lia-

ble on a contract made when a minor, when the events happen, but not before."

In the case before us, the defendant, on being asked by the plaintiff to pay, said that at the end of six weeks he would come and work for him, at a dollar a day, or else he would pay him the money. This was a qualified promise to pay, depending on a contingency. For the period of six weeks the defendant reserved to himself the right to pay in labor, at a dollar a day. During that time it was contingent whether his promise to pay the money would become binding, and until the expiration of that period, it was uncertain whether the original contract would be confirmed, or the alternative promise would be performed. Until the end of six weeks no action could be brought, either upon the old or the new contract; but after the six weeks had elapsed, after the right reserved by the defendant to pay in labor had ceased, the new promise to pay in money became absolute, and the old contract was absolutely confirmed, and the defendant was then liable to be sued upon either contract. It does not appear whether the action was brought before or after the expiration of the six weeks. We take it for granted, however, that it was brought after that time.

The effect of the new promise, after it became absolute, being to ratify and confirm the note, and to give it the same validity as if the promisor had been of legal capacity to make the note at the time of its date, it was from that time at least a good negotiable note, transferable according to its terms, and the action may well be brought in the name of the indorsee. Reed v. Bachelder, 1 Metc. (Mass.) 559. If an action had been brought upon the new promise, it must have been in the name of Barker, because that contract is not negotiable. * * *

Judgment on the verdict.[16]

LEE v. MUGGERIDGE et al.

(In the Common Pleas, 1813. 5 Taunt. 36.)

Assumpsit. The verdict for the plaintiff established the following facts: At the request of Mary Muggeridge, a married woman having a large separate estate, and in reliance upon her penal bond exe-

16 Other cases holding that action lies upon the note given by an infant are Reed v. Batchelder, 1 Metc. (Mass.) 559 (1840); Cheshire v. Barrett, 4 McCord (S. C.) 241, 17 Am. Dec. 735 (1827).

Action lies on the original promise of the infant, and, if infancy is pleaded, a replication alleging the new promise made after majority is sufficient to overcome the plea: Hunt v. Massey, 5 B. & Adol. 902 (1834); West v. Penny, 16 Ala. 186 (1849); Hodges v. Hunt, 22 Barb. (N. Y.) 150 (1856). Contra: Bliss v. Perryman, 1 Scam. (Ill.) 484 (1838). See Kales' Cases on Persons, 132, and note.

Where the contract made during infancy was itself without consideration, a new promise based thereon made after maturity will also be void. Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930 (1907).

cuted at that time undertaking to repay the money, the plaintiff had loaned £2,000 to one J. Hiller, Mary's son-in-law. The money was not repaid, and Mrs. Muggeridge, who meantime had become a widow and competent to contract, wrote to the plaintiff promising that the debt "would be settled by her executors." Mrs. Muggeridge died leaving an ample estate, and the defendants are her executors and residuary legatees. There was a motion in arrest of judgment on the ground that there was no consideration for the promise of the deceased. A rule nisi was obtained.

MANSFIELD, C. J.[17] The counsel for the plaintiff need not trouble themselves to reply to these cases; it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, whether upon this declaration there appears a good moral obligation. Now I cannot conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of £2,000 created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After her husband's death, she knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it; knowing all this, she promises that her executors shall pay; if then it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay this declaration is clearly good. This case is not distinguishable in principle from Barnes v. Hedley; there not only the securities were void, but the contract was void; but the money had been lent, and therefore when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of Doe on the demise of Carter v. Straphan is extremely applicable. Here in like manner the wife would have been grossly dishonest if she had scrupled to give a security for the money advanced at her request. As to the cases cited, of Lloyd v. Lee and Barber v. Fox, there was no forbearance, and those cases proceeded on the ground that no good cause of action was shown on the pleadings.

GIBBS, J. I agree in this case the plaintiff is entitled to recover. It cannot, I think, be disputed now that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty, or pay that debt, will be supported by the previous moral obligation. There cannot be a stronger case than this of moral obligation. The counsel for the defendant did not dare to grapple with this position, but endeavored to show that there was no case, in which a subsequent promise had been supported, where there had not been an antecedent legal obligation at some time or other; from whence he wished it to be inferred, that unless there had been the antecedent legal obligation, the mere moral obligation would not be a sufficient

[17] The facts have been restated and the short concurring opinions of Heath and Chambre, JJ., are omitted.

consideration to support the promise. But in Barnes v. Hedley, certainly Hedley never was for a moment legally bound to pay a farthing of that money for which he was sued; for it appears to have been advanced upon a previously existing usurious contract, and whatever was advanced upon such a contract certainly could not be recovered at any one moment. The borrower, availing himself of the law, so far as he honestly might, and no further, reducing it to mere principal and interest, does that which every honest man ought to do in like circumstances, promises to pay it, and that promise was held binding. As to the cases of Lloyd v. Lee and Barber v. Fox, they have sufficiently been answered by my Lord and my Brother Chambre, that if a man will state on his declaration a consideration which is no consideration, and shows no other consideration on his declaration, although another good consideration may exist, when that which he does show fails, he cannot succeed upon the proof of the other which he has not alleged. Now in the first of those cases there was clearly no forbearance, because forbearance must be a deferring to prosecute a legal right, but no legal right to recover previously existed. Whatever other consideration might exist for the promise, it was not stated in the declaration; it is therefore clear that this rule must be discharged upon the ground, that wherever there is an antecedent moral obligation, and a subsequent promise given to perform it, it is of sufficient validity for the plaintiff to be able to enforce it.

Rule discharged.[18]

LITTLE v. BLUNT.

(Supreme Judicial Court of Massachusetts, 1830. 9 Pick. 488.)

Assumpsit.[19] The writ was dated December 1, 1828.

The first, second and third counts were severally on three promissory notes, payable to one Somerby on demand, with interest, dated at Newburyport, one on August 29, 1807, another on September 12, 1807, and the third on April 26. 1810, and alleged to have been indorsed to the plaintiff each on the day of its date.

[18] In accord: Goulding v. Davidson, 26 N. Y. 604 (1863); Sharpless' Appeal, 140 Pa. 63, 21 Atl. 239 (1891). Contra: Holloway's Assignee v. Rudy, 60 S. W. 650, 22 Ky. Law Rep. 1406, 53 L. R. A. 353 (1901); Waters v. Bean, 15 Ga. 358 (1854); Kent v. Rand, 64 N. H. 45, 5 Atl. 760 (1886); Putnam v. Tennyson, 50 Ind. 456 (1875); Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780 (1882); Condon v. Barr, 49 N. J. Law, 53, 6 Atl. 614 (1886); Hayward v. Barker, 52 Vt. 429, 36 Am. Rep. 762 (1880). Lee v. Muggeridge is generally disapproved in the United States, except where a moral consideration will support a promise. See 53 L. R. A. 366–370, note; Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 7 L. R. A. (N. S.) 1053 (1906); Lyell v. Walbach, 113 Md. 574, 77 Atl. 1111, 33 L. R. A. (N. S.) 741 (1910).
The decision was doubted and distinguished in Littlefield v. Shee, 2 B. & Adol. 811 (1831).

[19] The arguments of counsel and parts of the opinion are omitted.

The fourth, fifth and sixth counts were similar to the first three, except that the indorsements to the plaintiff are alleged to have been made on December 20, 1822.

The defendant pleads, 1, the general issue, which is joined; 2, non assumpsit infra sex annos.

To the second plea the plaintiff replies, as to the fourth, fifth and sixth counts, that on the 17th of April, 1822, the defendant, in a letter written by him at New York to Somerby, promised to pay Somerby the notes declared on; that Somerby, after the receipt of the letter, viz. on the 20th of December, 1822, indorsed the notes to the plaintiff; and that always afterward, to wit, from the 17th of April, 1822, to the date of the writ, the defendant has been absent from the commonwealth and has had no property within the commonwealth that could by the ordinary process be attached.

To this replication the defendant demurred generally.

St. 1786, c. 52, § 4, provides, that if any person, against whom there shall be any cause of suit, was, at the time the same accrued, without the limits of the commonwealth, and did not leave property therein that could by the common and ordinary process of law be attached, the person entitled to bring such suit shall be at liberty to commence the same within the periods before limited in the statute, after such person's return into this government.

WILDE, J., afterward drew up the opinion of the Court. Two questions are raised by these pleadings. The first is, whether the original cause of action was barred by the statute of limitations; and if so, then, secondly, whether this action can be maintained on the new promise made in 1822. * * *

Then can this action be maintained on the new promise?

In the replication to the plea to the fourth, fifth and sixth counts, it is averred that this new promise was made on the 17th of April, 1822, that always afterwards, viz. from the 17th of April, 1822, to the date of the writ, the defendant had been absent from the commonwealth, and that he had no property within the state that could by ordinary process be attached. If the defendant had been living within this state at the time this new promise was made, an action no doubt would lie, at any time within six years after, and the statute would not operate as a bar. If the defendant in such a case had pleaded, that the cause of action did not accrue within six years before the commencement of the action, the plaintiff might reply that it did; and the new promise would support the affirmation of the issue. The reason is, that the new promise is regarded as a new cause of action upon which the statute operates in the same manner, and for the same period of time, as it did before on the original cause of action. Or it may be considered that the original cause of action is revived, and the statute again commences its operation; and this operation is limited by all the exceptions contained in the statute. Indeed the new promise is essentially a new cause of action. In the present case, be-

fore the promise in 1822 these demands had been long barred by the statute.

If the debt remained, the remedy was gone; and there was no subsisting cause of action. The new promise therefore was a new cause of action, for without it there was no cause of action. That alone gave the remedy. There was a sufficient consideration for this promise. A debt barred by the statute of limitations is a good consideration for an express promise. But it is not necessary to declare on the new promise. According to the established rules of pleading, the plaintiff had a right to declare on the original promise; and when the statute of limitations was pleaded, he might reply the new promise. When the pleadings assume this shape, the original promise is apparently the cause of action, but it is the new promise alone that gives it vitality; and that substantially is the cause of action. * * *

The defendant is clearly liable to an action on the new promise, and the statute could not be pleaded in bar. Or the plaintiff might amend by transferring the averments in the replication to the declaration, and setting forth the original cause of action as the consideration of the new promise. But there is no reason for turning the plaintiff round to a new action, or to require him to amend the declaration. The form of the pleadings cannot vary the construction or operation of the statute. We must regard substance rather than form, and substantially the new promise is the cause of action, whatever may be the form of the declaration.

Judgment for plaintiff on fourth, fifth, and sixth counts.[20]

CLARK v. JONES.

(Supreme Judicial Court of Massachusetts, 1919. 233 Mass. 591, 124 N. E. 426.)

BRALEY, J. The master finds that, the defendant having brought action against the plaintiff as maker on certain overdue promissory notes, the parties entered into negotiations for a settlement, and shortly before the return day the plaintiff executed "a note for fourteen hundred and twenty-two dollars," payment of which was secured by mortgage. It is further found that the note and mortgage were executed and duly delivered upon the consideration that the original note or notes were thereby paid and satisfied and the pending suit settled. While the master also states that when the action was begun

[20] A new promise made to the assignee, after the assignment, is enforceable. Lamar v. Manro, 10 Gill & J. (Md.) 50 (1838).

In Ilsley v. Jewett, 3 Metc. (Mass.) 439 (1841), the court held that the old debt and not the new promise was the real cause of action. This is to be explained on the ground that an intervening statute had enlarged the prison limits for debtors in case of new causes of action and the court thought it necessary to choose between the two operative facts, even though it is clear that both are necessary to an enforceable right.

six years had elapsed since the cause of action accrued and therefore the action had been barred under R. L. c. 202, § 2, it is plain that the mortgage note cannot be attacked for want of consideration as alleged in the bill. The remedy indeed had perished, but the debt not having been satisfied, the moral obligation to pay it afforded a sufficient consideration for the debtor's promise in writing signed by him with the unequivocal intention of liquidating the balance remaining on the old notes, as well as to avoid the expense and uncertainty of the litigation. Little v. Blunt, 9 Pick. 488; Chace v. Trafford, 116 Mass. 529, 17 Am. Rep. 171; Shepherd v. Thompson, 122 U. S. 231, 7 Sup. Ct. 1229, 30 L. Ed. 1156; R. L. c. 202, § 12; Custy v. Donlan, 159 Mass. 245, 247, 34 N. E. 360, 38 Am. St. Rep. 419. The compromise and settlement moreover furnished a sufficient consideration independently of the payment by the new note of the original indebtedness. Kennedy v. Welch, 196 Mass. 592, 596, 83 N. E. 11, and cases there collated. The note and mortgage being valid, the trial court properly refused to enjoin the foreclosure of the mortgage for breach of condition, or to order its cancellation for invalidity as prayed for, and the decree dismissing the bill should be affirmed with costs.

Ordered accordingly.

CARSHORE v. HUYCK.

(Supreme Court of New York, 1849. 6 Barb. 583.)

By the Court, HARRIS, J.[21] * * * The principal, and I think the only question in this case, is whether, after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it. Incidentally a question of pleading is involved, but the decision of the question I have stated must determine the rights of the parties in this action. The plaintiffs maintain the affirmative of this proposition. Unless they can sustain it, their action must fail. The defendant contends, that a promise to pay a judgment, cannot entitle the plaintiff in that judgment to maintain an action upon it, as a subsisting cause of action; that a judgment once barred by the statute of limitations can not have its vitality restored by a mere promise to pay.

The question is not without its difficulty; and neither party is without eminent authority to sustain his position. It seems, however, to be settled against the defendant, in this state. Upon a full examination of the cases in which the subject has been discussed I am satisfied that, at least in this state, the doctrine is too firmly established to be again unsettled, that where the operation of the statute of limitations is avoided by a new promise, the old demand, and not the

[21] Part of the report is omitted.

new promise, is to be the foundation of the action. I confess that were I at liberty to reason upon the question, the inclination of my mind would be to the other side of this question. The doctrine rests for its support upon a distinction between the cause of action itself, and the remedy. The distinction is too thin and subtle to be received with satisfaction. An existing, continuing cause of action, without any remedy to enforce it, is, to my mind, a mere abstraction. To say that a man has a cause of action left, after he has lost, by the operation of the statute, his remedy upon it, seems to me little less absurd, than to say I still have my property after I have actually lost it. If a debtor obtain a discharge under an insolvent act, a subsequent promise to pay the debt discharged, is regarded as a new contract, supported, it is true, by the pre-existing moral obligation, as a consideration for the new promise, but to be enforced as a new contract, and, like every other contract, according to its own terms. The reasonableness of this doctrine is much more manifest, at least to my mind, than that which has been established in this state in respect to the revival of debts barred by the statute of limitations. The best defense of the latter doctrine, with which I have met, is contained in the opinion of Mr. Justice Marcy, in Dean v. Hewit, 5 Wend. 257. His argument is, that the new promise rebuts the presumption of payment upon which the statute of limitations proceeds, and has the same effect, in keeping alive the remedy, whether made before or after the statute attaches. I am unable to perceive the conclusiveness of this reasoning. In the one case, the new promise, made before the statute has barred the debt, arrests its course, and a new starting point is made, from which it again commences to run. It cannot be said, in that case, that the new promise revives the debt; for it never was extinct. But when the statute has once attached, the debt is in fact, however it may be in theory, extinct. It has lost all its vitality. If, afterwards, it has any "legal use or validity," it is through the reanimating principle of the new promise. And it is only useful for this purpose, as furnishing, by virtue of its continuing moral obligation, a sufficient consideration for the promise. But it would not be profitable further to examine the foundations of this doctrine. It is enough, for the present occasion, that the question is entirely settled by adjudged cases in our own courts. I cheerfully yield to their authority, and even where I cannot clearly see the reason upon which they are founded, I can say with Lord Kenyon, "it is my wish and comfort to stand super antiquas vias." See Sands v. Gelston, 15 Johns. 511; Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174; Depuy v. Swart, 3 Wend. 135, 20 Am. Dec. 673; Soulden v. Van Rensselaer, 9 Wend. 293.

The doctrine is perhaps as clearly stated in Dean v. Hewit as any where else. "A demand," says Justice Marcy, "the remedy for the recovery of which is continued or revived by a new promise, is precisely the same, after the remedy has been continued or revived, as it

was before the statute had or could have attached." In that case, the action was upon a negotiable note. The new promise relied upon to relieve it from the operation of the statute of limitations, was made to the payee. It was held, that the negotiability of the note was co-existent with the demand, and that the remedy upon the note having been revived, while the note remained in the hands of the payee, an indorsee, to whom it had been subsequently transferred, might maintain his action upon it.[22] The same was held in Pinkerton v. Bailey, 8 Wend. 600; also in Soulden v. Van Rensselaer, above cited. If, then, the new promise so completely restores life, and gives effect to the original demand, as in the case of a negotiable instrument, to enable a subsequent holder, to maintain an action upon it, I think it must follow, that in case of a justice's judgment barred by the same statute, a new promise will enable the plaintiff in the judgment to maintain an action upon it, with the same effect as before the statute had attached. It is true, that all the cases in which the question has been presented were actions upon contract. It is only since the adoption of the revised statutes, that justices' judgments have been subject to the operation of the statute of limitations. Pease v. Howard, 14 Johns. 479. But if a new promise can have the effect of sustaining an action upon a negotiable security in the hands of an indorsee, to whom it has been transferred after the promise, much more should it have the effect to enable the plaintiff in a justice's judgment to whom the promise was made, to maintain an action of debt upon it. * * *

Upon the whole case, therefore, the plaintiffs are, in my opinion, entitled to judgment.

Judgment for the plaintiffs.[23]

[22] In accord: Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779 (1850); Little v. Blunt, 9 Pick. (Mass.) 488 (1830).

[23] Under the prevailing statutes of limitation it is very generally held that a specialty debt is not revived by a new parol promise: Crawford v. Childress Ex'r, 1 Ala. 482 (1840); Fuller v. Hancock, 1 Root (Conn.) 238 (1791); Ludlow v. Van Camp. 7 N. J. Law, 113, 11 Am. Dec. 529 (1823). So also the remedy on a judgment is not revived by a later parol promise. Niblack v. Goodman, 67 Ind. 174 (1879); Favrot v. Bates, McGloin (La.) 130 (1881) Brooks v. Preston, 106 Md. 693, 68 Atl. 294 (1907); Olson v. Dahl, 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435, 9 Ann. Cas. 252 (1906); Garabedian v. Avedisian (R. I.) 105 Atl. 516 (1919); Taylor v. Spivey, 33 N. C. 427 (1850); Berkson v. Cox, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539 (1895); McAleer v. Clay County (C. C.) 38 Fed. 707 (1889). Contra: Spilde v. Johnson, 132 Iowa, 484, 109 N. W. 1023, 8 L. R. A. (N. S.) 439, 119 Am. St. Rep. 578 (1906); Olcott v. Scales, 3 Vt. 173, 21 Am. Dec. 585 (1831); Carshore v. Huyck, 6 Barb. (N. Y.) 583 (1849). An action may be maintained upon the new promise, however, and the specialty or judgment may be proved as a sufficient consideration for the promise. Lamar v. Manro, 10 Gill & J. (Md.) 50 (1838); Brooks v. Preston, 106 Md. 693, 68 Atl. 294 (1907); Young v. Mackall, 3 Md. Ch. 398 (1850); St. Mark's Evangelical Lutheran Church v. Miller, 99 Md. 23, 57 Atl. 644 (1904); Otis v. Gazlin, 31 Me. 567 (1850). Contra: Ludlow v. Van Camp, 7 N. J. Law, 113, 11 Am. Dec. 529 (1823), the Chief Justice dissenting.

An action for a tort, barred by statute of limitations, is not revived by an acknowledgment or a new promise. Hegedus v. Thomas Iron Co. (N. J. Sup.)

TRASK v. WEEKS et al.

(Supreme Judicial Court of Maine, 1889. 81 Me. 325, 17 Atl. 162.)

Assumpsit on account by Abiel Trask against William Weeks and Stinson Weeks. Reported to stand for trial if, in the opinion of the law court, it could be maintained.

DANFORTH, J.[24] It is conceded that this action cannot be maintained against the defendant William Weeks. The result as to the other defendant must depend upon the construction of the following written contract, viz.: "Whereas, Abiel Trask, of Jefferson, has unsettled accounts against William Weeks and myself which it is not convenient to settle at this time, now I hereby agree to waive any and all objection to said accounts which might be brought against them on account of the statute of limitations, and hereby renew the promise to pay whatever balance shall be against us." This contract was dated March 20, 1868, signed by the defendant Stinson Weeks, and presumably delivered to the plaintiff at its date; and now, after the lapse of 20 years, this action is brought upon an account which is assumed to be that referred to in the agreement. To this action the defendant proposes to plead the statute of limitations. Is it competent for him to do so?

The plaintiff answers this question in the negative, claiming that the contract is equivalent to a covenant not to set up the statute in the future as a defense to the debt, and is therefore technically an estoppel, or operates as an estoppel, to avoid circuity of action, and relies upon Warren v. Walker, 23 Me. 453. It is clear that the contract cannot operate as an estoppel, for having been entered into after the statute of limitations had taken effect, there is no evidence in the case that the plaintiff, in consequence of it, has been induced to change his position, so as to lose any legal rights by delay or otherwise. There appear also insurmountable obstacles to its operation as a covenant. To give it this or any effect, it must necessarily have a sufficient consideration to support it. Such a contract, as seen in Warren v. Walker, is entirely independent of that mentioned in the statute as an acknowledgment of or a new promise to pay the debt, and must therefore have an independent consideration. In Warren v. Walker this was evidently considered an indispensable requisite, and much stress was laid upon the fact that a sufficient consideration there appeared.

110 Atl. 822 (1920). But if the tort was such that an action of indebitatus assumpsit could have been maintained against the wrong-doer, the debt created by the tort, even though barred, is a sufficient consideration for a new promise to pay it. See Ott v. Whitworth, 27 Tenn. (8 Humph.) 494 (1847), a new promise is not implied in a mere confession of the tort; Oothout v. Thompson, 20 Johns. (N. Y.) 277 (1822); Nelson v. Petterson, 229 Ill. 240, 82 N. E. 229, 13 L. R. A. (N. S.) 912, 11 Ann. Cas. 178 (1907); Belcher v. Tacoma Eastern R. Co., 99 Wash. 34, 168 Pac. 782 (1917).

[24] Part of the opinion is omitted.

In this case, though there appears abundant consideration for the contract construed as a new promise, none appears for such as the plaintiff claims it to be. As such it is immaterial that there is a subsisting debt, for, while the debt is the subject-matter of the contract, its state or condition is not changed; its obligation has neither increased nor diminished. Its value might be greater in consequence of a valid contract of that kind, but a benefit to the plaintiff is no reason for an increased obligation to the defendant, and, the statute of limitations having already applied, the delay takes no legal right from the plaintiff. True, as a supplementary report, there is in the case an agreement from the plaintiff to the defendant which we may assume is a part of the same transaction, but it is not of the same tenor as the defendant's. It promises nothing. It simply agrees to waive the statute, and "allow whatever may be found justly due them on settlement." This can only be construed to allow the amount on the plaintiff's account, and, as the defendant had already provided for this by his promise to pay the balance only, the agreement could be of no value to him, or injury to the plaintiff. It can therefore hardly be considered a valid consideration for the defendant's contract, as claimed by the plaintiff.

The proper construction of the agreement shows clearly that it is not in effect what the plaintiff claims, but that it was intended rather as the new promise contemplated by the statute to take the account out of its provisions than an independent covenant not to set it up in defense. The plaintiff contends that it is both; that it contains two elements,—a waiver of the statute, and a new promise to pay the balance due. There may be two elements, but they constitute one contract only. They are so combined that they cannot be separated, and must be construed as one whole. It is not to be expected, even if it were possible, that the parties would thus put in one, two contracts so entirely different in their nature and effect, when either would have answered the purpose in view. That the parties at the time the contract was made had in view the then condition of the account is evident from its terms. It refers in the preamble to the inconvenience of a settlement "at this time," agrees to waive, not the statute, "but all objections which," not may, but "might, be brought against them on account of the statute," and then, evidently to accomplish this purpose, adds, "and hereby renew the promise to pay whatever balance shall be against us," thus making the last clause a qualification of what went before. The waiving and the promise must stand or fall together; the former being in force only as long as the latter, and hence the contract as a whole subject to the statute of limitations. * * *

Plaintiff nonsuit.[25]

[25] An agreement not to plead the statute as a defense has been held valid and not against public policy. State Trust Co. v. Sheldon, 68 Vt. 259, 35 Atl. 177 (1895); Wells Fargo & Co. v. Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647 (1900).

BARKER v. HEATH.

(Supreme Court of New Hampshire, 1907. 74 N. H. 270, 67 Atl. 222.)

Action by Levi Barker against Kate P. Heath on a note for $734.52, dated April 1, 1895, and payable to plaintiff on demand with interest. Suit was brought November 2, 1905, and defendant pleaded limitations, to which plaintiff replied, alleging new promise within six years. A verdict was rendered in favor of plaintiff, and the case was transferred to the Supreme Court. Exceptions sustained.

The following indorsements are upon the back of the note: April 10, 1895, $5; September 19, 1895, $5; October 16, 1895, $5; December 16, 1895, $5; September 19, 1896, $3; August 25, 1898, $2; December 26, 1899, $2. The plaintiff testified as follows: He received the foregoing sums from the defendant at the dates mentioned, and made the indorsements in her presence. At the time of the last payment the defendant said, in substance, that it was all she could give him at that time; that she would give him more as soon as she could, and would pay him just as fast as she could; that she was having a hard time, her boarders had left her, her eyes were troubling her, and she had to go to an oculist; that it was taking her money, but she would pay him as fast as she could. At the dates of the indorsements she always promised to pay as fast as she could and as soon as she was able, and wanted him to be easy with her. In a conversation subsequent to December 26, 1899, she said she had no money for him then, but would give him some just as soon as she could. The defendant's evidence tended to prove that she did not make either of the last two payments indorsed on the note; that she did not promise the plaintiff at any time that she would pay the balance of the note, because she knew it was impossible for her to do so; and that she did not promise him on December 26, 1899, or at any subsequent date, that she would pay the note as soon as she was able, or as soon as she could, or promise anything to that effect. * * *

The court, after instructing the jury that their verdict must be for the defendant unless she, by her acts or promises, gave the plaintiff to understand within six years that she recognized the existence of the note and intended to pay it, further instructed them that the promise must be absolute, or, if conditional, that the condition must have been fulfilled; and that a promise by the defendant to pay as soon as she could, or when she was able, would be regarded by the law of this state as an absolute promise. Continuing, the court said: "So if you find that within six years she said, 'I will pay it as soon as I can,' or 'as soon as I am able,' then you will regard it as having been an absolute and unqualified promise on her part." To this portion of the charge the defendant excepted.

CHASE, J.[26] It was held in the earlier cases of assumpsit in this state

[26] Parts of the report are omitted.

that, while a simple acknowledgment of a debt would not prevent the statute of limitations from operating upon it, such acknowledgment was evidence from which, if there was nothing to rebut it, a jury might find a new promise. If the acknowledgment was accompanied by a condition, limitation, or qualification of any kind, its effect as evidence was modified correspondingly. Stanton v. Stanton, 2 N. H. 425; Buswell v. Roby, 3 N. H. 467; Atwood v. Coburn, 4 N. H. 315. * * * In case there is a condition, the creditor must show that it has been fulfilled or complied with to entitle himself to the implication of a new promise. Russell v. Copp, 5 N. H. 154; Exeter Bank v. Sullivan, 6 N. H. 124, 135, 136; Manning v. Wheeler, 13 N. H. 486, 487; Ventris v. Shaw, 14 N. H. 422; Butterfield v. Jacobs, 15 N. H. 140; Downer v. Shaw, 28 N. H. 151, 153; Dodge v. Leavitt, 59 N. H. 245; Stowell v. Fowler, 59 N. H. 585; Holt v. Gage, 60 N. H. 536; Pickering v. Frink, 62 N. H. 342; Gage v. Dudley, 64 N. H. 271, 275, 9 Atl. 786; Engel v. Brown, 69 N. H. 183, 184, 45 Atl. 402; Mooar v. Mooar, 69 N. H. 643, 46 Atl. 1052; Rossiter v. Colby, 71 N. H. 386, 387, 52 Atl. 927. A partial payment of a promissory note by the maker, under circumstances which show that he understood it was partial only, and which do not indicate an unwillingness on his part to pay the balance, is evidence from which, if there is nothing to control it, a jury should find a new promise. Indorsements upon a note will not be received as evidence of such payments unless shown to be in the handwriting of the maker, or there is other evidence of their genuineness and truthfulness. Exeter Bank v. Sullivan, 6 N. H. 124; Kenniston v. Avery, 16 N. H. 117; Chapman v. Boyce, 16 N. H. 237; Jones v. Jones, 21 N. H. 219; Brown v. Latham, 58 N. H. 30, 42 Am. Rep. 568; Engel v. Brown, 69 N. H. 183, 45 Atl. 402.

According to the plaintiff's testimony, the defendant made a payment of $2 upon the promissory note in suit within six years of the time when the action was brought, and said, in substance, at the time of making the payment, that it was all she could then pay, that she would pay more as soon as she could, would pay just as fast as she could on the note. This testimony, if credited by the jury, would justify them in finding that the defendant understood she was making a partial payment upon a promissory note which she regarded as a subsisting debt that she was liable to pay, and was willing to pay as fast as she could or was able. Her statements relating to losing her boarders, and to the extraordinary expenses to which she was subjected by reason of the trouble in her eyes, tend to prove that her willingness to pay was conditional and depended upon her future pecuniary ability. In effect, she promised that she would make payments on the note as fast as her pecuniary ability would enable her to do so. The later statement in evidence was to the same effect. In Butterfield v. Jacobs, 15 N. H. 140, 141, the court said: "Where a person, on being applied to for payment of a debt, declares his inability to pay it, but promises to pay it when he shall become able, the happening of the

contingency is in its nature susceptible of being proved. His pecuniary ability is a matter of fact no more indefinite nor uncertain than most facts ordinarily in controversy. Such a promise is clearly conditional, dependent on the happening of a future event. Evidence of the promise and of the pecuniary ability has therefore been held sufficient to take a case out of the operation of the statute." * * * It is quite clear that if the plaintiff's testimony in the present case is believed, the defendant's willingness to pay the balance of the note depended upon her pecuniary ability to pay it. Recent cases fully justify this view. Stowell v. Fowler, 59 N. H. 585; Rossiter v. Colby, 71 N. H. 386, 52 Atl. 927. See, also, Atwood v. Coburn, 4 N. H. 315, 318; Betton v. Cutts, 11 N. H. 170; Manning v. Wheeler, 13 N. H. 486. The defendant's exception to the charge of the court must therefore be sustained. * * * [27]

EARLY v. MAHON.

(Supreme Court of New York, 1821. 19 Johns. 147, 10 Am. Dec. 204.)

This was an action of assumpsit, tried at the Delaware Circuit, in June, 1820, before Mr. Chief Justice Spencer.

The plaintiff lent the defendant certain sums of money, for which the defendant gave a bond and warrant of attorney, in which bond was included usurious interest on the money lent. A judgment was entered upon the bond, in the Court of Common Pleas of Delaware county; and the Court, afterwards, on motion for that purpose, set aside the judgment on the ground of usury. The defendant, afterwards, promised to pay the plaintiff the original sum actually borrowed, but not the usurious interest contained in the bond. On this promise, the present suit was brought. At the trial, the plaintiff produced

[27] In accord: Gillingham v. Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320 (1901); Oliver v. Gray, 1 Har. & G. (Md.) 204, 216 (1827); Tanner v. Smart, (K. B.) 6 B. & C. 603 (1827); Big Diamond Milling Co. v. Chicago, M. & St. P. R. Co., 142 Minn. 181, 171 N. W. 799, 8 A. L. R. 1254 (1919); Morgan Hardware Co. v. American Carriage Co., 22 Ga. App. 168, 95 S. E. 721 (1918).

In Philips v. Philips (Ch.) 3 Hare, 281, 289 (1844), the court said: "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him. And the same consequences, I conceive, will follow upon that sort of acknowledgment which is found in a will like the present, creating a trust for paying debts barred by the Statute of Limitations. The creditor will get nothing but what the trust gives him."

the bond and note, which had also been given by the defendant, and offered to deliver them up, to be cancelled.

The Chief Justice was of opinion that the actual money lent, was a sufficient consideration to support the promise of repayment, though the securities taken were usurious and void; and the jury, under his direction, found a verdict for the plaintiff, for $569.84, subject to the opinion of the Court, on a case to be made.

SPENCER, C. J. delivered the opinion of the court.[28] There are two questions presented by the case: 1. Whether, when money has been lent upon an usurious contract, and the contract is afterwards vacated, there yet exists such a moral and equitable duty on the part of the borrower, that a subsequent promise by him to pay the money actually lent, can be enforced at law, in an action founded on the promise? * * *

1. The case of Barnes v. Hedley, 2 Taunt. 182, contains all the authorities and decisions in the British courts, on the first point; and, in my opinion, places the validity of the promise, and the sufficiency of the consideration, beyond a doubt. In that case, the original security was confessedly usurious; it was, by mutual consent, delivered up and cancelled and the borrowers promised to repay the principal and interest; and it was decided that the plaintiffs were entitled to recover the principal and legal interest. It was an issue out of Chancery and the Judges merely certified the result of their decision without giving their reasons at large. It has been repeatedly decided in this Court, that an equitable or moral duty is a sufficient consideration for an actual promise to pay. In Hawkes v. Saunders, Cowp. 289, Buller, J. said, "if such a question were stripped of all authority, it would be resolved, by inquiring, whether law were a rule of justice, or whether it was something that acts in direct contradiction to justice, conscience and equity; but (he added) the matter has been repeatedly decided." I consider it entirely settled, that notwithstanding the security be usurious, the money lent is a debt in equity and conscience, and ought to be repaid. This principle has long been acknowledged, and acted upon in courts of equity. 2 Vesey, 567; 2 Brown's Ch. Cas. 649. In the latter case, upon an application to set aside a judgment tainted with usury, it was decided, that it could be displaced only by doing what was just, and that it must stand for the money actually paid, with legal interest. In Rogers v. Rathburn, 1 Johns. Ch. 367, the Chancellor pronounced it to be a settled principle, that he who seeks equity, must do equity; that if the borrower came into that court for relief against his usurious contract, he must do what is right, as between the parties, by bringing into court the money actually advanced, with the legal interest; and that then the court would lend him its aid, as against the usurious excess. The statute to prevent usury, (1 N. Y. L. 1813, p. 64,) after regulating the rate of interest, and for-

[28] Part of the opinion has been omitted.

bidding a higher rate than seven per cent. per annum, to be taken, declares, that all bonds, bills, notes, contracts and assurances upon, or for any usury, by which there shall be reserved or taken, or secured, or agreed to be reserved or taken, above seven per cent. shall be utterly void. This provision of the statute relates wholly to the contract; and it makes that entirely void. Hence, it has been frequently held, that where there was an antecedent valid debt, and a security was given by the debtor, reserving illegal interest so as to be usurious, that the security being void, the pre-existing debt might be recovered, if even the security was one of a higher nature. 3 Camp. N. P. 119; 1 Hen. Bl. 462. I do not mean to say, that in this case, the plaintiff can recover, on the ground that the defendant has had his money, and the bond he took for it was void; and, that, therefore, he can maintain an action on the implied assumpsit. Here, the lending, and the usurious agreement, were contemporaneous acts; the usury infected the whole transaction; but I do say, in the words of Mr. Justice Lawrence, "the usury could not annihilate the sum of money itself, nor the fact of the receipt of the money;" and it does not admit of a doubt, that the defendant having had the plaintiff's money, without any consideration or security, but a void bond, the promise subsequently to repay this money, was founded on a moral and equitable duty. In Fitzroy v. Gwillim, 1 Term Rep. 153, in trover for goods which had been pledged for money advanced on an usurious contract, it was held, that to entitle the plaintiff to recover, it was necessary to prove a previous tender of the money actually due. This was a recognition by a court of law, of the principle adopted in courts of equity, that although the contract was void, there was yet a subsisting duty on the part of the borrower. It is observable, too, that the plaintiff has not committed an act which is malum in se, but malum prohibitum merely; and this distinguishes this case from giving money to one to commit a crime. In such case, it could not be recovered back, even upon a promise to restore it; and, it is to be borne in mind, that the present contract is free from usury. * * *

Judgment for the plaintiff.[29]

[29] In McClure v. Williams, 7 Vt. 210, 213 (1835), the court said: "The taint of usury is indeed upon him, but if the borrower promises to pay the honest debt, why is not the promise binding? The cash lent is still due and unpaid, and therefore as much a moral right and duty as a sum justly due on a note against which the statute of limitations has run, or that has been discharged by a certificate of bankruptcy; and no reason is perceived why the promise need be in writing in this any more than in those cases. In those cases, the original contract or note having been valid, it is declared upon, and the new promise removes the bar. Here the new promise is declared upon, because the first security was void, and the second good, which some judges have intimated should be the mode in case of a new promise, which avoids the statute of limitations."

Other cases in accord are Kilbourn v. Bradley, 3 Day (Conn.) 356, 3 Am. Dec. 273 (1809); Pinckard v. Ponder, 6 Ga. 253 (1849); Phillips v. Columbus City Bldg. Ass'n, 53 Iowa, 719, 6 N. W. 121 (1880); Sanford v. Kunz, 9 Idaho, 29, 71 Pac. 612 (1903); Sheldon v. Haxtun, 91 N. Y. 124 (1883);

BREWSTER v. BANTA.

(Supreme Court of New Jersey, 1901. 66 N. J. Law, 367, 49 Atl. 718.)

DEPUE, C. J. The declaration contains only the common counts. Annexed to it is a notice, pursuant to the statute, that the action was brought to recover the amount due on a promissory note dated November 7, 1898, made by Demarest Banta, and indorsed by Harvey D. Banta. The defense was that the note in question was made on Sunday, and that it was given in payment of the difference on an exchange of horses concluded on that day, and was therefore void. The case was tried in the Bergen circuit by the court without a jury. The court directed a nonsuit as to Harvey Banta, and found in favor of the plaintiff as against Demarest Banta. The judge held that the Sunday transaction was wholly illegal, and a nonsuit as to Harvey Banta was directed on the ground that he had no connection with the transaction, except in the indorsement of the note. The finding against Demarest Banta was made on the ground of an express promise made by him to the plaintiff to pay the debt after the note was given, which the learned judge decided was binding upon him. The law regulating this subject is conclusively settled in the series of cases beginning with Reeves v. Butcher, 31 N. J. Law, 224. In the first of these cases the supreme court held that the statute forbidding worldly employment or business on Sunday rendered void every transaction which, if performed on a week day, would be enforceable in a court of justice; that such a transaction, being wholly void, could not be validated by ratification, but that the consideration emanating from the tainted contract will be sufficient to form the foundation for a new express promise, on which recovery might be had. Reeves v. Butcher, supra; Ryno v. Darby, 20 N. J. Eq. 231; Cannon v. Ryan, 49 N. J. Law, 314, 8 Atl. 293.

The trial court found, as a question of fact, that, so far as Demarest Banta was concerned, there had been an express promise to the plaintiff to pay the debt. In the trial of an issue before the court, a jury being waived, pursuant to section 176 of the practice act (2 Gen. St. p. 2562), the court is substituted for the jury, and its finding on questions of fact cannot be reviewed on writ of error. All that can be reviewed is the sufficiency of the facts found to support the judgment. Bridge Co. v. Geisse, 38 N. J. Law, 39, 580; City of Elizabeth v. Hill, 39 N. J. Law, 555; Blackford v. Gaslight Co., 43 N. J. Law, 440. In this case there was evidence of a subsequent express promise to pay the note, and the trial judge so found. That decision cannot be called in question.

The judgment should be affirmed.

Drake's Ex'r v. Chandler, 18 Grat. (Va.) 909, 98 Am. Dec. 762 (1868); Barnes v. Hedley, (C. P.) 2 Taunton, 184 (1809); Flight v. Reed, (Exch.) 1 H. & C. 703 (1863).

MUIR v. KANE et ux.

(Supreme Court of Washington, 1909. 55 Wash. 131, 104 Pac. 153, 26 L. R. A. [N. S.] 519, 19 Ann. Cas. 1180.)

Action by B. L. Muir against M. Francis Kane and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff is a real estate broker and had found a purchaser for a parcel of land in Seattle by virtue of an oral agreement with the owners thereof, the defendants Kane and wife. The defendants later executed a written agreement with the purchaser, one Paul Bush, stating the terms of the sale and expressly providing that the defendants should pay to the plaintiff the sum of $200 out of the purchase price for his services theretofore rendered as broker. They have not paid this sum, and he now sues to enforce the written agreement.

FULLERTON, J.[30] * * * The statute (Laws 1905, p. 110, c. 58) governing contracts for commissions for buying or selling real estate provides that any agreement authorizing an employé, as an agent, or broker, to sell or purchase real estate for compensation or a commission, shall be void unless the agreement, contract, or promise or some note or memorandum thereof be in writing. The appellants contend that the writing relied upon by the respondent is insufficient under the statute; that it is not an agreement authorizing the respondent to sell the real property described for compensation or commission, nor does it authorize or employ the respondent to sell real estate at all. Manifestly, if the writing sued upon was intended as an agreement authorizing the respondent to sell real estate of the appellants, it is faulty in the particulars mentioned, and so far deficient as not to warrant a recovery even if a sale had been made thereunder. But we do not understand that this is the question presented by the record. It is clear that this writing was not intended as an agreement authorizing the respondent to sell the real property mentioned. In fact it was executed after that service had been performed, and is an agreement in writing to pay a fixed sum for a past service, not a service to be performed in the future. The question for determination is its validity as a promise to pay for a past service. Looking to the instrument itself, there is nothing on its face that in any manner impugns its validity. It is a direct promise to pay a fixed sum of money for services rendered. Prima facie, therefore, it is legal and valid; and, if it is illegal at all, it is because the actual consideration for the promise, which was alleged and proven, rendered the promise illegal. This consideration was the sale of real property for the appellants by the respondent acting as a broker without a written agreement authorizing the service, and it is thought that, because the statute declares an agreement for such a service void unless in writing, the service furnishes no consideration for the

[30] The court's statement of the facts is condensed as above and part of the opinion is omitted.

subsequent promise, since the service must either have been founded upon an invalid agreement or was voluntary. There are cases which maintain this doctrine. In Bagnole v. Madden, 76 N. J. Law, 255, 69 Atl. 967, the precise question was presented. There the plaintiff had been orally authorized by the defendant to sell a parcel of real estate owned by the defendant. A purchaser was found and a contract of sale entered into. The defendant thereupon executed a written agreement, and delivered the same to the plaintiff, wherein she promised to pay him $50 for his services. In an action brought upon the writing, the court held that she could not recover because of the invalidity of the original oral contract authorizing the services; it being in violation of the statute declaring such agreement void unless in writing.

The case was rested on a decision of the Court of Errors and Appeals (Stout v. Humphrey, 69 N. J. Law, 436, 55 Atl. 281), which announced the same doctrine, but upon a state of facts not quite the same; the subsequent promise to pay being oral instead of in writing. In the course of its opinion in the latter case the court said: "It is clear that if a contract between two parties be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet, according to the commonly received notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." The court, it will be observed, makes a distinction between contracts formerly good, but on which the right of recovery has been barred by the statute, and those contracts which are barred in the first instance because of some legal defect in their execution, holding that the former will furnish a consideration for a subsequent promise to perform, while the latter will not. It has seemed to us that this distinction is not sound. The moral obligation to pay for services rendered as a broker in selling real estate under an oral contract where the statute requires such contract to be in writing is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations; and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing, not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds

and perjuries, and, to accomplish that purpose, it is required that the evidence of the contract be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract or voluntarily will support a subsequent written promise to pay for such service. Nor is it a valid objection to say there was no antecedent legal consideration. The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt, if there were there would be no need for the new promise. The obligation is moral solely, and, since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not.

Our attention has been called to no case, other than the New Jersey case above cited, where the facts of the case at bar are presented. A case in point on the principle involved, however, is Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731. Certain persons without authority from the defendant had ordered lumber and used it in the erection of a building on the defendant's separate property; she being a married woman. Subsequently she gave her promissory note therefor, and, when an action was brought upon the note, she sought to defend on the ground of want of consideration. It was conceded that there was never any legal obligation on the part of the defendant to pay for the lumber, but that her obligation was wholly moral. It was thereupon urged that such an obligation was insufficient to support the promise. Speaking upon this question, the court said: "All of the authorities admit that where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay the same, although the legal obligation is gone forever; and I am unable to perceive any just distinction between such a case and one in which there never was a legal, but only a moral, obligation to pay. In the one case the legal obligation is gone as effectually as if it had never existed, and I am at a loss to perceive any sound distinction in principle between the two cases. In both cases, at the time the promise sought to be enforced is made there is nothing whatever to support it except the moral obligation, and why the fact that, because in the one case there was once a legal obligation, which having utterly disappeared, is as if it had never existed, should affect the question, I am at a loss to conceive. If in the one case the moral obligation, which alone remains is sufficient to afford a valid consideration for the promise, I cannot see why the same obligation should not have the same effect in the other. The remark made by Lord Denman in Eastwood v. Kenyon, 11 Ad. & E. 438, that the doctrine for which I am contending 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it,' is more specious than sound, for it entirely ignores the distinction

between a promise to pay money which the promisor is under a moral obligation to pay, and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay. It seems to me that the cases relied upon to establish the modern doctrine, so far as my examination of them has gone, ignore the distinction pointed out in the note to Comstock v. Smith, 7 Johns. (N. Y.) 89, above cited, between an express and an implied promise resting merely on a moral obligation, for, while such obligation does not seem to be sufficient to support an implied promise, yet it is sufficient to support an express promise." To the same effect is Anderson v. Best, 176 Pa. 498, 35 Atl. 194, wherein it was said: "The distinction sought to be made between considerations formerly good but now barred by statute, and those barred by statute in the first instance, is not substantial, and is not sustained by the cases." See, also, Bailey et al. v. Philadelphia et al., 167 Pa. 569, 31 Atl. 925, 46 Am. St. Rep. 691; Stout v. Ennis, 28 Kan. 706.

Believing, as we do, that the better rule is with the cases holding the moral obligation alone sufficient to sustain the promise, it follows that the judgment appealed from should be affirmed. It is so ordered.[31]

HURLBURT v. BRADLEY et al.

(Supreme Court of Errors of Connecticut, 1920. 94 Conn. 495, 109 Atl. 171.)

Action by Minnie W. Hurlburt against E. Miles Bradley and Dwight E. Russell, the maker and indorser respectively of a promissory note. Verdict set aside as against the indorser, and plaintiff appeals. Error.

On March 20, 1897, the defendant Bradley, by his promissory note, promised to pay to the order of the defendant Russell $500 six months after date at the maker's office, and the defendant Russell indorsed the note to the plaintiff. The complaint alleges that at the time of the indorsement it was understood and agreed that the indorser waived presentment and notice of dishonor, and also alleges that the note was not presented for payment at the time and place therein provided, and was not paid at maturity, and the plaintiff did not give the defendant Russell notice of nonpayment, and that Russell afterwards, with full knowledge of these facts, promised and agreed to pay the note. On the trial it appeared that semiannual payments of interest had been made by the maker and indorser on the note down to March 20, 1918; that about that time, the plaintiff having demanded payment of the note, the two defendants called at the plaintiff's residence, and after some conversation the defendant Russell promised to pay the note.

[31] In accord: Mohr v. Rickgauer, 82 Neb. 398, 117 N. W. 950, 26 L. R. A. (N. S.) 533 (1908); Pool v. Horner, 64 Md. 131, 20 Atl. 1036 (1885), past consideration given at request. As to moral obligation as a consideration, see notes in 53 L. R. A. 353; 26 L. R. A. (N. S.) 520.

There was a verdict for the plaintiff against both defendants, and the trial court on motion set aside the verdict as to the defendant Russell on the ground that there was no evidence which would justify the jury in finding that the new promise was made with knowledge on the part of the defendant Russell that no demand had been made on the maker of the note at maturity.

BEACH, J.[32] (after stating the facts as above). No evidence was offered in support of the allegation of an express waiver of the presentment and notice at the time of the indorsement; and the first question is whether a new promise to pay, made by the indorser long after his discharge by omission to make presentment and give due notice of dishonor, revives his liability as indorser when the promise is made with full knowledge of the laches of the holder.

Until the Negotiable Instruments Act of 1897 the rule in Connecticut was that stated in the headnote to Huntington v. Harvey, 4 Conn. 124: "The promise of the indorser of a note, payable to a third person, and by him assigned to the holder, to pay the note, made after the indorser had become discharged from his liability by the laches of the holder, has no legal efficacy, being without consideration."

On principle this would seem to follow from the language of the indorser's contract. The indorser is not a surety. When his contract is expressed by a simple indorsement, he is only secondarily liable. In addition to the implied warranties his contract, as defined in section 4424, is that on due presentment the note shall be paid according to its tenor, and that, if dishonored, and the necessary steps on dishonor are duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who has been compelled to pay it. This is the contract which was implied by law before the statute, and, stated shortly, it is: "A contract for payment conditioned on due presentment to the maker for payment and due notice of dishonor." Spencer v. Allerton, 60 Conn. 410–417, 22 Atl. 778, 779 (13 L. R. A. 806).

If the holder fails to perform these conditions, the result is, as stated in section 4447, that "any * * * indorser to whom such notice is not given is discharged." It is true that the word "discharged" as applied to debts and debtors is used in two senses—it may mean a discharge by performance which puts an end to the obligation as well as to the liability; or it may mean, as in bankruptcy, a personal privilege which leaves the obligation unfulfilled, and hence capable of supporting a new promise. As applied to the contract of indorsement, a discharge by failure to give notice of dishonor would seem to leave no obligation on the part of the indorser unfulfilled, and hence to leave no support for a new promise to pay.

It is easy to see why such a promise made after the time for giving notice of dishonor has passed should be taken as an admission that due notice of dishonor was in fact given, when that fact is in dispute.

[32] Part of the opinion is omitted.

And when the question is whether the notice was given within a reasonable time, or in a proper manner, such a promise may well be taken as an admission that the notice was reasonable and regular. Breed v. Hillhouse, 7 Conn. 523–528. In this case no such question of fact is in dispute. The complaint alleges that the note was not presented for payment, and that no notice of dishonor was given. It admits that the indorser was discharged; and it is hard to see how a liability can be created more than ten years afterward by a new promise without fresh consideration.

Nevertheless, it has long been the law in England and in most of the United States that an indorser who has been discharged may make himself liable by a new promise. No satisfactory explanation of this rule has been brought to our attention. * * *

But, however that may be, our decision is controlled by section 4467, which provides that notices of dishonor may be waived either before giving notice or after the omission to give due notice, and that the waiver may be express or implied. In the language of the Kentucky court, when confronted with the same situation, we feel that the foregoing provision was intended "to put in force in this state the rule that had theretofore been adopted by a majority of the states." Mechanics' Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071, Ann. Cas. 1912A, 439.

The statute puts the revival of liability on the ground of waiver, and in this case waiver by a new promise to pay. To have that effect the promise must have been made with full knowledge of the facts, and the next question is whether the evidence supports the verdict in that respect. The general rule is that the burden of proving a waiver rests upon him who asserts it; and in this case the complaint expressly admits that the indorser was discharged, and expressly alleges a subsequent waiver by a new promise made with full knowledge of the facts. The evidence offered in support of these allegations stops with proof of the new promise and with proof that the note was not presented for payment and that no notice of dishonor was given. It may fairly be said, notwithstanding the lapse of time, that the defendant indorser, when he made the new promise, knew that no notice of dishonor had been given, for he was the one to be notified. But there is no evidence as to whether he knew that the note was not presented for payment, unless such knowledge or the lack of it is to be inferred from the surrounding circumstances. We think, however, that in this particular case it is quite immaterial whether or not the indorser knew of the failure to present the note. The question is whether the new promise was made with intent to relinquish a known right, or in this case a known immunity arising from the laches of the holder. A new promise made with knowledge of the fact that no notice of dishonor had been given sufficiently manifests that intent. When the intent to relinquish the immunity is established, the waiver is complete. It adds nothing to prove that the indorser also knew that the note had

not been presented for payment, and it detracts nothing to prove that he thought it had been presented. It is sufficient that, knowing he was immune from liability because of the holder's laches, he nevertheless promised to pay.

There is error, and the case is remanded, with directions to enter judgment against the indorser, Russell, upon the verdict.

The other Judges concurred.[33]

ZAVELO v. REEVES et al.

(Supreme Court of the United States, 1913. 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664.)

Mr. Justice PITNEY delivered the opinion of the court:[34]

Defendants in error sued plaintiff in error November 22, 1907, in the city court of Birmingham, Alabama, declaring upon the common counts for moneys due December 10, 1906, and February 19, 1906, and by an amendment declared upon a promissory note for about $250, which was a part of a claim of the defendants in error that antedated the bankruptcy of the plaintiff in error. The defendant (now plaintiff in error) pleaded that on November 22, 1905, he filed in the district court of the United States for the northern district of Alabama, his petition in bankruptcy; that said court had jurisdiction of said bankruptcy proceedings, and duly adjudicated him a bankrupt on that date; that subsequently he offered a composition to his creditors, and the offer was accepted and a composition made in said proceedings and duly confirmed by said district court February 6, 1906, a certified copy of the decree of confirmation being attached to and made a part of the plea; that the plaintiffs were then creditors of the bankrupt, and as such accepted the offer of composition and were paid a dividend thereon; that the claim sued on herein is a part of and was included in said claim on which said dividend was paid, and the claim herein is barred by said proceedings and discharged by said composition. The plaintiffs replied, (a) that on January 1, 1906 (which date was after the adjudication and before the discharge), defendant promised that if plaintiffs would lend him $500 for use in paying the consideration of a composition with his creditors in said bankruptcy proceedings, he, defendant, when said composition was confirmed, would pay plaintiffs the balance of the demand sued on, after

[33] In accord: Doherty v. First Nat. Bank of Louisville, 170 Ky. 810, 186 S. W. 937 (1916); Sigerson v. Mathews, 20 How. 496, 15 L. Ed. 989 (1857); Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1 (1877); Rindge v. Kimball, 124 Mass. 209 (1878); Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365 (1889); Neg. Inst. Law. §§ 109–111 (Mass. St. 1898, c. 533); N. Y. Neg. Inst. Law (Consol. Laws, c. 38) §§ 180–182. See Sebree Deposit Bank v. Moreland, 96 Ky. 150 28 S. W. 153, 29 L. R. A. 305 (1894); Burgettstown Nat. Bank v. Nill, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079, 110 Am. St. Rep. 554, 5 Ann. Cas. 476 (1906). Also, for waiver before maturity, L. R. A. 1916B, 944.

[34] Part of the opinion is omitted.

deducting therefrom plaintiffs' share of the consideration of such composition; and plaintiffs averred that they accepted defendant's said offer and promise, and did so lend him the said sum of $500 for the said purpose; and (b) for further replication, that after the filing of defendants' said petition in bankruptcy, and after he had been adjudged a bankrupt, defendant promised plaintiffs that he would pay what he owed them, being the same demand sued on herein, when his composition in bankruptcy was confirmed, and that plaintiffs accepted said promise. To these replications the defendant demurred. The city court overruled the demurrers and proceeded to a trial of the issues of fact, which resulted in favor of the plaintiffs upon both the common counts and the note. The defendant appealed to the supreme court of Alabama, which affirmed the judgment. 171 Ala. 401, 54 South. 654. Whereupon he sued out the present writ of error.

The case is brought here under § 709, Rev. Stat. (U. S. Comp. Stat. 1901, p. 575), the contention being that a right or immunity set up and claimed by the plaintiff in error under the Federal bankruptcy act was denied by the state court. * * * [35]

(2) It is contended as to both replications that although a debt barred by discharge in bankruptcy may be revived by a new promise made after the discharge, this cannot be done by a new promise made in the interim between the adjudication and the discharge.

It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. Kirkpatrick v. Tattersall, 13 Mees. & W. 766; Otis v. Gazlin, 31 Me. 569; Hornthal v. McRae, 67 N. C. 21; Fraley v. Kelly, 67 N. C. 78; Hill v. Trainer, 49 Wis. 537, 5 N. W. 926; Knapp v. Hoyt, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; Lanagin v. Nowland, 44 Ark. 84; Wiggin v. Hodgdon, 63 N. H. 39; Griel v. Solomon, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 25 N. E. 338.

[35] The court held that the pleadings did not show that the agreement was an illegal secret preference.

Our attention is not called to any decision in point arising under the present bankruptcy act; but we deem it clear that the same rule should be applied. * * * [36]

Judgment affirmed.

EARLE v. OLIVER.

(In the Court of Exchequer, 1848. 2 Exch. 71 [Welsby, H. & G.].)

Assumpsit. The declaration stated that the plaintiff had become surety for the defendant in a sum not to exceed £250, by a continuing guaranty in favor of a certain bank giving credit to the defendant. Later, and after the bank had made advances to the defendant, bankruptcy proceedings were brought against him. During such proceedings the defendant promised the plaintiff in writing that if the plaintiff should be forced to pay to the bank the sum of £250 by virtue of the guaranty, he would repay that sum to the plaintiff with interest thereon without regard to the certificate of discharge in bankruptcy, "whenever it should be in his power to do so." The plaintiff was later forced to pay £250 to the bank and has been repaid only £50 by the defendant. It was alleged that it had been and still was within the power of the defendant to pay as promised, and judgment was asked for £200 with interest amounting to £52.

There were several pleas, a replication, and a general demurrer, and the question was whether or not the declaration stated a cause of action.[37]

PARKE, B. This case was very fully and ably argued before my Brothers ALDERSON, ROLFE, PLATT, and myself, at the sittings after last Michaelmas term. Two questions arose,—the first, as to the sufficiency of the first count on general demurrer; the second, whether the pleadings to the second count, which was money paid, disclosed a sufficient defence. The first count was, in substance, on a promise in writing by the defendant to the plaintiff, in consideration of the defendant's liability, to repay the plaintiff a debt which he had contracted with a banking company as surety for the defendant before the bankruptcy; and the promise was made, before the certificate, to repay the debt when the plaintiff should have paid it, and also the interest on that debt from the time it should be paid by the plaintiff to the time of repaying by the defendant. There was a plea stating that the promise was before certificate, and a special demurrer to the plea, on the ground that it merely stated what was admitted before in the declara-

[36] The court further held that under the present Bankruptcy Act no claims are provable, except those existing at the time of filing the petition, in bankruptcy, and that therefore the duty created by the new promise was not itself affected by the subsequent discharge.

[37] The statement of facts has been condensed and part of the opinion has been omitted.

tion. That is true, and the consequence is, that the question is simply whether the first count is good on demurrer.

So far as relates to the objection that the promise was made before the certificate, the case of Kirkpatrick v. Tattersall, 13 Mees. & W. 766, is an answer. It may be worth while to state that a similar point had been previously decided by Lord Chief Justice Eyre in the case of Roberts v. Morgan, 2 Esp. 736.

The next objection was that, although an existing debt which would be barred by a certificate, and which was due by the bankrupt to the plaintiff, was a good consideration to support a promise to pay it, a mere liability to repay the plaintiff when he should have first paid the debt for the defendant was not. This goes a step further than the cases above cited, but seems to us to fall within the same principle. This liability, like the debt, would be discharged by the certificate; and it seems to us as just and reasonable for the bankrupt, after the fiat, to waive the benefit of his certificate with respect to it, as it is to waive it with respect to a debt; and, if the debt so discharged is a good consideration for a promise to pay it, the liability which is discharged in the same way is a good consideration for a promise to continue liable.

Two further objections were made, on the supposition that this liability is to be put on the same footing as a debt, and is a good consideration: First, that this debt or liability, in a course of being barred by a certificate, cannot be treated as the executed consideration for a promise which a debt or liability, not barred by a certificate, would not support, and that by the course of modern decisions, beginning with the case of Hopkins v. Logan, 5 Mees. & W. 241, and ending with Roscorla v. Thomas, 3 Q. B. 234, a debt cannot be laid as an executed consideration for any promise which the law would not imply from it; and that a promise to pay whenever the party was able was never implied. The second was that a promise to pay interest could not be supported by the consideration, and was as objectionable as if the promise had been to do any collateral thing. We think that these objections ought not to prevail.

The strict rule of the common law was no doubt departed from by Lord Mansfield in Hawkes v. Saunders, Cowp. 290, and Atkins v. Hill, Id. 288. The principle of the rule laid down by Lord Mansfield is that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it. There is a very able note to the case of Wennall v. Adney, 3 Bos. & P. 252, explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the statute of limitations; and the rule in these instances has been so constantly followed that there

can be no doubt that it is to be considered as the established law. Debts so barred are unquestionably a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay them. Promises to pay a debt simply, or by installments, or when the party is able, are all equally supported by the past consideration; and, when the debts have become payable instanter, may be given in evidence in the ordinary declaration in indebitatus assumpsit. So, when the debt is not already barred by the statute, a promise to pay the creditor will revive it, and make it a new debt, and a promise to an executor to pay a debt due to a testator creates a new debt to him. But it does not follow that, though a promise revives the debt in such cases, any of those debts will be sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so indeed it was held in this court in the case of Reeves v. Hearne, 1 Mees. & W. 323.[38] In such case it is but an accord unexecuted, and no action will lie for not executing it.

We think, therefore, that the conditional promise to pay the debt would be good in this case, and supported by the original consideration; and a conditional promise, which, when absolute, will be only a renewal of the original liability, and to the same extent, is equally good and supported by the original consideration.

The next objection relates to the interest. It seems to us to be supported by the same consideration as the original promise. The promise is to pay the debt conditionally; and, if the debt be unpaid, that the defendant will pay interest for it. We are of opinion, therefore, that the first count is good.[38] * * *

HERRINGTON v. DAVITT et al.

(Court of Appeals of New York, 1917. 220 N. Y. 162, 115 N. E. 476.)

COLLIN, J. The action is upon a promissory note made by the defendants' testator. After the note was delivered the maker was adjudicated a bankrupt, under the federal act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. §§ 9585-9656]), and thereunder received his discharge. A composition was effected, under the provisions of the act, between the bankrupt and his creditors. The plaintiff duly accepted the offer of the composition and the 20 per centum of

[38] See, also, Trask v. Weeks, ante, p. 421.
In Porter's Adm'r v. Porter, 31 Me. 169 (1850) the court said: "If any action would lie against the defendant upon a promise to pay the debt in a manner different from that provided in the original contract, it would be necessary to declare specially on such promise. Penn v. Bennet, 4 Camp. 205 (1815). As where the debt was payable in money, and there should be a new promise to pay in specific articles." And see note to Janson v. Colomore, ante, p. 388.

the face value of the note payable under it. The defendants' testator thereafter wrote to the plaintiff a letter as follows:

"Troy, N. Y., Dec. 6, 1904.

"My Dear Sister: Your letter received. Was somewhat surprised at its contents. In regard to your claim against me you will be paid every dollar of it with inst as soon as I sell the mill. If anything happens to me the farm is in my name and you will be paid. I have left orders to that effect. Tell Lester to see what balance there is due me on the books for wood and to pay it to you for inst money.

"Yours truly, A. W. Davitt."

The claim mentioned in the letter was the note. The mill referred to in the letter was sold and conveyed by the testator in January, 1907. This action upon the note was commenced June 8, 1912. Upon the trial judgment in favor of the plaintiff for the unpaid balance payable by the terms of the note was ordered. The Appellate Division unanimously affirmed the consequent judgment.

The action was properly brought upon the note. For the purpose of the remedy, the original debt might still be considered the cause of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543.[89] It might, had the plaintiff so elected, have been brought upon the new promise. It would be more accurate and consistent with the provisions of section 481 of the Code of Civil Procedure and the other sections regulating the pleadings in an action to allege the new promise as the real foundation of the action. The note was a debt provable in the bankruptcy proceedings. The legal obligation which it created or evidenced was, by virtue of the confirmation of the composition offer and the discharge in the proceedings, discharged by force of the statute, and the remedy of plaintiff existing at the time the discharge was granted to recover her debt by action barred. The right of action is given by a new and efficacious promise. The practice of bringing the action upon the original demand is, however, sanctioned by usage. The discharge in bankruptcy is, under such practice, regarded as a discharge of the debt sub modo only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. The new promise with such other facts as are essential to constitute it a valid cause of action may, however, be alleged. See Wolffe v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809; Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042, affirmed 179 N. Y. 546, 71 N. E. 1140; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869.

The appellants assert and argue that the letter of December 6, 1904, does not contain or constitute a promise or agreement to pay the sum unpaid. At its writing, a statute provided: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or

[89] In accord: Shippey v. Henderson, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458 (1817).

by his lawful agent, if such agreement, promise or undertaking; * * * 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy. * * *" Personal Property Law (Laws 1897, c. 417) § 21.

The statute has remained in force. Personal property law (Consol. Laws, c. 41) § 31. The debtor does not promise to pay the debt discharged in bankruptcy, unless there is a distinct and unequivocal expression by him, by a writing of the prescribed form, of a clear intention to bind himself to its payment. The acknowledgment of the existence of the debt by the payment of a part of it or of interest upon it or by express written words is not sufficient. For the purpose of creating anew the liability, the law does not imply a promise. The promise need not be made to the creditor, but it must with certainty refer to the debt. No particular form of words need be used. The promise is constituted by words which, in their natural import, express the present intention to obligate or undertake to pay. The payment may, however, depend upon a contingency or condition. If so dependent, it must be proved that the contingency has happened or the condition has been performed. Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406; Nathan v. Leland, 193 Mass. 576, 79 N. E. 793; Elwell v. Cumner, 136 Mass. 102; Bigelow v. Norris, 139 Mass. 12, 29 N. E. 61; Kraus v. Torry, 146 Ala. 548, 40 South. 956; Meech v. Lamon, 103 Ind. 515, 3 N. E. 159, 53 Am. Rep. 540; Scheper v. Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869. A promise made at any time after the adjudication, and, perhaps, after the filing of the petition, is actionable. Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154.

The letter of the defendant's testator constituted a distinct and unqualified promise to pay the debt. In effect and in truth it said to the plaintiff, I will pay you every dollar remaining unpaid upon the note, with interest, and will so pay you as soon as I sell the mill. He stated positively that he then undertook and obligated himself to pay. The construction of the words used by the debtors and the conclusions stated in the judicial decisions above cited adequately support such decision.

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. Dusenbury v. Hoyt, 53 N. Y. 521, 13 Am. Rep. 543. The appellant asserts that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the creditors seeking to enforce the unpaid debt. The clear weight of judicial opin-

ion and correct reasoning declare such assertion erroneous. In Cohen v. Lachenmaier, 147 Wis. 649, 133 N. W. 1099, the facts, in the particular under consideration, were as are the facts here. The trial court awarded judgment for the balance unpaid on the note. The Supreme Court of Wisconsin in affirming the judgment said:

"It is further contended that each promise, if made, is nudum pactum, because the plaintiff, as one of the creditors, joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law but is one effected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt."

In Matter of Merriman's Estate, 44 Conn. 587, Fed. Cas. No. 9,479, the court stated the principal question as being "whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the seventeenth section of the amended Bankruptcy Act of June 22, 1874," and carried into effect and held that the promise was valid. It enunciated that an express promise to pay a debt, which had been theretofore discharged by operation of law, was valid. The adequate consideration was the moral obligation to keep the original promise; this rule does not apply to a composition inter partes which derives its validity merely from the will of the parties; and if a debt is legally discharged by the voluntary act of the party, there remains no obligation which can be deemed a consideration for a promise; a discharge by performance of the terms of a bankruptcy composition is a discharge by operation of law; the composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. There are other decisions of like reasoning and effect. Guild v. Butler, 122 Mass. 498, 23 Am. Rep. 378; First National Bank of St. Albans v. Wood, 53 Vt. 491; Mason & Hamlin Organ Co. v. Bancroft, 1 Abb. N. C. 415; Easton Furniture Manfg. Co. v. Caminez, 146 App. Div. 436, 131 N. Y. Supp. 157. In Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, the plaintiffs accepted the composition offer of the defendant in bankruptcy proceedings. Thereafter the defendant promised plaintiffs, upon a loan to them of $500, that he would pay the balance of their claim

proved in the proceedings. The action was to recover such balance. The plaintiffs recovered. Mr. Justice Pitney in the opinion of the court recognized the general rule that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt, and ignored the composition and its acceptance. The reasoning and the conclusions of those decisions are harmonious with and applicable to the provisions of the Bankruptcy Act of 1898.

The case of Taylor v. Skiles, 113 Tenn. 288, 81 S. W. 1258, conflicts with the decisions cited and others of like import. Therein it is stated: "It is very generally held that, in the case of a discharge of a debt under insolvent or bankrupt laws, a subsequent promise to pay by the insolvent or bankrupt will revive the original debt and make it enforceable at law. But it is otherwise where the creditor comes to terms with his debtor under a valid composition, and agrees to, and does, accept a part of his debt for the whole. When this is done, the debt is extinguished. The parties having met on common ground, and agreed on terms of settlement which have been carried out, there is no longer even a moral obligation resting upon the debtor as to the balance of the original liability. So that a new promise after composition is without consideration, and will not afford a cause of action. Warren v. Whitney, 24 Me. 561 [41 Am. Dec. 406]; Stafford v. Bacon, 1 Hill (N. Y.) 532 [37 Am. Dec. 366]; Evans v. Bell, 15 Lea [Tenn.] 569."

It is to be noted that the decisions thus cited sustain the proposition that a promise to pay a debt voluntarily discharged is not binding for want of a legal consideration, but do not hold that a discharge in bankruptcy through a composition is a voluntary release or extinguishment of the debt.

We do not find merit in the other grounds for reversal urged by the appellant.

The judgment should be affirmed, with costs.[40]

Judgment affirmed.

[40] This case is annotated in 1 A. L. R. 1700, 1704. In accord: Spann v. Read Phosphate Co., 238 Fed. 338, 151 C. C. A. 354 (1916); Brashears v. Combs, 174 Ky. 344, 192 S. W. 482 (1917).

WARREN v. WHITNEY.

(Supreme Judicial Court of Maine, 1845. 24 Me. 561, 41 Am. Dec. 406.)

SHEPLEY, J. It appears from the case stated, that the defendants were indebted to the plaintiff before Jan. 16, 1836, on a promissory note; and that on that day they made an assignment of their property for the benefit of their creditors. The assignment contained a release of all debts due from the defendants to their creditors. The plaintiff became a party to it, and thereby released his debt, and received a dividend upon it from the assignees. The defendants, by a contract in writing, made on March 14, 1836, promised to pay the plaintiff any balance of the debt, which might remain unpaid by the assignees. And they afterward paid a small amount of such balance. The plaintiff having voluntarily released his debt upon an agreement to receive his proportion of the property conveyed to the assignees, the transaction was equivalent to an accord and satisfaction. There was no longer a subsisting debt due from the defendants to the plaintiff; and no consideration for the new promise; unless a moral obligation to pay a debt, which has been discharged by payment of part only, can be considered sufficient.

This court had occasion to consider and to deny, that a moral obligation can constitute in all cases a legal consideration for a contract, and to lay down some rules respecting it, in the case of Farnham v. O'Brien, 22 Me. 475. It was there stated, that when a person had received a benefit from, or occasioned a loss to, another, and a statute or rule of public policy protected him from making compensation, the moral obligation to do it remained, and would constitute a legal consideration for a promise to do it. When a debt has been voluntarily discharged, a case is not presented within the rule. The case of Willing v. Peters, 12 Serg. & R. (Pa.) 177, would however authorize the plaintiff to recover in this case. The authority of that case must be considered as essentially impaired, if not wholly destroyed, by the case of Snevily v. Reed, 9 Watts (Pa.) 396. In the latter case, the plaintiff had discharged the defendant from custody under a ca. sa.; and thereby discharged the debt. The defendant subsequently promised to pay it; and the Court considered, that there was no legal consideration for the promise.[41]

The case of Stafford v. Bacon, 1 Hill (N. Y.) 533, 37 Am. Dec. 366, decided, that a promise to pay a debt voluntarily discharged, was not binding for want of a legal consideration.

The counsel for the plaintiff insist upon a distinction, that when the release is made at the request and for the benefit of the debtor, the new promise is binding; and that when not so made, it is not. The case of Valentine v. Foster, 1 Metc. (Mass.) 520, 35 Am. Dec.

[41] An agreement for forbearance to prosecute further would likewise be no consideration. Herring v. Dorell (Q. B.) 8 Dowling, 604 (1840).

377, is referred to as establishing such a distinction. It the debt be released for the benefit of the debtor, it is not the less perfectly discharged. When a moral obligation has been properly held to constitute a legal consideration a plea of accord and satisfaction could not have been supported. The party must have pleaded a statute bar, or facts to bring the case within some rule of public policy forbidding a recovery, such as infancy or coverture. There is little similarity between such cases and a case, in which a party could have pleaded and have sustained his plea, that he had satisfied and paid the debt.

A nonsuit is to be entered.[42]

STRAUS v. CUNNINGHAM.

(Supreme Court of New York, Appellate Division, 1913. 159 App. Div. 718, 144 N. Y. Supp. 1014.)

Action by Ferdinand Straus against James W. Cunningham. From an order denying plaintiff's motion for judgment on the pleadings and sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

SCOTT, J. The question presented by this appeal is: When will a moral obligation survive the release of a debt by a composition agreement so as to furnish a sufficient consideration to support a subsequent promise to pay the debt?

The latest and most comprehensive decision upon this subject in this state is to be found in Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. Supp. 1042, affirmed 179 N. Y. 546, 71 N. E. 1140. In that case Mr. Justice Hiscock, writing for the Appellate Division, stated the general rule as follows:

"If plaintiff, under proceedings in bankruptcy or other involuntary form, had been compelled to accept the stock received by him in full legal settlement of an indebtedness which it did not in fact actually pay, a moral obligation upon the part of the debtor to pay the deficiency would have survived his discharge from his legal and enforceable obligations which would be a sufficient consideration for a subsequent promise to pay such balance. Upon the other hand * * * if plaintiff, without further agreement or provision by voluntary proceedings of compromise, had accepted the stock in question in full settlement and satisfaction of the indebtedness due to him, no moral obligation on the part of the debtor would have sur-

[42] In accord: Phelps v. Dennett, 57 Me. 491 (1870); Grant v. Porter, 63 N. H. 229 (1884); Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573 (1863); Montgomery v. Lampton, 3 Metc. (Ky.) 519 (1861); Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322 (1882). See, also, note, 53 L. R. A. 363.

In Valentine v. Foster, 1 Metc. (Mass.) 520, 35 Am. Dec. 377 (1840), a new promise to pay made subsequently to a voluntary release, given by the creditor for a purpose of his own, was not enforceable.

vived which would have furnished an adequate consideration for a subsequent promise to pay."

That these two propositions, so far as they go, accurately state the law upon the subject, seems to be conceded and, at all events, is well settled.

There is a third case, however, not precisely covered by either of the foregoing propositions, and that third case is illustrated by Taylor v. Hotchkiss. In that case the firm of H. L. Hotchkiss & Co., being financially embarrassed and unable to pay its debts, made a general assignment. It then sought an adjustment with its creditors and issued a circular letter to them suggesting that they should accept certain stocks and bonds at a valuation of 80 per cent. of their par value, and should thereupon release the firm so that it might resume business on the Stock Exchange. This was accepted and a general release executed. In their circular letter Hotchkiss & Co. said:

"We propose to offer a moral obligation to take those securities back from our creditors at 80 at a date not later than April 1, 1895."

Then followed an explanation as to how the firm proposed to fulfill this moral obligation. Of course, this proposition was intended to, and doubtless did, have an influence in inducing the creditors to execute the composition agreement, although of itself it did not amount to a binding agreement to take the stock back. The court, however, found that after the execution of the release Hotchkiss renewed by independent agreements his obligation to retake the stock at 80. The question was whether a moral obligation arose out of the composition agreement sufficient to serve as a consideration for the new promise. The court held that it did, notwithstanding the composition and release were voluntary acts on the part of the creditors. The court was of the opinion that, even in case of a voluntary composition, the debtors may, by their acts, expressly provide for that survival of the moral obligation to pay, in the future, in full the indebtedness compromised which would serve as a sufficient consideration for a new promise.

This seems to be a reasonable rule in view of the wide power which individuals have to contract as between themselves. Nor is it necessary that the reservation of this moral obligation be so closely interwoven with the composition agreement as it was in Taylor v. Hotchkiss. We see no reason why a debtor may not, at the time he accepts a voluntary extinguishment of his debts, expressly reserve a moral obligation to pay in full, if able, which will support a subsequent promise to pay.

The facts alleged in the complaint in the present case, which for the purpose of this appeal must be taken as true, are that in March, 1905, the firm of Ellingwood & Cunningham owed the plaintiff the sum of $27,000; that said firm entered into a composition agreement with certain of their creditors wherein and whereby said creditors for certain consideration therein expressed agreed to release said firm and the members thereof from all their legal obligation to pay the debts

and obligations due to said creditors; that plaintiff signed said agreement and became a party thereto. The complaint then proceeds as follows:

"IV. That prior to and simultaneously with the making of the said agreement, the defendant expressly reserved from the operation of the said agreement and release his moral obligation to pay the debt of the plaintiff, amounting, as aforesaid, to the sum of $27,000 and interest, and duly acknowledged and recognized said moral obligation as then existing and continuing to exist thereafter.

"V. That thereafter and on or about the 19th day of April, 1905, the defendant recognizing his said moral obligation to pay to the plaintiff the said debt of $27,000, and in consideration thereof, did then and there promise that he would pay to the plaintiff the said sum of $27,000 with interest from April 19, 1905, as follows: $8,000 on or about May 22, 1906, and the balance within a year thereafter, the said defendant, however, to be credited on account of said payment with all sums which the plaintiff might receive from the trustees or assignees under said composition agreement.

"VI. That thereafter, from time to time, the defendant made payments upon account of the said sum agreed to be paid by him, as aforesaid, in the amounts and at the times set forth in the annexed schedule, which is marked schedule 'A' and made part thereof as though the same were herein specifically set forth in full, and the plaintiff received various sums from the trustees or assignees under said composition agreement at the times and in the amounts set forth in said schedule 'A'."

It is also alleged that from time to time plaintiff sent to defendant statements of account which were received and accepted by defendant. Attached to the complaint is a schedule showing the payment of several thousand dollars by defendant to plaintiff between June 1, 1905, and January 20, 1908.

Those allegations, as it seems to us, bring the present case fairly within the principle of Taylor v. Hotchkiss.

It was certainly competent for the defendant to reserve a moral obligation to pay his debt in full, if possible, and perhaps most honorable men would feel that such an obligation rested upon them. It may well be, although not so alleged, that the defendant's recognition and reservation of this moral obligation had weight with the creditors in consenting to compromise and release the debts.

The rule is we think satisfied by holding that, unless specially reserved, no moral obligation to pay the debts survives a voluntary composition and release, but that where at the time of the release the debtor expressly recognizes and reserves a moral obligation to pay notwithstanding the release, that express reservation keeps alive the obligation after release to the extent that it will furnish a sufficient consideration for a subsequent and quite distinct promise to pay. It is entirely optional with a debtor, under such circumstances, whether

or not he will reserve a moral obligation, and if he elects to do so we can see no rule of law which is violated by holding that that reservation will support a subsequent promise to pay.

The appellant devotes no small space in his brief to demonstrating that it does not appear on the face of the complaint that the alleged reservation was a fraud upon other creditors. It is quite clear that it does not so appear, and the respondent expressly disclaims making any such contention, admitting in express terms, as is the undoubted fact, that on the face of the complaint no preference is shown to have been obtained by the plaintiff over any other creditor.

The order appealed from must therefore be reversed, with $10 costs and disbursements, and plaintiffs' motion for judgment on the pleadings granted, with $10 costs, with leave to the defendant to withdraw his demurrer and answer over within 20 days upon payment of all costs of the action.[43]

BENTLEY v. MORSE.

(Supreme Court of New York, 1817. 14 Johns. 468.)

In error, on certiorari to a justice's court.

The plaintiff in error had an account, for work, against the defendant in error, which the latter paid, and took the receipt of the plaintiff in error for $24.90. In November, 1815, the plaintiff in error brought an action against the defendant in error, on his account, and recovered judgment. It did not appear that any defence was made. In December, in the same year, the parties happening to be together, the defendant observed to the plaintiff, that he had paid him a sum of money, and held his receipt for it, (alluding to the receipt above mentioned,) and had been since compelled to pay him a second time; the defendant denied any knowledge of the payment or of giving a receipt, but promised, that if the defendant had such receipt, he would repay him the amount of it. The present action was founded on that promise; and the defendant in error, who was plaintiff in the court below, at the trial, produced the receipt in evidence. The defendant below offered the record of the former judgment in evidence, as a bar to the action, but it was overruled, and a verdict and judgment were rendered for the defendant in error.

Per Curiam. In consequence of the omission of the defendant in error, to make a defence in the former action against him, and to produce his receipt to show the payment of the debt, he was forever barred from maintaining an action to recover back the money he had paid; and the question now is, whether the promise to repay the amount of the money expressed in the receipt is valid in law.

The debt having been paid, the recovery in the former action was

[43] The concurring opinion of Ingraham, P. J., is omitted.

clearly unjust; and though, in consequence of his neglect, the defendant in error lost all legal remedy to recover back his money; yet there was such a moral obligation, on the part of the plaintiff in error, to refund the money, as would be a good consideration to support an assumpsit or express promise to pay it. The moral obligation is as strong as any in the cases in which it has been held sufficient to revive a debt barred by statute or some positive rule of law. It is like the promise of an infant to pay a debt contracted during his non-age, or of an insolvent or bankrupt to pay a debt from which he is discharged by his certificate.[44]

Judgment affirmed.

BINNINGTON v. WALLIS.

(Court of King's Bench, 1821. 4 Barn. & Ald. 650, 106 Eng. Rep. 1074.)

Declaration stated, that before the making of the promise and undertaking, the plaintiff had cohabited with the defendant as his mistress; and an immoral connexion and intercourse had existed between them for a long space of time, to wit, for the space of twelve years; and the plaintiff had thereby been greatly injured in her character and reputation, and deprived of the means of honestly procuring a livelihood; and that, before the time of the making of the promise, to wit, on the 1st of January, 1816, at, &c. the plaintiff wholly ceased to cohabit with the said defendant, as his mistress, and to have any immoral intercourse with her, and thereupon it was determined and agreed between them, that no immoral intercourse or connexion should ever again take place between them; and that the defendant, as a compensation for the injury so sustained by the plaintiff, should pay and allow to the plaintiff, the quarterly sum of £10, while she should be and continue of good and virtuous life, conversation, and demeanour; and there-

[44] Lord Mansfield laid it down as a general rule that a moral obligation is a sufficient consideration for a subsequent express promise. In Hawkes v. Saunders, Cowper, 289 (1782), he said: "Where a man is under a moral obligation, which no court of law or equity can enforce and promises, the honesty and rectitude of the thing is a consideration." See, also, Watson v. Turner, Buller N. P. 129 (1767).

In a few states the same general rule has been laid down, either by statute or by the courts. See Ga. Code 1895, § 3658; Gray v. Hamil, 82 Ga. 375, 10 S. E. 205, 6 L. R. A. 72 (1889); Robinson v. Hurst, 78 Md. 59, 26 Atl. 956, 20 L. R. A. 761, 44 Am. St. Rep. 266 (1893); Holden v. Banes, 140 Pa. 63, 21 Atl. 239 (1891); Spear v. Griffith, 86 Ill. 552 (1877); Olson v. Hagan, 102 Wash. 321, 172 Pac. 1173 (1918). The cases antecedent hereto show the extent to which a moral obligation is regarded as a consideration in other states.

A bare promise without consideration, past or present, creates no moral obligation, and a subsequent note or promise in renewal thereof creates no legal duty. Monroe v. Martin, 137 Ga. 262, 73 S. E. 341 (1911); Parsons v. Teller, 188 N. Y. 318, 80 N. E. 930 (1907); Nutter v. Stover, 48 Me. 163 (1859); Smith v. Taylor, 39 Me. 242 (1855).

upon, in consideration of the premises; and that the plaintiff, at the request of the defendant, would resign and give up the said quarterly sum, he undertook to pay her so much money as the said quarterly sum was reasonably worth, in order to enable her to continue to live in a virtuous and decorous manner. The declaration then averred, that the plaintiff did resign and give up the said quarterly sum, and the same from thence wholly ceased and determined; and that she had always, from the time of the cessation of the immoral connexion lived in a virtuous and decorous manner, and been of virtuous life, conversation, and demeanour. It then averred, that the quarterly sum was reasonably worth £400; and then alleged as a breach, nonpayment by the defendant. The other counts omitted any mention of the quarterly allowance, and in other respects were similar to this. To this declaration, there was a general demurrer.

PER CURIAM. The declaration is insufficient. It is not averred that the defendant was the seducer, and there is no authority to shew that past cohabitation alone, or the ceasing to cohabit in future, is a good consideration for a promise of this nature. The cases cited are distinguishable from this, because they are all cases of deeds, and it is a very different question, whether a consideration be sufficiently good to sustain a promise, and whether it be so illegal as to make the deed which required no consideration void. There must therefore be judgment for the defendant.

Judgment for defendant.[45]

MILLS v. WYMAN.

(Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 207.)

This was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, ex-

[45] In accord: Beaumont v. Reeve, 8 Q. B. 483 (1846).
But a release from a valid engagement to marry in a case of this sort is a sufficient consideration. Henderson v. Spratlen, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655 (1908). See, also, Jennings v. Brown (Exch.) 9 M & W. 496 (1842).

cept what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the court of common pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

Parker, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientiæ to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preëxisting obligation which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preëxisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent val-

uable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit di-

rected by the court of common pleas was right, and that judgment be entered thereon for costs for the defendant.[46]

[46] Moral obligation, so called, and the facts causing such moral obligation, are generally stated not to be a sufficient consideration. Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79 (1828); Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 Atl. 884, 66 L. R. A. 395 (1904), promise of son to reimburse a town for supporting his mother; Schwerdt v. Schwerdt, 235 Ill. 386, 85 N. E. 613 (1908); Rask v. Norman, 141 Minn. 198, 169 N. W. 704 (1918); Strevell v. Jones' Estate, 106 App. Div. 334, 94 N. Y. Supp. 627 (1905); Eastwood v. Kenyon, 11 A. & E. 438 (1840); notes in 53 L. R. A. 353; 3 L. R. A. (N. S.) 436, 7 L. R. A. (N. S.) 1048, and 26 L. R. A. (N. S.) 520.

In Davis & Co. v. Morgan, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171 (1903), the court said: "No benefit accrued to him who made the promise, nor did any injury flow to him who received it. Such promises are not made within the scope of transactions intended to confer rights enforceable at law. They are lightly made, dictated by generosity, courtesy, or impulse, often by ruinous prodigality. To enforce them by a judgment in favor of those who gave nothing therefor would often bring such imperfect obligations into competition with the absolute duties to wife and children, or into competition with debts for property actually received, and make the law an instrument by which a man could be forced to be generous before he was just."

CHAPTER III

CONTRACTS UNDER SEAL

DEED [Defined in TERMES DE LA LEY, 149–152]. Translated in the first American edition from the London edition of 1721.

Deed is a writing sealed and delivered, to prove and testify the agreement of the party whose deed it is to the thing contained in the deed; as a deed of feoffment is a proof of the livery of seisin, for the land passes by the livery of seisin; but when the deed and the delivery are joined together, that is a proof of the livery, and that the feoffor is contented that the feoffee shall have the land.

All deeds are either indented, whereof there are two, three, or more parts, as the case requires; of which the feoffor, grantor, or lessor hath one; the feoffee, grantee, or lessee another; and peradventure some other body a third, &c. Or else they are poll deeds, single, and but one, which the feoffee, grantee, or lessee hath, &c. And every deed consists of three principal points, (without which it is no perfect deed to bind the parties) namely, writing, sealing, and delivery.

1. By writing is shewed the parties' names to the deed, their dwelling places, their degrees, the thing granted, upon what considerations, the estate limited, the time when it was granted, and whether simply, or upon condition, with other such like circumstances. But whether the parties to the deed write in the end their names, or set to their marks, (as it is commonly used) it matters not at all, (as I think) for that is not meant, where it is said, that every deed ought to have writing.

2. Sealing is a farther testimony of their consents to what is contained in the deed; as it appears in these words, In witness whereof, &c. or to such effect, always put in the latter end of deeds, without which words the deed is insufficient.

And because we are about sealing and signing of deeds, it shall not be much amiss here to shew you, for antiquity's sake, the manner of signing and subscribing deeds in our ancestors the Saxons' time, a fashion differing from that we use now, in this, that they to their deeds subscribed their names, (commonly adding the sign of the cross) and in the end did set down a great number of witnesses, not using at that time any kind of seal; and we at this day, for more surety, both subscribe our names, (though that be not very necessary) and put to our seals, and use the help of witnesses besides.

That the former fashion continued absolute until the time of the conquest by the Normans, whose manners by little and little at the length prevailed amongst us; for the first sealed charter in England, is thought to be that of king Edward the Confessor, to the abbey of Westminster, who being educated in Normandy, brought into the realm

that and some other of their fashions with him. And after the coming of William the Conqueror, the Normans liking their own country custom, (as naturally all nations do) rejected the manner that they found here, and retained their own, as Ingulphus the abbot of Croiland, who came in with the conquest witnesses, saying: "The Normans do change the making of writings (which were wont to be firmed in England with crosses of gold, and other holy signs) into an impression of wax, and reject also the manner of the English writing." Howbeit, this was not done all at once, but it increased and came forward by certain degrees; so that first and for a season the king only or a few other of the nobility, used to seal; then the noblemen, for the most part, and none other. Which thing a man may see in the history of Battle-Abby, where Richard Lucie, chief justice of England, in the time of king Henry II, is reported have blamed a mean subject for that he used a private seal, whereas that pertained (as he said) to the king and nobility only.

At which time also, as J. Rosse notes it, they used to engrave in their seals their own pictures and counterfeits, covered with a long coat over their armours. But after this, the gentlemen of the better sort took up the fashion, and because they were not all warriors, they made seals engraven with their several coats or shields of arms, for difference sake, as the same author reports. At length about the time of Edward III seals became very common; so that not only such as bear arms used to seal, but other men also fashioned to themselves signets of their own devices, some taking the letters of their own names, some flowers, some knots and flourishes, some birds and beasts, and some other things, as we now yet daily see used.

Some other manners of sealings besides these have been heard of among us; as namely, that of king Edward III, by which he gave to Norman the Hunter,

> The hop and the hop town,
> With all the bounds upside down:
> And in witness that it was sooth,
> He bit the wax with his fore tooth.

The like to this was shewed me by one of my friends in a loose paper, but not very anciently written, and therefore he willed me to esteem of it as I thought good. It was as follows:

"I, William, King, give to thee Plowden Royden, my hop and hop lands, with all the bounds up and down, from heaven to earth, from earth to hell for thee and thine to dwell, from me and mine, to thee and thine, for a bow and a broad arrow, when I come to hunt upon yarrow. In witness that this is sooth, I bite this wax with my tooth, in the presence of Magge, Maud, and Margery, and my third son Henry." [1]

[1] A practice of this sort is referred to in Lacey v. Hutchinson, 5 Ga. App. 865, 64 S. E. 105 (1909).

Also that of Alberick de Vere, containing the donation of Hatfield, to which he affixed a short black-hafted knife like an old halfpenny whittle, insead of a seal: with divers such like.

But some peradventure will think, that these were received in common use and custom, and that they were not the devices and pleasures, of a few singular persons: such are no less deceived than they that deem every charter and writing, that hath no seal annexed, to be as ancient as the conquest; whereas indeed sealing was not commonly used till the time of king Edward III, as hath been already said.

3. Delivery, though it be set last, is not the least; for after a deed is written and sealed, if it be not delivered, all the rest is to no purpose.

And this delivery ought to be done by the party himself, or his sufficient warrant; and so it will bind him whosoever wrote or sealed the same: and by this last act the deed is made perfect, according to the intent and effect of it; and therefore, in deeds, the delivery is to be proved, &c.

Thus you see, writing and sealing, without delivery, is nothing to purpose: sealing and delivery, where there is no writing, work nothing: and writing and delivery without sealing, make no deed. Therefore they all ought jointly to concur to make a perfect deed.[2]

WARREN v. LYNCH.

(Supreme Court of Judicature of New York, 1810. 5 Johns. 239.)

This was an action of assumpsit brought by the plaintiff, as the first endorser of a promissory note, against the defendant as maker. The note was as follows:

"Petersburg, Va., August 27, 1807.

"Four months after date I promise to pay Hopkins Robertson or order, the sum of $719.12½ cents, witness my hand and seal. Payable in New York. Thomas Lynch. [L. S.]"

The flourish and initials L. S. at the end of the maker's name constituted what was called his seal. The defendant pleaded non assumpsit, with notice of special matter to be given in evidence at the trial. * * *

On this evidence the judge was of opinion that the plaintiff was entitled to recover, and under his direction the jury found a verdict for the plaintiff for the amount of the note with interest.

KENT, C. J.[3] * * * 1. The note was given in Virginia, and by

[2] *Recognizances.*—As to the manner of executing a formal recognizance by parol in open court, see Albrecht v. State, 132 Md. 150, 103 Atl. 443 (1918). See, also, State v. Chandler, 79 Me. 172, 8 Atl. 553 (1887); McNamara v. People, 183 Ill. 164, 55 N. E. 625 (1899); Bodine v. Commonwealth, 24 Pa. 69 (1854).

[3] Parts of the report are omitted.

the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this State. Thompson v. Ketcham, 4 Johns. 285. Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other States, of substituting a scrawl for a seal; and what was said by Mr. Justice Livingston, in the case of Meredith v. Hinsdale, 2 Caines, 362, in favor of such a substitute, was his own opinion and not that of the court. A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. Sigillum est cera impressa, quia cera sine impressione non est sigillum.

A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. Multum abludit imago. To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are consecrated by time and usage, become substance. The calling a paper a deed will not make it one if it want the requisite formalities. "Notwithstanding," says Perkins (§ 129), "that words obligatory are written on parchment or paper, and the obligor delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an escrowl, though the name of the obligor be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages, but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. Ista ratio nullius pretii (says Vinnius, in Inst. 2, 10, 5) nam et alieno annulo signare licet. Seals were never introduced or tolerated in any code of law, because of any family impression or image or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law.[4]

[4] In accord: Ball v. Dunsterville, 4 T. R. 313, 100 E. R. 1038 (1791), one partner attached a seal for both in the other's presence. And where the instrument purports in its own terms to be under the hands and seals of the parties, they will all be presumed to have adopted the single seal appearing thereon. Ryan v. Cooke, 172 Ill. 302, 50 N. E. 213 (1898); Hiett v. Turner-Hudnut Co., 182 Ill. App. 524 (1913); Davis v. Burton, 3 Scam. (4 Ill.) 41, 36 Am.

The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed and frauds less likely to be practised upon the unwary. President Pendleton, in the case of Jones and Temple v. Logwood, 1 Wash. (Va.) 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (§ 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors if every one put his seal upon the same piece of wax." And Brooke (tit. Faits, 30 and 17) uses the same language. In Lightfoot and Butler's Case, which was in the Exchequer, 29 Eliz. (2 Leon. 21) the Barons were equally explicit as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Selden's Notes to Fortescue (De Laud. p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject, for in the late case of Adam v. Keer, 1 Bos. & Puller, 360, it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. Subscrip-

Dec. 511 (1841); Lord Lovelace's Case, W. Jones, 268 (1643); and note in 20 Ann. Cas. 1327; Cf. Baltimore Pearl Hominy Co. v. Linthicum, 112 Md. 27, 75 Atl. 737, 136 Am. St. Rep. 383, 20 Ann. Cas. 1325 (1910); Hess' Estate, 150 Pa. 346, 24 Atl. 676 (1892).

"Nota, that it was held by all the Justices that where the obligation upon which suit was brought read, In cujus rei testim' sigillum apposui, the deed is good even though the word meum is omitted, because if the deed is delivered it is a good deed, whether the seal is his own seal or the seal of another." Y. B. 21 Edw. IV, 81, 30.

tione testium, et ex edicto prætoris, signacula testamentis imponerentur (Inst. 2, 10, 3). The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius (Elementa juris civilis secundum ord., Inst. 497), with any other instrument which would make an impression, and this, he says is the law to this day throughout Germany. And let me add that we have the highest and purest classical authority for Lord Coke's definition of a seal, Quid si in ejusmodi cera centum sigilla hoc annulo impressero? (Cicero. Academ. Quæst. Lucul. 4, 26.) * * *

Rule refused.[5]

JACKSON v. SECURITY MUT. LIFE INS. CO.

(Supreme Court of Illinois, 1908. 233 Ill. 161, 84 N. E. 198.)

Action by Isabella H. Jackson against the Security Mutual Life Insurance Company. Judgment for defendant, affirmed by the Appellate Court, and plaintiff appeals. Affirmed.[6]

This is an appeal from a judgment of the Appellate Court affirming the judgment of the circuit court of Cook county in an action in assumpsit brought by appellant to recover from appellee a balance of $7,500 alleged to be due upon an insurance policy for $10,000, issued November 17, 1897, upon the life of her husband, William S. Jackson. * * * Appellee pleaded, in addition to the general issue, a release by appellant, for $2,500, of all claims under the policy; that the policy was issued in consideration of a written application by the insured, which appellee's officers, after the death of the insured, were led by certain information to believe contained divers false representations; that appellee in good faith believed it had a complete defense to all claims and entered into the agreement with appellant

[5] In accord "at common law": Woodbury v. United States Casualty Co., 284 Ill. 227, 120 N. E. 8 (1918).

In many states it is provided by statute that a scroll or other device with the pen shall be sufficient. Stimson, Am. St. Law, §§ 1564-5. In New York the word "seal" or the letters "L. S." (locus sigilli), or anything affixed by an adhesive substance, may be used. N. Y. Statutory Construction Law (Consol. Laws, c. 22) § 13.

In other states the earlier common-law rule has been changed by judicial decision, following changes in local custom: Lorah v. Nissley, 156 Pa. 329, 27 Atl. 242 (1893); Hacker's Appeal, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861 (1888). In Alexander v. Jameson, 5 Bin. (Pa.) 238, 244 (1812), Brackenridge, J., said: "Illi robur et æs triplex. He was a bold fellow who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. * * * How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex is usually made by the scrivener drawing the instrument, and the word 'seal' inscribed within it."

[6] Parts of the report are omitted.

to compromise said claims for $2,500, which sum was paid in full satisfaction of all claims and the policy surrendered. After both parties had introduced their evidence, the jury, under an instruction from the court, returned a verdict in favor of appellee. At the time of the settlement appellant gave a receipt to appellee's respresentative, H. J. McCormick, as follows:

"Chicago, Ill., Nov. 18, 1898.

"Received of the Security Mutual Life Association twenty-five hundred dollars, in full release of all claims under this policy No. 22,819 on the life of William S. Jackson.

"Isabella H. Jackson. [Seal.]
"Widow of William S. Jackson. Seal. } Beneficiary.
"........................ Seal.

"Witness: Adelor J. Petit,
"H. J. McCormick."

It is admitted that the word "seal" after the name of appellant was on the receipt before she signed it, but the evidence is conflicting as to whether the scrawl or irregular ink line about the word "seal," indicated above by brackets, was also there at that time.

CARTER, J. * * * Appellant insists that the scrawl or irregular ink mark around the word "seal" after her name on the release was placed there after she signed it. McCormick testified that he put the scrawl about the word "seal" at the same time he filled in the body of the release and dated it, and that this was done before it was signed by the appellant. Even though it should be admitted that the scrawl was placed there afterwards by a representative of appellee, such fact does not render the instrument void, if the word "seal" was sufficient to constitute the instrument a sealed instrument without the necessity of a scrawl. Section 1 of chapter 29, p. 460, Hurd's Rev. St. 1905, reads: "That any instrument of writing, to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation, to all intents, as if the same were sealed." While this statute has been frequently construed, the precise question in the form here presented has never been passed upon by this court. In Ankeny v. McMahon, 3 Scam. 12, it was held that, where an instrument describes itself in the body as sealed, and the letters "L. S." are either written or printed opposite the signature, it is a sealed instrument, and that there is no substantial difference as to the validity or dignity of the instrument whether the party executing it writes his name opposite a scrawl previously written or printed, or actually affixes a scrawl after signing his name. In Davis v. Burton, 3 Scam. 41, 36 Am. Dec. 511, it was held that where a bond or sealed instrument purports, on its face, to be sealed by all the signers, and there are several seals attached, but not so many as there are names, the court will presume that each signer has adopted some one of the seals already attached. To the same effect is Ryan v. Cooke, 172 Ill.

302, 50 N. E. 213. See, also, Eames v. Preston, 20 Ill. 389. The recital of the seal is not essential. If the instrument be actually sealed, it will operate as such without the recital, and the general rule is that, if there is no seal at the end, the instrument will not be held to be a specialty, although the parties in the body of the writing make mention of a seal. 2 Bouvier's Law Dic. (Rawle's Rev.) p. 1020; 9 Am. & Eng. Ency. of Law (2d Ed.) p. 147, and cases cited.

Appellant contends that, our statute on this subject having been adopted substantially from that of Virginia, it must be presumed we adopted the construction given by the courts of that state up to the time the statute was adopted; that the courts of Virginia had held that an instrument such as this, even with a scrawl about the word "seal," but which did not term itself in the body of the instrument as a sealed instrument, was not one. Clegg v. Lemessurier, 15 Grat. (Va.) 108; Parks v. Hewlett, 9 Leigh (Va.) 511. This rule might obtain if this were a question of first impression and our courts had not construed the statute differently from the Virginia courts. Moreover, a more recent decision of the highest court of that state has held that the word "seal" has the same force and effect as a scrawl, under a statute very like our own. Lewis' Ex'rs v. Overby's Adm'r, 28 Grat. (Va.) 627. Considering the evidence in the most favorable light possible to appellant, our conclusion on the whole record is that this must be held a sealed instrument. * * *

Judgment affirmed.[7]

PARKS v. HAZLERIGG.

(Supreme Court of Indiana, 1845. 7 Blackf. 536, 43 Am. Dec. 106.)

SULLIVAN, J. This was an action of debt on an appeal-bond. The plaintiff declared against Hazlerigg, Kizer, Russell, and Dugan; for that the defendants, on, etc., at, etc., by their certain writing obligatory sealed with their seals, etc., acknowledged themselves to be held and firmly bound, etc. On oyer it appeared that the above defendants were named in the bond as obligors. There were four seals affixed to the bond, but it was signed only by Hazlerigg, Russell, and Dugan. Opposite to the fourth seal there was no signature. Demurrer to the declaration and judgment for the defendants.

This case presents the simple question, whether it is necessary to the validity of a bond, which has been sealed by the obligor, that it be signed by him also.

[7] Seals not consisting of cera impressa are now generally operative. Hacker's Appeal, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861 (1888), a mere dash after the name; Van Bokkelen v. Taylor, 62 N. Y. 105 (1875), a revenue stamp affixed as a seal; Pillow v. Roberts, 13 How. 472, 14 L. Ed. 228 (1851), an impression in the paper itself, like the official and corporation seals now in use; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254 (1882).

The local custom should be looked up and followed.

At common law, signing was not necessary to the validity of a deed. 2 Blacks. Comm. 305–306; Cromwell v. Grunsden, 2 Salk. 462. To this point it is not necessary to multiply authorities. It has been intimated that since the Statute of Frauds and Perjuries, signing, as well as sealing, is necessary, 2 Blacks. Comm., supra; but the better opinion seems to be, that the statute has made no alteration in this respect, since it applies only to mere agreements and not to deeds. 1 Shepp. Touch. by Preston, 56, note 24; Hurlstone on Bonds, 8. "Signing," says Gresley, in his Equity Evidence, p. 121, in speaking of the execution of a deed, "is not ordinarily essential, but it is always as well to prove it as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is prima facie evidence of sealing and delivery." The common law, therefore, remains unchanged, and signing was not essential to the validity of the bond declared on in this case. If the plaintiff can prove that Kizer, with the other defendants, sealed the bond, the proof will support the declaration, which is in the usual form. The Court erred in sustaining the demurrer.[8]

The judgment is reversed, with costs. Cause remanded.

TRINITY TERM, 1537. DYER, 19a.

An obligation was thus: "for the well and faithful payment of which I bind myself by these presents, dated, etc." and not said "sealed with my seal" nor "in witness whereof;" wherefore it was asked of the court if such an obligation be good, or not. And it seemed to SHELLEY and FITZHERBERT that the obligation is well enough, if a seal be put to the deed, etc.[9]

[8] In accord: Taunton v. Pepler, 6 Madd. 166 (1820); Cherry v. Heming, 4 Exch. 631 (1849). No doubt an instrument sealed and delivered without a signature would be regarded with doubt and suspicion.

[9] It is usual and desirable for the instrument to contain a testimonium clause, "In witness whereof I have hereunto set my hand and seal," but by the great weight of authority it is not necessary. See Brook's New Cases, 83; Peters v. Field, Hetley, 75 (1630); Eames v. Preston, 20 Ill. 389 (1858); Wing v. Chase, 35 Me. 260 (1853); Osborn v. Kistler, 35 Ohio St. 99 (1878). A few states require it in certain cases. Bradley Salt Co. v. Norfolk Importing & Exporting Co., 95 Va. 461, 28 S. E. 567 (1897); Blackwell v. Hamilton, 47 Ala. 470 (1872). Some do not require it in the case of a common-law seal but do in the case of a pen scroll seal. Alt v. Stoker, 127 Mo. 466, 30 S. W. 132 (1895). And cf. Weeks v. Esler, 143 N. Y. 374, 38 N. E. 377 (1894).

MICHELL v. STOCKWITH AND ANDREWS.

(1588. Gouldsborough, 83.)

Thomas Michell brought debt upon an obligation against Stockwith and Andrews, and the jury found a special verdict, viz. that after the issue joyned, and before the nisi prius, the seal of Andrews was fallen off & si, &c.

WINDHAM. A case hath been adjudged here, that where a bond was delivered to the custos brevium to be kept, and the mise broke the seal, and the Court adjudged that the plaintiff should be at no prejudice thereby. And here insomuch that no fault was in the plaintiff, the Court awarded that he should recover, and judgment was entered accordingly.

Y. B., 1 HENRY VI, 4, pl. 14.

Note, that COTT said, that if I make and deliver a release to you bearing a certain date, and you make an obligation to me bearing date a week earlier, and you deliver the obligation to me after the release was delivered to you, etc., in an action of debt upon this obligation it is a good plea to say that I have given a release, and it is a good replication for me to say that you have delivered the obligation to me at a time since the delivery of the release. And this was so adjudged before CHIRN and HULL, etc.[10]

CHAMBERLAIN v. STAUNTON.

(In the Common Pleas, 1588. 1 Leon. 140.)

Chamberlain brought debt upon an obligation against Staunton, and upon non est factum, the jury found this special matter, that the defendant subscribed and sealed the said obligation, and cast it upon a certain table, and the plaintiff took it without any other delivery or any other thing amounting to a delivery. And the Court was clear of opinion, that upon that matter the jury had found against the plaintiff, and it is not like the case which was here lately adjudged, that the obligor subscribed and sealed the obligation, and cast it upon a table, saying these words, this will serve, the same was held to be a good delivery, for here is a circumstance, the speaking of these words, by which the will of the obligor appeareth, that it shall be his deed.[11]

[10] A deed is effective from the day of its delivery, not from the day of its date. Stone v. Bale, 3 Lev. 348 (1693); Y. B. 34 Lib. Ass. pl. 7; Goddard's Case, 2 Co. Rep. 4 b (1584).

That a deed need not be dated at all, see Kellway, 34 pl. 1 (13 Hen. VII).

[11] S. c. Cro. Eliz. 122, Owen, 95.

"Delivery may be effected by words without acts, or by acts without words, or by both acts and words." Ruckman v. Ruckman, 32 N. J. Eq. 259, 261 (1880);

ANONYMOUS.

(1596. 2 Anderson, 41, No. XXVII.)

An instrument poll (unindented) was made in which J. S. covenanted with R. C., and in the very same instrument R. C. covenanted with J. S., and the covenants were both in express terms in the instrument. The said R. C. first delivered the instrument ensealed to the said J. S. as his deed, and afterwards the said J. S. delivered it as his deed ensealed by him to the said R. C. The question was whether this was the deed of J. S. or of R. C. or of both. It was adjudged by THE COURT that this was the deed of both the one and the other, and that he who had possession of it could maintain an action of covenant against the other, irrespective of whether he held by the first or the second delivery, for both parties are equally bound.[12]

XENOS v. WICKHAM.

(In the House of Lords, 1867. L. R. 2 H. L. 296.)

The plaintiffs were owners of the ship Leonidas, and the defendant is the representative of the Victoria Insurance Company. The declaration alleged, in the usual form, that the plaintiffs caused their vessel to be insured by this company for the space of twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at £1,000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. The defendant denied the insurance as alleged.

It appeared on the trial that the plaintiffs employed Mr. Lascaridi, an insurance broker, to secure a policy on the Leonidas for £1,000.

Jordan v. Davis, 108 Ill. 336 (1884); Johnson v. Gerald, 169 Mass. 500, 48 N. E. 764 (1897); Thoroughgood's Case, 9 Co. Rep. 136 b (1612), words not necessary; Shelton's Case, Cro. Eliz. 7 (1582). Mere intention is insufficient. Bush v. Genther, 174 Pa. 154, 34 Atl. 520 (1896); Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22 (1897).

The validity of a delivery of any formal document is determined by the same rules, whether it is a sealed instrument or not. See Sarasohn v. Kamaiky, 193 N. Y. 203, 86 N. E. 20 (1908), delivery of a certified copy, or counterpart, of a written contract.

Delivery of Incomplete Document.—It was often held that the filling of material blanks after delivery of the deed invalidated the whole. Powell v. Duff, 3 Camp. 181 (1812); Buller, N. P. 267; Cross v. State Bank, 5 Ark. 525 (1844); State to Use of Rosett v. Boring, 15 Ohio, 507 (1846). A new delivery after filling the blanks is effective. Hudson v. Revett, 5 Bing. 368 (1829). The doctrine of estoppel is often invoked to sustain such instruments in the hands of innocent holders for value. Butler v. U. S., 21 Wall. 272, 22 L. Ed. 614 (1874); White v. Duggan, 140 Mass. 18, 2 N. E. 110, 54 Am. Rep. 437 (1885); Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328 (1893).

[12] Where a lease is to be executed by both parties, the delivery of the document, signed and sealed by one party, for the purpose of execution by the other, does not make it an operative instrument. Diebold Safe & Lock Co. v. Morse, 226 Mass. 342, 115 N. E. 431 (1917).

He called at the defendant's office and they agreed upon the issuance of such a policy at a definite premium. The Company gave credit to Lascaridi, charging him personally with the premium, and Lascaridi collected the premium from the plaintiffs. A policy in the usual form was drawn up in accordance with Lascaridi's instructions, duly signed and sealed, but was held by the company's clerks until the following month when Lascaridi was requested to make payment. He did not pay, and the policy remained with the company.

Several months later, the Leonidas was lost, and suit was brought for the insurance. The Lord Chief Justice directed a verdict for the defendant, his decision being later affirmed by the Exchequer Chamber. On appeal to the House of Lords, the Judges were summoned, the following attending: POLLOCK, C. B., PIGOTT, B., and BLACKBURN, WILLES, MELLOR, and SMITH, JJ. The following question was put to the Judges:

"Whether, on the facts stated in the special case, the Victoria Fire & Marine Insurance Company was, when the ship Leonidas was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned?"

Mr. Justice BLACKBURN. I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the defendant's company to the plaintiffs.[13] * * *

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, shew that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the

[13] Only so much of the case is here stated as deals with the question of delivery. The concurring opinions of Chelmsford, L. C., Cranworth, L. J., Pigott, B., and Mellor, J., and the dissenting opinions of Willes and Smith, JJ., are omitted.

company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a baillee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In Butler and Baker's Case (3 Co. Rep. 26), it is said: "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it in pais, and thereby the obligation will lose its force." [14] I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use

[14] *Delivery in Escrow.*—Delivery can be made to a third person to be held in escrow until the fulfillment of some condition, and the fact that such delivery was conditional may be proved by parol evidence. See Pym v. Campbell, 6 El. & Bl. 370 (1856). By the weight of authority a delivery directly to the other party to the deed or contract makes the document operative at once, and parol evidence is not admitted to show that the delivery was conditional and intended as a delivery in escrow. This rule is disapproved by Wigmore, Evidence, § 2404 et seq. Parol evidence that such a delivery was conditional was allowed in an action on a sealed contract in Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600 (1894). See Anson on Contracts (Corbin's Ed. 1919) § 346, and notes; Conditions in the Law of Contract, 28 Yale L. Jour. 764–768 (1919).

After delivery in escrow, the grantor has no power of revocation. "A subsequent change of intention, if any were shown, could not affect the delivery thus completed." Moore v. Downing, 289 Ill. 612, 124 N. E. 557 (1919).

See, also, Braman v. Bingham, 26 N. Y. 483 (1863); Jones v. Jones, 101 Me. 447, 64 Atl. 815, 115 Am. St. Rep. 328 (1903), conditional delivery of promissory note.

of the assured. There is neither authority nor principle for qualifying the statement in Butler and Baker's Case, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider it to be, in other words, whether it was shewn that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case, the assured could not have refused the deed in pais, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it in pais.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

The House decided in harmony with Blackburn's opinion. Judgment reversed; and judgment given for the plaintiffs.[15]

[15] Of course delivery of the policy might not be necessary to the valid acceptance of the insured's application and offer for insurance. In such case the undelivered policy would not itself be an operative fact, but there would be a parol agreement without it. Weber v. Prudential Ins. Co. of America, 284 Ill. 326, 120 N. E. 291 (1918); Cherokee Life Ins. Co. v. Brannum, 203 Ala. 145, 82 South. 175 (1919).

The mailing of the policy to the company's own agent operates as delivery, if the agreement is perfect and no act other than physical transfer of the document is to be done by the agent. Williams v. Philadelphia Life Ins. Co., 105 S. C. 305, 89 S. E. 675 (1916). But otherwise if the agent is not to deliver it until after a health investigation. Bowen v. Prudential Ins. Co. of America, 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587 (1913).

Acceptance by Grantee.—It has often been held in America that delivery is not complete until an expression of assent, by the grantee or his representative. Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75 (1898); Bowen v. Prudential Ins. Co., of America, 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587 (1913); Derry Bank v. Webster, 44 N. H. 264 (1862); Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231, 22 Atl. 572, 13 L. R. A. 676 (1891); New York Life Ins. Co. v. Manning, 124 N. Y. Supp. 775 (1910), affirmed 156 App. Div. 818, 142 N. Y. Supp. 1132 (1913); Anon, 2 Rolle Rep. 238 (1622). "While acceptance will often be presumed where the deed is beneficial to the grantee, yet where the deed imposes obligations, and without remuneration, it is absolutely essential that the grantee shall accept it." Sellers v. Rike, 292 Ill. 468, 127 N. E. 24 (1920). Cf. Roberts v. Security Co., [1897] 1 Q. B. 111.

UNITED STATES FIDELITY & GUARANTY CO. v. RIEFLER et al.

(Supreme Court of the United States, 1915. 239 U. S. 17, 36 Sup. Ct. 12, 60 L. Ed. 121.)

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit presenting questions as to whether a certain instrument was a completed contract of indemnity or guaranty. Answered in the affirmative.

Mr. Justice HOLMES delivered the opinion of the court:

The facts certified are simple. One Dooling, being required to give an official bond, applied in Springfield, Illinois, to an agent of the plaintiff in error, a bonding company having its home office in Baltimore, Maryland, was informed that the company would become his surety only on condition that he furnish indemnity, and was handed a printed form of indemnity bond. The defendants in error, at Dooling's request, signed and sealed this bond for the purposes therein expressed, and authorized Dooling to deliver it to the company through its Springfield agent, which Dooling did. The agent, who is not shown to have had authority to execute bonds, forwarded it for acceptance. The company, relying upon it, became surety for Dooling. One of the recitals of the bond was that the company "has become or is about to become surety, at the request of the said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof." The condition was that Dooling should keep the company indemnified for all loss by reason of its suretyship. A copy of the company's bond was not attached and at the date of the indemnity bond had not been executed. Dooling was not a party to the indemnity bond. The defendants in error received no pecuniary consideration for their act and were not notified of the acceptance of their bond or of the execution of the other by the company. The questions propounded are: "(1) Was the instrument which was signed by Riefler and Hall, and relied on by the company, a completed contract of indemnity or guaranty? (2) Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the company, in accordance with Davis v. Wells, F. & Co., 104 U. S. 159, 26 L. Ed. 686, and Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. Ed. 480, 6 Sup. Ct. 173? (3) And, if in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?"

If the bond in suit had been delivered directly to the company and had been pronounced satisfactory there would have been no need to notify Riefler and Hall of the company's subsequently executing

the Dooling bond. Riefler and Hall assumed an obligation in present words to indemnify the company against an exactly identified suretyship that the company had gone or was about to go into, as they stated. The company was about to go into it and went into it. If Riefler and Hall had made only a parol offer in the same terms, the company, by becoming surety, would have furnished the consideration that would have converted the ofter into a contract; but notice is held necessary in Davis Sewing Mach. Co. v. Richards. If it had been a covenant, the company's act would have satisfied the condition upon which the covenant applied. O'Brien v. Boland, 166 Mass. 481, 483, 44 N. E. 602. As it was a bond, the company's entering into its undertaking in like manner furnished the subject-matter to which the obligation by its terms applied. In the case of either covenant or bond there was no need for notice that an event had happened that the defendants' contract contemplated as sure to happen, if it had not already come to pass.

The only ground for hesitation is that seemingly the bond in suit might have been rejected by the company as unsatisfactory, and that therefore it may be argued that Riefler and Hall were entitled to notice that it had been accepted. But we are of opinion that, in the circumstances of this case, it is reasonable to understand that they took the risk. They are chargeable with notice that by their act their bond had come to the hands of the company. The bond on its face contemplated that the company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee, and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery, by which the obligee might have made it ineffectual, has not been fulfilled. The contract is complete without the notice (Butler's Case, 3 Coke, 25, 26b; Xenos v. Wickham, L. R. 2 H. L. 296; Pollock, Contr. [8th Ed.] 7, 8), and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied (Bird v. Washburn, 10 Pick. [Mass.] 223). In Davis v. Wells, F. & Co. the guaranty was an open, continuing one up to $10,000, but it was under seal, and was held binding, although additional reasons were advanced.

We answer the first question: Yes.

Mr. Justice McKENNA dissents.

BELLEWE, 111.

WADHAM. In debt on contract the plaintiff must show in his count for what cause the defendant became his debtor. Otherwise in debt on obligation, for the obligation is contract in itself.[16]

ALLER v. ALLER.

(Court of Errors and Appeals of New Jersey, 1878. 40 N. J. Law, 446.)

The action was brought on the following instrument, viz.: "One day after date, I promise to pay my daughter, Angeline H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. $312.61. This note is given in lieu of one-half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. [L. S.] Witnesses present, John J. Smith, John F. Grandin."

Both subscribing witnesses were examined at the trial, and it appeared that there was a note for $1000, dated May 1st, 1858, given by said Peter H. Aller to Mary Ann Aller, upon which there were endorsements of payments—April 1st, 1863, $50; April 1st, 1866, $46; April 1st, 1867, $278.78.

Mary Ann Aller, the wife, died, and on the day after her burial, Peter H. Aller told his daughter, the plaintiff, to get the note, which he said was among her mother's papers. She brought it, read the note; he said there was more money endorsed on it than he thought; requested the witness John F. Grandin to add up the endorsements and subtract them from the principal, to divide the balance by two, and draw a note to each of her daughters, Leonora and Angeline, for one-half. After they were drawn by the witness, Peter H. Aller said: "Now here, girls, is a nice present for you," and gave them the notes.

[16] In this connection study McMillan v. Ames, 33 Minn. 257, 22 N. W. 612 (1885), ante, p. 200.

In accord: Candor and Henderson's Appeal, 27 Pa. 119 (1856); Cosgrove v. Cummings, 195 Pa. 497, 46 Atl. 69 (1900); Storm v. United States, 94 U. S. 76, 24 L. Ed. 42 (1876); Barrett v. Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876 (1893).

"Specialties—Those formal common-law contracts under seal—were enforced in the absence of an allegation of consideration, not because it was conclusively presumed that they were founded on a consideration, but because consideration was not an essential element to such contracts. Contracts under seal were enforceable at common law because of the formality of their execution, and such contracts were fully recognized and enforced long before the doctrine of consideration appeared in the law." Lacey v. Hutchinson, 5 Ga. App. 865, 64 S. E. 105 (1909), holding, however, that the rule is not applicable to a sealed instrument of a sort unknown to early common law.

Angeline was directed to put the old note back among her mother's papers. Grandin was afterwards appointed administrator of Mary A. Aller, and as such, he says, he destroyed the old note. * * *

The verdict was for the plaintiff, and a rule to show cause was allowed at the Circuit.

The opinion of the court was delivered by

SCUDDER, J.[17] * * * But it is said that the act of April 6th, 1875, (Revision 1877, p. 387, § 52,) opens it to the defence of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads—"that in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," &c.

Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said: "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above-quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between "nudum pactum" and "pactum vestitum," by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification. 1 Parsons on Cont. (6th Ed.) *427.

The opinion of Justice Wilmot, in Pillans v. Van Mierop, 3 Burr. 1663, is instructive on this point.

The early case of Sharington v. Strotton, Plow. 308, gives the

[17] Parts of the opinion have been omitted.

same cause for the adoption of the sealing and delivery of a deed. It says, among other things, "because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation, &c. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. IV, if I by deed promise to give you £20 to make your sale de novo, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration, viz., the will of the party that made the deed." It would seem by this old law, that in case of a deed the saying might be applied, stat pro ratione voluntas.

In Smith on Contracts, the learned author, after stating the strictness of the rules of law, that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb. Eq. 335, note a. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be nudum pactum." See, also, 1 Chitty on Cont. (11th Ed.) 6; Morly v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 T. R. 350, note a.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common-law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defences have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defence, the other takes away the conclusive evidence of a sufficient considera-

tion heretofore accorded to a sealed writing, and makes it only presumptive evidence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration. * * *

The rule for a new trial should be discharged.[18]

PATTERSON v. CHAPMAN et al.

(Supreme Court of California, 1918. 179 Cal. 203, 176 Pac. 37, 2 A. L. R. 1467.)

Two actions by Etta I. Patterson against M. C. Chapman and others, executors of the estate of Wm. E. Dargie, deceased. Judgments in each case for the defendants, and plaintiff appeals. Judgments reversed.

PER CURIAM. In these two appeals from judgments entered in favor of the defendants the plaintiff attacks the rulings of the court sustaining general demurrers to the complaints without leave to amend. The question involved in each case is the same.

It appears from the complaints that William E. Dargie made, executed and delivered to plaintiff an instrument in writing, a copy of which as set out therein is as follows:

"Oakland, Jan. 16—08.

"For value received I hereby instruct the administrator of my estate to pay to Miss Etta Patterson, formerly of Edgewood, Cal., the

[18] By a later statute (P. L. 1900, p. 366) it was further provided that in actions upon sealed instruments the defendant may plead want or failure of consideration, the same as if the instrument were not sealed. See United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. Law, 286, 78 Atl. 203, Ann. Cas. 1912A, 412 (1910).

sum of fifty thousand dollars, within one year from the date of my death—or two years at the least. Interest at the rate of six per cent. per annum is to be paid on said sum, quarterly, till said amount is paid in full. Said fifty thousand dollars may be paid in real estate or stocks and bonds, which I may own at the time of my death, if cash cannot be paid without sacrificing my estate, but said stocks, bonds or real estate, must be the full value of cash at the date of delivery. I desire this request and order to be carried out promptly and without question of any kind. W. E. Dargie."

Dargie died testate on February 10, 1911, and thereafter plaintiff duly presented her claim based upon said instrument to the executors of his estate, by whom it was rejected.

Some confusion of thought may arise if there is not kept constantly in mind the difference between the question of the sufficiency of the complaint as a pleading and the question of the sufficiency of the instrument as evidence of a valid contract or obligation for the payment of money. At common law a seal was necessary in order to create the presumption that an executory contract was founded upon a valuable consideration, and therefore, if it was not under seal, the rule of pleading was that the complaint or declaration must allege that the contract was executed for a valuable consideration. Our Civil Code declares that "a written instrument is presumptive evidence of a consideration." Section 1614. Hence it follows that in this state, in an action upon an unsealed written instrument as evidence of an obligation to pay money, the common-law rule applicable to sealed instruments prevails and it is not necessary to make the additional allegation that it was made for a valuable consideration. Henke v. Eureka Endowment Ass'n, 100 Cal. 429, 34 Pac. 1089; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. Hence the complaints are not rendered bad because of the failure to make such allegation.

The sole question presented for determination is whether or not the writing upon which plaintiff relies is in form and character testamentary as held by the trial court, or as claimed by appellant it is a contract by virtue of the execution and delivery of which Dargie in his lifetime created an obligation to be discharged after his death by his executors.

If the instrument created a debitum in præsenti, an obligation existing in the lifetime of the obligor, the fact that it was not to be discharged until after Dargie's death renders it none the less enforceable as a demand against his estate. 8 Cyc. 1007. "Where a testator has not, in a paper payable post mortem, recognized himself either by intendment, or language, as under legal indebtedness to the party in whose favor it is made, such instrument is without consideration, purely voluntary, and testamentary in its character." Kirkpatrick v. Pyle, 6 Houst. (Del.) 569. Any memorandum in writing, however, regardless of its form, and whether payable in money or specific property, whereby a debt is acknowledged by one as owing to another to

whom the memorandum is delivered is sufficient to create such obligation. "Any words which prove a man to be a debtor will charge him with the payment of the money." Cover v. Stem, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406. Hence, conceding the document in question is not a negotiable instrument, draft, check, or bill of exchange, as claimed by respondent, the want of such character is immaterial if terms are employed therein which at the time of its execution created a debitum in præsenti. Banker v. Coons, 40 App. Div. 572, 58 N. Y. Supp. 47; Robbins v. Robbins' Estate, 175 Mo. App. 609, 158 S. W. 400; Kirkpatrick v. Pyle, supra.

It is true the instrument contains no express promise to pay, but where the existence of an indebtedness based upon consideration is acknowledged the law implies a promise to pay it (Ward v. Bush, 59 N. J. Eq. 144, 45 Atl. 534), and the fact that payment is postponed until after the death of the party so acknowledging it is immaterial (Robbins v. Robbins' Estate, supra; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487).

The instrument being signed by Dargie, every statement therein must be considered as his declaration and given effect accordingly. In the absence of any defense on the ground of fraud, mistake, or want of consideration, each declaration therein made, or necessarily implied from its language, must be given the full effect that the meaning carries. The instrument, therefore, contains a declaration by Dargie that in his lifetime, and before or at the time of its execution, he had received from the plaintiff something of value, a value which he considered equal to $50,000, and that for that consideration his executors are ordered and directed to pay to the plaintiff that sum in the manner and at the time specified. This precludes the idea of a gift to her. Its meaning is that he is ordering the payment to be made to her as a return for the value which he had received from her. This makes it a payment or recompense, not a gift. Furthermore, as it was an admission by him that in his lifetime he had received from her that value, not as a gift or as payment of any obligation to him, this fact alone, without any order to his executors to pay, would, in law, raise an implied promise by him to pay her for the benefit so received, and would be a sufficient foundation for a claim against the estate for such value. Cover v. Stem, supra. The only effect of the order, it having been accepted by her, is to merge the implied contract, and to modify it, so that she is thereby obliged to accept payment at the time and in the manner therein provided.

An examination of the authorities cited by respondent, chief among which is that of Cover v. Stem, supra, discloses that the instruments under consideration and constituting the subjects of the actions contained no promise and no words which by intendment or otherwise could be construed as acknowledging an indebtedness. Thus, in Cover v. Stem, supra, Moore v. Stephens, 97 Ind. 271, Pena v. New Orleans, 13 La. Ann. 86, 71 Am. Dec. 506, and other like cases, it was

held that in the absence of a promise, and without recital or acknowledgment of consideration, an instrument containing a mere direction to the executors to pay the sum mentioned was testamentary in character. And to like effect are the cases in this state, namely, Wisler v. Tomb, 169 Cal. 382, 146 Pac. 876, and Tracy v. Alvord, 118 Cal. 655, 50 Pac. 757, both of which involved notes shown to have been given without consideration, and in the first of which such fact appeared from the complaint. On the other hand, in the cases of Banker v. Coons, supra, Robbins v. Robbins' Estate, supra, Kirkpatrick v. Pyle, supra, Hatch v. Gillette, 8 App. Div. 605, 40 N. Y. Supp. 1016, and Ward v. Bush, supra, where the instruments were executed under seal, but in addition to the fact presumed therefrom, as in the case at bar, contained the words, "For value received," or those of like import, it was held they created a debitum in præsenti, which obligation being established, the law implied a promise to pay it.

The judgments are reversed.[19]

I dissent: WILBUR, J.

[19] See, also, Krell v. Codman, 154 Mass. 454, 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 260 (1891).

Statutory Changes.—(1) Some states, while preserving the distinction between sealed and unsealed instruments, make the presence of the seal only presumptive evidence of consideration, and permit the presumption to be rebutted by evidence of no consideration. Ala. Code 1896, § 3288; Mich. Comp. Laws 1895, §§ 10185–10186; N. J. Gen. St. 1895, p. 1413, § 72; N. Y. Code Civ. Proc. § 840 ("upon an executory instrument"); Or. B. & C. Comp. 1902, § 765; Wis. St. 1898, § 4195.

(2) Many states abolish all distinction between written sealed and unsealed instruments, and most of these provide that any written contract shall have a rebuttable presumption of consideration. Cal. Civ. Code, § 1629; Idaho Civ. Code 1901, § 2730; Iowa Code, § 3068; Ind. Burns' Ann. St. 1901, § 454; Kan. Gen. St. 1897, c. 114, §§ 6, 8; Ky. St. §§ 471–472; Minn. Rev. Laws 1905, § 2652; Miss. Code 1892, §§ 4079–4082; Mo. Rev. St. 1906, §§ 893, 894; Mont. Civ. Code 1895, §§ 2190, 2169; Neb. Comp. St. 1909, c. 81, § 1; N. D. Rev. Code 1905, § 5338; Ohio Rev. St. 1890, § 4; S. D. Ann. St. 1901, § 4738; Tenn. Milliken & V. Code, §§ 2478–2480; Tex. Rev. St. arts. 4862, 4863; Utah Rev. St. 1898, §§ 1976, 3399; Wyo. Rev. St. 1899, § 2749. See construing such statutes, Bender v. Been, 78 Iowa, 283, 43 N. W. 216, 5 L. R. A. 596 (1889), written release of debt upon part payment not binding; Winter v. Kansas City Cable Ry. Co., 160 Mo. 159, 61 S. W. 606 (1900), same, release under seal; Hale v. Dressen, 73 Minn. 277, 76 N. W. 31 (1898), same; J. B. Streeter, Jr., Co. v. Janu, 90 Minn. 393, 96 N. W. 1128 (1903), undisclosed principal liable on sealed contract; Ames v. Holderbaum (C. C.) 44 Fed. 224 (1890), same; Bradley v. Rogers, 33 Kan. 120, 5 Pac. 374 (1885), private seals abolished; Garrett v. Belmont Land Co., 94 Tenn. 459, 29 S. W. 726 (1894), same; Murray v. Beal, 23 Utah, 548, 65 Pac. 726 (1901), same.

CHAPTER IV

OPERATION OF CONTRACT AND OF FACTS SUBSEQUENT TO ACCEPTANCE[1]

(And Herein of the Interpretation and Construction of Contracts, and the Effect of Breach)

INTRODUCTORY NOTE

---

1. What is a condition? A condition is an operative fact, the occurrence of which will create some new legal relation (or extinguish an existing legal relation). It is generally not a promise, although the performance of an act promised is often a condition. A not uncommon use of the word is to denote almost any term or provision in a contract (i. e., a group of words). This use should be avoided. A group of words may determine that some fact shall operate as a condition, but the group of words are not themselves the condition.

2. When will a fact operate as a condition? It will so operate when the parties to a contract agree that it shall and express this agreement either by words or by conduct from which it may reasonably be inferred (or implied). It will likewise so operate when the court believes that justice requires it, even though the parties neither had nor expressed any intention regarding it.[2] Conditions may therefore be classified as express, implied, and constructive.

3. What are conditions precedent and subsequent? A condition may be regarded with reference to the legal relations that it extinguishes or those that it helps to create. As to the former, it is subsequent; as to the latter, it is precedent.[3] The particular legal relation

[1] See Anson on Contract (Corbin's Ed.) chapter XIII.

[2] "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions." Justice O. W. Holmes, "The Path of the Law, 10 Harv. L. Rev. 466. See, also, Leonard v. Dyer, 26 Conn. 172, 178, 68 Am. Dec. 382 (1857); Bankes, L. J., in Grove v. Webb, 114 L. T. 1082, 1089 (1916).

[3] In the sense as herein defined, a condition is never "concurrent." It precedes the legal relation that it creates, and it is subsequent to the relation that it extinguishes. But two mutual promises may require concurrent performances. In such cases a tender of performance by either one may be a condition precedent to an instant and enforceable duty in the other.

with respect to which a condition is to be judged varies with the case, but it is usually the legal duty of instant performance for breach of which an action lies. When the creation of a particular legal duty requires the existence of four facts, all four are conditions precedent; if three of them already exist, the fourth is a condition precedent. The term "conditional duty" is commonly used to indicate that three (or some) of the necessary facts exist or have occurred and that the enforceable duty awaits only the occurrence of the fourth (or others).

4. Are offer, acceptance, consideration, delivery, legality of object, and the like, conditions? They might be so called, because in their absence no new contractual relations will exist; but it is not customary to describe them as conditions, and it is convenient to restrict the term condition to apply to an operative fact subsequent to acceptance and prior to discharge. The legal relations created by acceptance are called "contract" or primary obligation (primary relations). The question of conditions usually involves an inquiry as to breach of contract and the existence of new legal relations called secondary obligations.

5. What is a dependent promise? It is one that creates no instant duty, but instead a duty conditional upon the performance (or tender thereof) by the promisee of a return promise made by him. An independent promise is one that is not thus conditional.

6. What sorts of facts customarily operate as conditions? They are many, and the question must be answered by a study of the cases. They may be classified according to a number of different principles, each having a certain usefulness and convenience.

I. Express; implied; constructive. (See 2, supra.)

II. Precedent; subsequent. (See 3, supra.)

III. (a) Acts or events not in themselves the consideration for the promise sued on. These are usually express; e. g., architect's certificate.

(b) Facts constituting the expected equivalent, being generally acts of the promisee (he sometimes having promised to perform them and sometimes not). These are more often not express.

IV. (a) Acts or events that are certain to occur at a definite time; e. g., the arrival of a future date.

(b) Those certain to occur, but at an uncertain time; e. g., the death of X.

(c) Those not certain to occur at all; e. g., the arrival of a ship, or the construction of a building.

V. (a) Conditions not within the volitional control of any person; e. g., a fair wind, as in Constable v. Clobery.

(b) Those within the volitional control of a third person; e. g., architect's certificate, or the king's return to London.

(c) Those within the volitional control of the promisor. See Scott v. Moragues Lumber Co. (1918) 202 Ala. 312, 80 South. 394, infra, 492.

(d) Those within the volitional control of the promisee; e. g., ordinary option contracts.

VI. By the Louisiana Code, conditions precedent and subsequent are called suspensive and resolutory, each of these being again subdivided into casual and potestative. See discussion and application of these code provisions in New Orleans v. Texas & Pac. R. Co. (1897) 171 U. S. 312, 332, 18 Sup. Ct. 875, 43 L. Ed. 178.

No doubt still other classifications are useful, and no classification is indispensable. The cases present facts in many combinations and they are not easily classified. In some degree, the cases herein are arranged according to I and II, supra; but the chief purpose underlying the arrangement was to make the cases most readily teachable.

SECTION 1.—EXPRESS CONDITIONS PRECEDENT [4]

(Conditions Distinguished from Promises and Covenants, and Express Conditions Illustrated)

CONSTABLE v. CLOBERY.

(In the King's Bench, 1626. Latch, 49.)

Action of covenant. The plaintiff alleged that he had hired his ship to the defendant and that by charter party indented he had covenanted with the defendant and one A. that the ship should sail with the next wind on a voyage to Cadiz. The defendant and A. jointly and severally covenanted with the plaintiff that if the ship went the intended voyage and returned to the Downs the plaintiff should receive a certain sum as freight, but if it should go on to Amsterdam they would pay to the plaintiff so much more. The plaintiff further alleged that the ship went to Cadiz and returned to the Downs, and that the defendant had not paid the sum agreed upon for freight, primage, etc. The defendant pleaded a special plea and denied particularly that the ship had sailed with the next wind.

[4] Several cases are here printed merely as illustrations of different sorts of Express Conditions. There is no distinct boundary line between express and implied conditions, since the intention of men is expressed in various ways, with varying degrees of clearness and accuracy. In general, the effort of the courts is to interpret the words and other conduct of the parties, so as to arrive at their intention; so that, in dealing with Implied Conditions later, we shall constantly deal also with "express" conditions as well.

The plaintiff demurred to this plea, raising the question whether it set up a good defense. STONE argued that it did not, because the substance of the covenant is that the ship should sail and not that it should sail with the next wind, inasmuch as the wind may change and vary with the passing hour. And he said that this was proved by the covenant itself, which is to give so much as freight, that is to say, for going the voyage, and not for sailing with the next wind (citing Ughtred's Case, 7 Co. Rep. 9). THE COURT held that the plea was bad. But JONES, J., said that if the defendant had covenanted that if the ship should sail for Cadiz with the next wind he would pay the agreed sum, then the plaintiff ought to allege that he had sailed with the next wind. DODERIDGE, J., gave as his reason that the wind is uncertain, and therefore is not the substance of the covenant.[5]

ANDERSON et al. v. ODD FELLOWS' HALL OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey, 1914. 86 N. J. Law, 271, 90 Atl. 1017.)

Action by John B. Anderson and others against the Odd Fellows' Hall of Jersey City. Judgment for defendant, and plaintiffs appeal. Reversed.

BERGEN, J.[6] This action was instituted to recover the value of extra work and material furnished by the plaintiffs, in excess of what a contract between the plaintiffs and defendant for the construction of a building required. The plaintiffs had judgment in the district court for $297, and the defendant appealed to the Supreme Court, where the judgment below was reversed, and a judgment of nonsuit ordered entered in the district court for two reasons, the first being that a covenant contained in the contract, requiring arbitration in certain matters, was a condition precedent, and that without its performance the plaintiffs could not recover.

At the close of the testimony the defendant admitted that as to $227 of plaintiffs' claim written orders required by the contract had been produced, and to that extent the claim was not disputed on that ground, but insisted that, as some of the items were disputed, arbitration as to all was a condition precedent, and this the Supreme Court sustained. To affirm this judgment will sustain a nonsuit where a part of the plaintiffs' claim is not in any wise subject to the arbitration agreement, even if it should be a condition precedent, because not

[5] Not all of the report is here translated. The case is also reported in Palmer, 397, and Popham, 161.

See, also, Shadforth v. Higgin, 3 Camp. 385 (1813), and Ollive v. Booker, 1 Ex. 416 (1847), post, pp. 692, 693.

[6] A condition precedent is an operative fact that must precede the existence of an enforceable right. Part of the opinion not dealing with the distinction between a condition and a covenant is omitted.

disputed. But, in our opinion, the covenant for arbitration contained in this contract is not a condition precedent to an action for the recovery of the extra work sued for.

The contract on this subject provides that: "No alteration shall be made in the work except upon written order of the committee; the amount to be paid by the owner, or allowed by the contractors by virtue of such alterations, to be stated in said order. Should the owner and the contractors not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree the determination of said amount shall be referred to arbitration as provided for in article XII of this contract."

Article XII provides that: "In case the owner and contractors fail to agree in relation to matters of payment, allowance, or loss, referred to in articles III or VII of this contract, or should either of them dissent from the decision of the committee referred to in article VII, * * * the matter shall be referred to a board of arbitration, to consist of one person selected by the owner and one person selected by the contractors, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto."

The condition to arbitrate, as expressed in this contract, is not, by its terms, made a condition precedent to an action to recover for extra work.[7] It is nothing more than an agreement to arbitrate disputes regarding the amount to be allowed for extra work ordered and performed, in cases where the parties cannot agree, revocable at any time before it is fully executed and an award made, and the bringing of a suit amounts to a revocation. Reed v. Washington Ins. Co., 138 Mass. 572.

In the case of Wolff v. Ins. Co., 50 N. J. Law, 453, 14 Atl. 561, the agreement contained a stipulation that no action should be maintained until after an award be obtained fixing the amount of the claim, as provided by the agreement to arbitrate. This was held to be a condition precedent, but Chief Justice Beasley, who delivered the opinion of the court, distinguished such condition from a case where the agreement merely declares that, if the parties shall disagree as to the amount, such difference shall be arbitrated, which is the situation in the present case, for there is here no contract that the amount shall not be recoverable by suit until after arbitration, or the recovery limited to a sum to be fixed by arbitrators, or that arbitration shall be a condition precedent to a right of action, and therefore the arbitration covenant in this contract is not a condition precedent. Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598. This question was considered in Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, where the condition was similar to that in this case, there being "no provision whatever post-

[7] This sentence should read: The express terms used by the parties do not make the award of arbitrators a condition precedent to the right to payment.

poning the right to sue until after an award," and it was there held that the agreement to arbitrate was not a condition precedent, and the court distinguished that case from Hamilton v. Liverpool & L. & G. Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, where the condition was that no suit should be sustained until after an award, in which case the obtaining of an award was held to be a condition precedent. To the same effect is Mutual Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623.

The weight of authority favors the rule that, where the contract provides for submission to arbitration of matters of dispute arising under it, such agreement is a condition precedent, where it is provided that an action can only be brought for a sum to be fixed by arbitrators, or that no action shall be brought until there has been an arbitration, or that arbitration shall be a condition precedent to a right of action, but, where no such covenants are present, and there is simply a covenant to pay, and another covenant to arbitrate, they are distinct and collateral, and the covenant to arbitrate [the arbitration and award] is not in such case a condition precedent. The covenant to arbitrate in the present case being distinct and collateral, and the right of action not having been made dependent upon the result of arbitration, it is not a condition precedent, and the judgment of the Supreme Court based upon this ground cannot be sustained. * * *

Reversed, and new trial granted.[8]

[8] Cases holding that a term of the contract creates a condition, but is not a promise, and creates no duty, are Home Ins. Co. v. Union Trust Co., 40 R. I. 367, 100 Atl. 1010, L. R. A. 1917F, 375 (1917); Coykendall v. Blackmer, 161 App. Div. 11, 146 N. Y. Supp. 631 (1914).

For cases holding that the particular proviso is promissory, and creates a duty, and not a mere condition, see St. Paul Fire & Marine Ins. Co. v. Upton, 2 N. D. 229, 50 N. W. 702 (1891); Boston Safe-Deposit & Trust Co. v. Thomas, 59 Kan. 470, 53 Pac. 472 (1898). Some cases indicate a great readiness to find a promise by mere inference or implication. Dupont De Nemours Powder Co. v. Schlottman, 218 Fed. 353, 134 C. C. A. 161 (1914); Patterson v. Meyerhofer, 204 N. Y. 96, 97 N. E. 472 (1912). Cf. Clark v. Hovey, 217 Mass. 485, 105 N. E. 222 (1914).

In Green County, Ky., v. Quinlan, 211 U. S. 582, 29 Sup. Ct. 162, 53 L. Ed. 335 (1908), a county issued bonds to assist in construction of a railroad, "upon condition" that the railroad be constructed through Green county. It was held that "that which is called a condition is really but a covenant or agreement, to be performed independently of the counter obligation with which it is associated." This holding was largely due to the fact that the money was to be used in the construction and not afterwards.

A representation of fact made in the formal document may be such that its truth is a condition. If the statement is "warranted" to be true, it will often be held to be a promise, and its truth to be a condition. See Yorkshire Ins. Co. v. Campbell, [1917] A. C. 218; Harrison v. Knowles, [1918] 1 K. B. 608. Cf. Globe Mut. Life Ins. Ass'n v. Wagner, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169 (1900); Rathman v. New Amsterdam Casualty Co., 186 Mich. 115, 152 N. W. 983, L. R. A. 1915E, 980, Ann. Cas. 1917C, 459 (1915). See Ollive v. Booker, post, 693.

production of these. He argues that the policy is to be void only for the failure to do both, and that no penalty attaches for the failure to perform one of the conditions. What is meant by the expression "to keep and produce?" The word "keep" is a general term which is variously applied, and is often used in more than one sense in the same instrument or writing. It may mean to make or enter or to retain and preserve. It is plain that the meaning of the words "keep a set of books," as used in the second condition of the warranty, is that the insured shall make and enter in books a record of the business transacted by him. As there used, the words have no reference to the preservation and safety of the books when they are made.

In the third paragraph of the warranty the word has a definite signification. There it means to hold, care for, or preserve, which is the primary meaning of the word. It implies that the books when made and the inventories when taken shall be preserved as against destruction or loss, and to that end it is provided that they shall be placed or kept securely locked in a fireproof safe at night and when the store is not open for business, or, in the event that this is not done, that they shall be kept in a place not exposed to fire which would ignite or destroy the store building. The coupling of inventories with books in the third paragraph tends to strengthen the view that the word "keep" implies preservation, because the keeping of an inventory does not convey the idea of taking or making one, but rather the preserving of it from destruction. The keeping provided for in the third paragraph requires that the books and inventories shall be cared for and preserved so that they can be produced and, in case of loss, furnish some evidence as to the extent of the loss sustained by the insured and of the liability of the insurer.

Some comment is made on the action of the agent in including this clause in the policy without the knowledge of the insured. It is not contended that there was any fraud or deception practiced by the agent. The clause is one common in policies insuring merchandise, and it is conceded that it serves a useful purpose. In speaking of this clause it was said in Insurance Co. v. Knerr, 72 Kan. 385, 387, 83 Pac. 611, 612:

"It is not an unreasonable precaution; it is one with which the insured might very easily have complied. In any event, the parties making the contract agreed that it should be performed by the insured, and, since it is a part of the contract, it cannot be ignored or arbitrarily set aside. It is generally held that neglect on the part of the insured substantially to comply with a clause in an insurance policy to keep the books used in conducting the insured's business in an iron safe, or in some place where they will not be destroyed in case the place in which the insured stock is kept is consumed by fire, will avoid the policy." * * *

We think the trial court correctly interpreted the contract of insurance, and that the insured failed to keep and produce the books as

he had agreed to do, and, further, that compliance with this requirement was essential to a recovery under the policy.

We find nothing in the testimony that would have warranted the court in reforming the contract by striking out the clause in question.

The judgment of the district court will be affirmed. All the Justices concurring.[10]

SELMAN v. KING et al.

(In the King's Bench, 1607. Cro. Jac. 183.)

Assumpsit. Whereas upon a suit in the Star-Chamber between the defendant and others, a commission issued for the examination of witnesses; that the plaintiff at the time of the commission kept an inn in Beningham; and in consideration that she promised to find horse-meat and man's-meat for the defendant and his company during the time of the sitting of the commission, that the defendant assumed to pay to the plaintiff all such sums as that diet and horse-meat amoumted to, when he should be thereunto requested: and alledgeth in fact, that the commissioners sat there three days, and that she found the said horse-meat and man's-meat during the said time, which amounted to five pounds six shillings; and that the defendant, licet sæpius requisitus, hath not paid it.

The defendant pleads non assumpsit; and it was found against him: and now moved in arrest of judgment, that the promise being to pay when he should be requested, there ought to be a precise request alleged, and the year, day, and place of the request expressed; for the defendant is not otherwise chargeable in an assumpsit.

The whole Court was of that opinion; for when the defendant is chargeable upon a collateral promise, and not for a mere debt, there ought to be a request precisely alledged: but in an assumpsit for debt, where a duty was due before, that being but in nature of a debt, the general allegation, licet sæpius requisitus, is sufficient: and for that cause the judgment was stayed.[11]

[10] In accord: Morris v. Stuyvesant Fire Ins. Co., 145 La. 471, 82 South. 586 (1919); Liverpool & London & Globe Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460 (1901).

[11] Where the defendant has promised to pay for certain goods or services or other executed consideration, a debt exists an action for which will lie without any demand for payment. Estrigge and Owles' Case, 3 Leon. 200 (1588), promise to pay in return for forbearance by the promisee; Case of an Hostler, Yelv. 66 (1605), promise to pay for food and lodging; Runball v. Ball, 10 Mod. 38 (1711), note for money loaned payable on demand; Gibbs v. Southam, 5 B. & Adol. 911 (1834), debt on bond to pay a stated sum with interest.

But if the defendant has expressly promised only to pay upon demand, there being no pre-existing debt, no action lies without demand. Banks and Thwait's Case, 3 Leon. 73 (1579); Harrison v. Mitford, 2 Bulst. 229 (1614); Hill v. Wade, Cro. Jac. 523 (1619); Lowe v. Kirby, Sir Wm. Jones, 56 (1624); Peck v. Mithwolde, Sir Wm. Jones, 85 (1625); Alcock v. Blofield, Latch. 209 (1627); Birks v. Trippet, 1 Wms. Saunders, 32 (1666); Carter v. Ring, 3 Camp. 459 (1813); Dean v. Woodbridge, 1 Root (Conn.) 191 (1790).

NEW ENGLAND CONCRETE CONST. CO. v. SHEPARD & MORSE LUMBER CO.

(Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 207, 107 N. E. 917.)

Action by the New England Concrete Construction Company against the Shepard & Morse Lumber Company. To certain rulings at the trial, plaintiff excepts. Exceptions overruled.

CROSBY, J. The contract upon which this action is brought arises from certain letters and an "order slip" delivered to the plaintiff by the defendant. By the terms of the contract the defendant agreed to manufacture and furnish the plaintiff 58,000 feet of No. 1 maple flooring, in accordance with certain specifications, for the sum of $37.50 per thousand, delivered at Salem, Massachusetts.

The defendant, in its letter to the plaintiff dated January 14, 1913, states: "We will forward the order to our Burlington, Vermont, mill and will make preparations to have it filled as requested."

The fair inference from this evidence is that the flooring so to be furnished by the defendant was to be manufactured by it at its mill in Burlington, Vermont; at least the presiding judge before whom the case was tried without a jury could have so found.

The contract contained a further provision that: "All contracts are contingent upon strikes, fires, breakage of machinery and other causes beyond our control."

The evidence shows that on February 19, 1913, and before any of the flooring had been manufactured or delivered to the plaintiff the defendant's mill at Burlington was destroyed by fire; that the defendant duly notified the plaintiff by letter of that fact and of its inability for that reason to carry out the contract.

The agreement is not an absolute contract by which the defendant agreed to furnish the flooring to the plaintiff, but was subject to certain conditions, including the condition that the contract was contingent upon fires; that is to say, the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract. Davis v. Columbia Coal Mining Co., 170 Mass. 391, 49 N. E. 629.

The effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the defendant from the obligation to furnish the flooring called for by the contract. Metropolitan Coal Co. v. Billings, 202 Mass. 457, 462, 89 N. E. 115.

The plaintiff contends that the word "fires" in the clause in question is to be construed in connection with the phrase "and other causes beyond our control," and that the last clause qualifies the other causes enumerated so that the word "fires" means "fires beyond the control of the defendant," and that the burden of proof was upon the defendant to show that the fire which occurred was beyond its control. We do not agree with this construction of the fire and strike clause. The

language used is clear and free from ambiguity, and interpreting the words according to their natural and ordinary meaning, we are of opinion that the contingency of fires is independent of and distinct from all other causes enumerated, and cannot be construed as "fires beyond the control of the defendant."

The mill having been destroyed by fire, the defendant is wholly relieved from performance; at least, in the absence of evidence to show that the fire was the result of its willful and intentional wrong, or of that of its servants or agents.

The case at bar is to be distinguished from such cases as Oakman v. Boyce, 100 Mass. 477, Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 84 N. E. 1020, and Metropolitan Coal Co. v. Billings, 202 Mass. 457, 89 N. E. 115, all of which cases involved the construction of strike clauses in contracts for the sale and delivery of coal, but where the contracts, properly construed, did not excuse performance absolutely, and where it was held that coal companies were required to make reasonable efforts to fulfill the contracts notwithstanding strikes.

There was evidence to show that the defendant was a lessee of its mill in Burlington which its lessor was under no legal obligation to rebuild after the fire; that the defendant had no other mill where the flooring could have been manufactured, and that it could not have been furnished to the defendant, had the mill been rebuilt, until the latter part of June 1913.

Whether the contract is to be construed as requiring the defendant to deliver the flooring about June first, or "as required about June first," we are of opinion that upon all the evidence it could have been found that time was an essential part of the contract and was so contemplated by the parties; and the judge was warranted in finding that by reason of the destruction of the mill by fire it was impossible for the defendant to perform the contract according to its terms. Pickering v. Greenwood, 114 Mass. 479.

We perceive no error in the manner in which the presiding judge dealt with the requests for rulings, and are of opinion that the finding was warranted.

Exceptions overruled.[12]

AUDETTE v. L'UNION ST. JOSEPH.

(Supreme Judicial Court of Massachusetts, 1901. 178 Mass. 113, 59 N. E. 668.)

Action by Malvina Audette, administratrix of the estate of Louis Audette, deceased, against L'Union St. Joseph. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A by-law of the defendant association provided that no sick mem-

[12] In Elliott v. Blake, 1 Lev. 88 (1662), there was a promise to deliver goods, "provided that, if fire or water disable him, he should be excused."

ber should receive any benefits before producing a sworn certificate of a physician. The physician who attended plaintiff's intestate in his last sickness refused to give a sworn certificate because of conscientious scruples against making an oath.

LORING, J. This case comes within the rule that where one engages for the act of a stranger he must procure the act to be done, and the refusal of the stranger, without the interference of the other party, is no excuse. That rule has been applied in this commonwealth to the obligation of a person, insured under a fire insurance policy, to furnish to the fire insurance company a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and believes that the assured has, without fraud, sustained loss on the property insured to the amount certified. Johnson v. Insurance Co., 112 Mass. 49. In that case it was held that the plaintiff was not excused from producing such certificate by showing that he applied to two magistrates for such a certificate in vain, and used his best efforts to procure it, accompanied by proof of the facts which were to be certified to. And this case was confirmed in Dolliver v. Insurance Co., 131 Mass. 39, 44. To the same effect, see Insurance Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512; Ætna Ins. Co. v. People's Bank, 8 U. S. App. 554, 10 C. C. A. 342, 62 Fed. 222; Kelly v. Sun Fire Office, 141 Pa. 10, 20, 21, 21 Atl. 447, 23 Am. St. Rep. 254; Daniels v. Insurance Co., 50 Conn. 551; Roumage v. Insurance Co., 13 N. J. Law, 110; Lane v. Insurance Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; Insurance Co. v. Duke, 43 Ind. 418; Leadbetter v. Insurance Co., 13 Me. 265, 29 Am. Dec. 505.

The defendant relies on the reference to Nolan v. Whitney, 88 N. Y. 648, in Beharrell v. Quimby, 162 Mass. 571, 575, 39 N. E. 407; and to O'Neill v. Association (Sup.) 18 N. Y. Supp. 22. The decision in O'Neill v. Association professes to be nothing more, and is nothing more, than the application to a right to recover "sick benefits" of a rule which is established in New York in case of building contracts. But Nolan v. Whitney is not law in this commonwealth. On the contrary, it is settled here that in contracts for erecting buildings or doing other work, where it is stipulated that the quantity or quality of the work to be done shall be determined by an engineer or architect, whose decision shall be final, it is not open to either party to show, when the engineer or architect has passed upon the question submitted to him, that he was in error, and ought not to have given a certificate where he in fact gave one (Flint v. Gibson, 106 Mass. 391; Robbins v. Clark, 129 Mass. 145); or that the certificate given by him was erroneous (Palmer v. Clark, 106 Mass. 373; and see White v. Railroad Co., 135 Mass. 216, 220; Trust Co. v. Abbott, 162 Mass. 148, 154, 38 N. E. 432, 27 L. R. A. 271). This action, therefore, was prematurely brought; but the plaintiff, on producing a sworn certificate, unless there is

some objection to it not now disclosed, can bring a new writ, and recover the sick benefits now sued for.

Judgment for the defendant affirmed.[13]

LAPLEAU v. SUCCESSION OF LAPLEAU.

(Supreme Court of Louisiana, 1919. 144 La. 988, 81 South. 597.)

Suit by Philip Lapleau against the succession of Louis Victor Lapleau. From a judgment for defendant on exception to the petition, plaintiff appeals. Affirmed.

PROVOSTY, J. The petition in this case alleges that plaintiff made advances to his son to enable him to study civil engineering, and that this was done under an agreement that the advances were to be repaid by the son when he should "have secured such a start in the pursuit of his profession of civil engineering as to be in a position, financially, to repay said advances; that thereafter he commenced the practice of his profession of civil engineering, but died before being able to acquire such a position financially as to enable him to repay any part of said advances." The suit is against the succession of the son, and we assume that the property of his succession consists in his inheritance from his mother, who died after the time at which the advances in question are alleged to have been made.

The petition was excepted to, as showing no cause of action, because there is no allegation that the son had attained his majority and was capable of contracting at the time the advances were made; and because, even if he was a major, the father was under obligation to support him; and, finally, because by the terms of the contract he was to repay these advances only when he should have secured such a start in his profession of civil engineering as to be in a position, financially, to repay these advances, and that he died before this time had arrived.

On this last ground, if not, also, on the others, the exception was properly sustained.

Judgment affirmed.[14]

[13] In accord: Worsley v. Wood, 6 T. R. 710 (1796), approved and followed in Mason v. Harvey, 8 Ex. 819 (1853); Roper v. Lendon, 1 El. & El. 825 (1859). Contra: Lang v. Eagle Fire Co., 12 App. Div. 39, 42 N. Y. Supp. 539 (1896).

[14] In accord: Work v. Beach, 59 Hun, 625, 13 N. Y. Supp. 678 (1891); Wright v. Farmers' Nat. Bank, 31 Tex. Civ. App. 406, 72 S. W. 103 (1903).

SCOTT v. MORAGUES LUMBER CO.

(Supreme Court of Alabama, 1918. 202 Ala. 312, 80 South. 394.)

Suit by the Moragues Lumber Company, a corporation, against J. M. Scott, for damages for breach of an agreement of charter party. Judgment for plaintiff, and defendant appeals. Affirmed.

Count 2 of the complaint as amended is as follows:

"The plaintiff claims of the defendant $13,000 as damages from breach of an agreement entered into between the plaintiff and the defendant on the 27th day of June, 1917, consisting of an offer by the defendant that, subject to his buying a certain American vessel, 15 years old, which he was then figuring on and which was of about 1,050 tons and then due in Chile, he would charter said vessel to the plaintiff for the transportation of a cargo of lumber from any port in the Gulf of Mexico to Montevideo or Buenos Aires, for the freight of $65 per thousand feet of lumber, freight to be prepaid, free of discount and of insurance, and the vessel to be furnished to the plaintiff within a reasonable time after its purchase by the defendant, which said offer was accepted by the plaintiff, and the plaintiff avers that although the defendant purchased said vessel, and although the plaintiff was at all times ready, willing, and able to comply with all the provisions of said contract on its part, the defendant without notifying the plaintiff of said purchase, and before said vessel was delivered to him, chartered said vessel to a third person, and thereby rendered himself unable to comply with the said contract." * * * [15]

SAYRE, J. * * * It is said, in the first place, that the alleged contract between the parties was conditioned upon the will of appellant, defendant, and was therefore void for want of consideration or mutuality of obligation. A valid contract may be conditioned upon the happening of an event, even though the event may depend upon the will of the party, who afterwards seeks to avoid its obligation. This principle is illustrated in McIntyre Lumber Co. v. Jackson Lumber Co., 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 66. Appellant was not bound to purchase the vessel; but, when he did, the offer—or the contract, if the offer had been accepted—thereafter remained as if this condition had never been stipulated, its mutuality or other necessary incidents of obligation depending upon its other provisions and the action of the parties thereunder. Davis v. Williams, 121 Ala. 546, 25 South. 704; 3 Page on Contracts, § 1358. * * *

The effect of appellee's acceptance, if communicated while the offer was yet open, was to convert it into a binding contract. 6 R. C. L. p. 605, § 27. In substance, it is alleged in the complaint that appellant's offer was accepted; that appellant purchased the vessel; that appellee was able, ready, and willing to perform the contract on

[15] Statement of facts condensed and parts of the opinion have been omitted.

its part; but that appellant disabled himself, or failed and refused to perform on his part. From the order in which the facts are alleged it is to be inferred that appellee accepted appellant's offer before the latter purchased the vessel, and there is no ground of demurrer questioning the sufficiency of the complaint to that effect. Thereupon the offer was converted into a binding contract to be performed, if not otherwise stipulated, within a reasonable time; the promise on either hand constituting the consideration of the promise on the other. Appellant's purchase of the vessel was a condition precedent to the existence of a binding contract, it is true; but that was alleged, as it was necessary that it should be. 13 C. J. p. 724, § 847, citing McCormick v. Badham, 191 Ala. 339, 67 South. 609; Long v. Addix, 184 Ala. 236, 63 South. 982; Flouss v. Eureka Co., 80 Ala. 30 And so with respect to appellee's acceptance of the offer. It was necessary that appellee communicate its acceptance to appellant. 1 Page, § 43. But this communication was a part of the acceptance and was covered by the general allegation of acceptance. * * *

Affirmed.[16]

MILNES v. GERY.

(In High Court of Chancery, 1807. 14 Ves. 400, 9 Rev. Rep. 307, 6 Eng. Rul. Cas. 684.)

Previous to the marriage of John Milnes and Mary Selina Gery, one third part of certain estates was settled in trust for them for life. By the agreement of settlement it was provided that the trustee should have a power to sell this one third interest with the approval of said John and Mary, and that the owner of the balance of the estates, one Hugh Wade Gery, should have the option to buy said one third interest, at a price to be determined by two appraisers, one of whom was to be named by John and Mary and the other by Hugh, and in case of disagreement by an umpire to be named by the two appraisers. John Milnes gave a bond in the penal sum of £12,000 to carry out the agreement, in case Hugh Wade Gery should give a certain six months notice of his intention to purchase. The notice was properly given by Hugh, and each party named an appraiser. The two appraisers differed greatly in their estimates, and they were utterly unable to agree upon a third person to act as umpire.

The plaintiff therefore filed this bill to have the agreement carried into execution, praying that the notice by the defendant may be considered binding, and that a proper person or persons may be ap-

[16] Query: What were the jural relations of the parties after acceptance by the plaintiff and before the purchase of the vessel by the defendant?

In most "option" contracts the condition is usually a fact within the control of the promisee.

pointed by the Court to make a valuation, or that the valuation should be ascertained in such other manner as the court should direct.[17]

The MASTER OF THE ROLLS (Sir WILLIAM GRANT). The more I have considered this case, the more I am satisfied, that independently of all other objections, there is no such agreement between the parties, as can be carried into execution. The only agreement into which the defendant entered, was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract, which this Court is called upon to execute? The price is of the essence of a contract of sale. In this instance the parties have agreed upon a particular mode of ascertaining the price. The agreement, that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The Court declaring that the one shall take, and the other shall give, a price fixed in any other manner, does not execute any agreement of theirs; but makes an agreement for them, upon a notion, that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence, which upon a subject, materially interesting to him, he has reposed in an individual of his own selection? No substantial difference arises from the circumstance, that in this case the decision may ultimately fall to an umpire, not directly nominated by the parties, as through the medium of the original nominees they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided.

The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out; there is nothing, therefore, precluding the court from adopting any means adapted to that purpose. The case, in which the Court has modified particular, subordinate parts of an agreement falls far short of the decree, that is now demanded. Perhaps some of those cases may be thought rather to require defence for the length to which they have gone, than to furnish a justification for still farther extending the discretionary power, of which they are instances. The Court never professes to bind a man to any agreement, except that which he has made; but sometimes holds the agreement, which it executes, and that which he has made, to be substantially the same; when to common understandings there is a very perceptible difference between them. The Court, however, has never gone the length of compelling a party to buy or sell the whole subject of his agreement at a price that he has never fixed, and that was never fixed in any mode to which he has given his consent.

[17] The statement of facts has been rewritten and the arguments of counsel are omitted.

In the case of Hall v. Warren, 9 Ves. 605, it was rather assumed, than proved, that if Warren was competent to enter into the agreement, some means might be found to carry it into execution. That was so little discussed, that the attention of the Court was not drawn to the point; and the doubt, recently thrown upon that point in the case of Cooth v. Jackson, 6 Ves. 12, was not at all adverted to. I state it as a doubt only, as the decision was ultimately upon a different ground; but neither Lord Rosslyn nor Lord Eldon conceived that the Court could be substituted for the arbitrators, to make a division of the estate. The division of an estate does not imply more personal confidence, or which other persons will be less capable of executing, than the ascertainment of value; and the admission there was, that the defendant was instrumental in preventing the award by private instructions to the arbitrator. Upon the principle, that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted whether an agreement, that did not settle the price, was at all binding. Justinian's Institutes and the Code state that doubt;[18] and resolve it by declaring that such an agreement should be valid and complete, when and if the party to whom it was referred, should fix the price: otherwise it should be totally inoperative: "quasi nullo pretio statuto;" and such clearly is the law of England.

I do not know, that upon this point there can be any difference between decisions at law and in equity. If you go into a Court of Law for damages, you must be able to state some valid, legal contract, which the other party wrongfully refuses to perform; if you come to a Court of Equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties, which the one refuses to execute. In this case the plaintiff seeks to compel the defendant to take this estate at such price as a master of this Court shall find it to be worth, admitting, that the defendant never made that agreement; and my opinion is, that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by an arbitrary discretion that the Court could substitute the one in the place of the other.

This bill must therefore be dismissed without costs.[19]

[18] Justinian, Institutes, III, 23, 1. And see annotations in 6 E. R. C. 690.

[19] The decision or approval of a third party is often made a condition. Old Colony St. Ry. Co. v. Brockton & P. St. Ry. Co., 218 Mass. 84, 105 N. E. 866 (1914); Thurnell v. Balbirnie, 2 M. & W. 786 (1837) to pay at a valuation made by M. and N.; Rogers v. Maloney, 85 Or. 61, 165 Pac. 357 (1917); Chapman v. Ferguson, 152 Mo. App. 84, 132 S. W. 284 (1910), to pay on the order of X.; Wilhelm v. Wood, 151 App. Div. 42, 135 N. Y. Supp. 930 (1912), on the approval of our attorney, J. T.

Cases where the certificate of an architect or engineer is a condition precedent to the duty to pay for the work are of the same character as those above; they will be found later, along with certain other building and construction contracts. See post, p. 628.

HAMILTON v. HOME INS. CO.

(Supreme Court of the United States 1890. 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708.)

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action, brought June 26, 1886, upon a policy of insurance, numbered 3,190, by which the Home Insurance Company of New York insured Robert Hamilton for one year from February 23, 1886, on a stock of tobacco in his warehouse at 413 and 415 Madison street in Covington in the state of Kentucky, against loss or damage by fire to the amount of $5,000, "to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in New York."

The policy, after providing that in case of loss the assured should forthwith give notice, and as soon afterwards as possible furnish proofs of loss, with a magistrate's certificate, submit to examination on oath, and produce books and vouchers, and copies of lost books and invoices, further provided, among other things, as follows:

"When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles, according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the assured and the company, their report in writing to be made under oath before any magistrate, or other properly commissioned person, one-half of the appraisers' fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value; and, until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable."

"But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy."

"And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used

and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The answer admitted the execution of the policy, and notice of loss; put in issue the amount of loss; denied that the plaintiff ever delivered due proofs of loss, or had performed the conditions of the policy on his part; and, after reciting the substance of the provisions above quoted, alleged as follows: "And the defendant says that differences having arisen touching the loss and damage sustained by said plaintiff under said policy and the amount thereof, the plaintiff claiming a loss of $40,000, and the defendant claiming and believing that it was slight and but a very small part of said sum, and being unable to agree upon the amount of said loss, this defendant requested and demanded in writing that the amount of such loss and damage should be submitted to and ascertained and determined by impartial arbitrators, whose award in writing should be binding upon the parties as to the amount of loss or damage, but should not decide the liability of the company under said policy. And the said defendant further says that the plaintiff wholly disregarded the terms and conditions of said policy in that respect, and neglected and refused to have such arbitration, and refused to choose or submit to arbitrators chosen in accordance with the terms and provisions of said policy the amount of the loss or damage by fire to the property covered by said policy, and refused to be governed in the ascertainment of said loss by any of the terms and conditions of said policy, and, against the protest of the defendant, proceeded to and did sell all of said property at auction. An arbitration and the ascertainment of the said loss thereby, as provided in said policy, became impossible, and this defendant was deprived of its rights and privileges under said policy with respect to said property and the appraisement thereof. This defendant further says that the damage done to the property insured was of such a nature as to require careful and scrutinizing examination to ascertain the injury thereto and loss thereon, and that an appraisement by arbitrators, as required by the terms and conditions of said policy, was of the greatest importance to the defendant, and the only means under said policy whereby the exact amount of damage and injury sustained by said plaintiff upon said property could be determined; and the said plaintiff, by the sale of said property, and in disregarding the terms and conditions of said policy in that respect, wholly deprived this defendant of the right to an arbitration, as provided in said policy, and all other rights in respect to the property so injured or damaged by said fire. The defendant further says that by reason of the failure and refusal of said plaintiff to agree upon arbitrators to determine the amount of the loss and damage so sustained as aforesaid, and his refusal to submit the amount of such loss to arbitration in accordance with the plain terms and provisions of said policy, and the sale of said property so injured as aforesaid

against the written protest of the defendant, the said plaintiff is not entitled to recover in this action, nor to have or maintain this action against the said defendant." The plaintiff filed a replication, denying these allegations of the answer. * * * [20]

Upon the evidence, the court instructed the jury that, on the issues joined on the special defenses in the answer, the plaintiff could not recover, and that they should return a verdict for the defendant. The plaintiff tendered a bill of exceptions to these instructions, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Justice GRAY. This case resembles in some aspects that of Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419 (decided at the last term), but it is essentially different in important and controlling elements.

In that case, the effect of the provisions of the policy by reason of which it was held that the assured, having refused to submit to the appraisal and award provided for, could not maintain his action, was thus stated by the court: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action." 136 U. S. 254, 255, 10 Sup. Ct. 949, 34 L. Ed. 419. That policy looked to a single appraisal and award, to be made as one thing, and by one board of appraisers or arbitrators, whenever any difference should arise between the parties, and to be binding and conclusive as to the amount of the loss, although not to determine the question of the liability of the company; and the policy contained, not only a provision that until such an appraisal the loss should not be payable, but an express condition that no action upon the policy should be sustainable in any court until after such an award.

In the case now before us, on the other hand, the appraisal and the award are distinct things, and to take place at separate times, and the effect assigned to each is quite different from that given to the appraisal and award in the other policy. The "appraisal,"

[20] A statement of the correspondence between the parties and as to the evidence introduced is omitted.

without which the loss is not payable, is required to be made not merely when differences arise as to its amount, but in all cases, and results in a mere "report in writing," which is not declared to be binding upon the parties in any respect, and is in truth but a part of the proofs of loss. It is only by a separate and independent provision, and when differences arise touching any loss "after proof thereof has been received in due form," that the matter is required, at the request of either party, to be submitted to "arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss, but shall not decide the liability of this company under the policy;" and there is no provision whatever postponing the right to sue until after an award. The special defenses set up, with some tautology and surplusage, in the answer, reduce themselves, when scrutinized, to a single one, the plaintiff's refusal to submit to an award of arbitrators, as provided in the policy. This appears by the general frame of the answer, and by its speaking of the award as "an arbitration and the ascertainment of the said loss thereby," and as "an appraisement by arbitrators," as well as by the distinct averments that the defendant requested and the plaintiff declined a submission to arbitration, and by the omission of any specific allegation that the plaintiff neglected to procure a report of appraisers. The evidence introduced at the trial was to the same effect. Proofs of loss, sent by the plaintiff to the defendant, with a request that any defects in substance or form might be pointed out so that he might perfect the proofs to the defendant's satisfaction, were received by the defendant, without then or afterwards objecting to their form or sufficiency. The subsequent correspondence between the parties was evidently influenced in form by embracing insurances in different companies under policies with various provisions; but, as applied to the policy in suit, it manifestly related, and was understood by both parties to relate, not to a mere report of appraisers, but to an award of arbitrators which should bind both parties as to the amount of the loss. The instruction to the jury, therefore, that on the issues joined on the special defenses in the answer, and upon the evidence in the case, the plaintiff could not recover, was, in effect, a ruling that the plaintiff could not maintain his action because he had refused to submit the amount of his loss to arbitration.

A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in Hamilton v. Insurance Co., above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for

submitting the amount to arbitration is collateral and independent; and that a breach of this agreement while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. Roper v. Lendon, 1 El. & El. 825; Collins v. Locke, L. R. 4 App. Cas. 674; Dawson v. Fitzgerald, 1 Exch. Div. 257; Reed v. Insurance Co., 138 Mass. 572; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Insurance Co. v. Pulver, 126 Ill. 329, 338, 18 N. E. 804, 9 Am. St. Rep. 598; Crossley v. Insurance Co. (C. C.) 27 Fed. 30. The rule of law upon the subject was well stated in Dawson v. Fitzgerald, by Sir George Jessel, M. R., who said: "There are two cases where such a plea as the present is successful: First, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant" "to bring an action for not referring," or (under a modern English statute) "to stay the action till there has been an arbitration." 1 Exch. Div. 260. Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongly held by the circuit court to bar this action.

Judgment reversed, and case remanded, with directions to set aside the verdict, and to take such further proceedings as may be consistent with this opinion.[21]

GRAHAM et al. v. GERMAN AMERICAN INS. CO.

(Supreme Court of Ohio, 1907. 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. [N. S.] 1055, 9 Ann. Cas. 79.)

Action by Graham and others against the German American Insurance Company. Judgment for defendant, and plaintiffs bring error. Affirmed.[22]

[21] Promises to submit to arbitration are generally held to be collateral and independent; the award will not be a condition precedent, unless so provided in express terms. Mecartney v. Guardian Trust Co., 274 Mo. 224, 202 S. W. 1131 (1918); Brocklehurst & Potter Co. v. Marsch, 225 Mass. 3, 113 N. E. 646 (1916); Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten (D. C.) 232 Fed. 403 (1916); Flavelle v. Red Jacket Consol. Coal & Coke Co., 82 W. Va. 295, 96 S. E. 600 (1918), "while a breach of the agreement will support a separate action, it cannot be pleaded in bar." See, also, Lowndes v. Earl of Stamford, 18 Q. B. 425 (1852).

But compare Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54 (1880); President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250 (1872).

[22] Two other cases were considered at the same time. Statements in regard to them are omitted.

In this case the policy contained provisions as follows:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. * * *

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * *

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. * * * This policy is made and accepted subject to the foregoing stipulations and conditions. * * *"

DAVIS, J.[23] (after stating the facts). These cases have been the subject of unusual and protracted consideration, not only on account of the intrinsic importance of the questions involved, but also because there is a divergence of views in the lower courts, and a variance between two reported decisions of this court. * * *

In several reported cases, not "in numerous cases and supported by the great weight of authority," it has been assumed, rather than dem-

[23] Parts of opinion are omitted.

onstrated by a proper course of reasoning, that the effect of the clause quoted above is that the conditions relating to arbitration and appraisal do not become obligatory on the insured until appraisal has been required, in the sense of having been requested or demanded by the insurer, notwithstanding a stipulation in the policy, as in those now before the court, that: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." The contrary view is supported by several courts of high standing in carefully considered and well-reasoned opinions, which will be cited further on. It also logically results from the ruling in Insurance Co. v. Carnahan, supra, upon like policies, although in those cases there had been a demand for appraisal, by the insurers, that the condition as to arbitration or appraisement is a condition precedent and to entitle the insured to maintain an action to recover under the policy, he must show that he has either performed the condition or has a legal excuse for nonperformance thereof. To state it in another form, in case of a disagreement between the insurer and the insured as to the amount of the loss, the contract gives to the insured no right of action upon the policy, but only the right to enforce an award, unless the insurer has waived the condition by refusal to proceed under it, when requested, or otherwise. Carroll v. Girard Fire Ins. Co., 72 Cal. 297, 13 Pac. 863.

The Supreme Court of the United States, in Hamilton v. Home Ins. Co. of N. Y., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, held that "if a contract of insurance provides that no action upon it shall be maintained until after an award by arbitrators is made as to the amount due upon it, the award is a condition precedent to a right of action on the contract." See, also, Hamilton v. Liverpool & London & Globe Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Old Saucelito L. & D. Co. v. Com. Union Assur. Co., 66 Cal. 253, 5 Pac. 232; Scottish Union & National Ins. Co. v. Clancy, 71 Tex. 5, 8 S. W. 630. The last paragraph of these policies, respectively, contains this clause: "This policy is made and accepted subject to the foregoing stipulations and conditions." A little above that occurs the following: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." It should be noted that the "requirements" here mentioned are requirements by the terms of the contract, not requests by the insurer, for they are requirements already made and "foregoing." At the very beginning of the statement of the conditions of the policy is the following: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such cash value * * * said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as

hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of loss have been received by this company in accordance with the terms of this policy."

Now, could a condition precedent be more express than this? In case of difference or disagreement the "ascertainment" of the amount for which the insurer shall be liable "shall be made" by appraisers, and, the amount "having been thus determined," the same, not some other sum, shall be payable "sixty days after due notice, ascertainment and satisfactory proofs of loss have been received by the insurer in accordance with the terms of the policy," not in accordance with demand or request of the insurer. Beyond all reasonable dispute, this is an agreement to pay only after an award. * * *

When is an appraisal required or "made necessary" ex vi termini within this contract? An award is not called for or required by this agreement in every case, because in many cases, doubtless in most cases, there may be no dispute over the loss, but, by the express agreement of the parties, in the strongest terms, it is required "if they differ" and "in the event of a disagreement." By the terms of the contract it is provided that, in case of disagreement, the loss does not become payable unless an appraisal has taken place; the "policy is made and accepted subject to the foregoing stipulations and conditions," one of which is that "no suit or action on the policy shall be sustainable * * * until after full compliance by the insured with all the foregoing requirements."* It is very clear that the foregoing requirements are the requirements or conditions of the contract, and that the phrase cannot fairly be applied to some future and contingent demand or request by one of the parties.

In a given state of circumstances, these policies plainly and definitely make the obtaining of an award, or at least an attempt in good faith to obtain an award, a condition precedent to a right of action on the policy, and it is elementary that the obligation of taking the initiative, or of showing an excuse for not doing so, is upon the party who has the affirmative in the action. "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract or show that by time or accident he is unable to do so." United States v. Robeson, 34 U. S. (9 Pet.) 319, 327, 9 L. Ed. 142. See, also, 4 Encyc. Pl. & Prac. 632; 5 Id. 368; 1 Cyc. 692. So that, from all the foregoing considerations, our conclusion is that the clause "including an award when appraisal has been required" is very far from meaning "when appraisal has been requested by the insurer."

Yet, by the construction which is urged upon us now, and which has been once adopted by this court, a condition precedent which has been so clearly expressed is declared to be no condition precedent, and it is not available to the insurer even as a collateral condition unless upon its own demand. As we have already said, the courts which have adopted this construction have assumed, rather than demonstrated, its correctness. It has been fully discussed and its weakness, as we think satisfactorily shown in Murphy v. Northern British & Mercantile Company, 61 Mo. App. 323; and again in McNees v. Southern Ins. Co., 69 Mo. App. 232; and these cases have become the settled law of the state of Missouri on that subject. We need not extend the discussion further. In accord with the later view are the opinions of the courts in Minnesota, Tennessee, and Illinois, as follows: Mosness v. German-American Ins. Co. of New York, 50 Minn. 341, 52 N. W. 932; Palatine Ins. Co. v. Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787; Phœnix Ins. Co. v. Lorton & Co., 109 Ill. App. 63.

Having the strong convictions as to the proper construction and legal effect of these policies, which we have endeavored to concisely express above, we are of the opinion that the former ruling of this court in Grand Rapids Ins. Co. v. Finn, 60 Ohio St. 513, 54 N. E. 545, 54 L. R. A. 555, 71 Am. St. Rep. 736, was wrong and the same is now expressly overruled.

It follows that the judgment of the circuit court of Stark county should be, and it is, affirmed.[24]

SECTION 2.—IMPLIED AND CONSTRUCTIVE CONDITIONS PRECEDENT[25]

(a) Their Historical Development—Dependent and Independent Promises

(Early Cases, Particularly Sales of Goods and of Land)

ANDREW v. BOUGHEY.

(In the Court of King's Bench, 1552. 1 Dyer, 75 a.)

The declaration was that the defendant "on such a day, year, and at such a place, undertook for twenty marks (the moiety of which

[24] An award was held a condition precedent in Scott v. Avery, 5 H. L. C. 811 (1856); Eyre-Shoemaker v. Buffalo, R. & P. R. Co., 193 Fed. 387, 113 C. C. A. 313 (1912); President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250 (1872); Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54 (1880).

[25] The dividing line between actually intended conditions and facts that operate as conditions by pure construction of law to satisfy the prevailing con-

was in hand, paid, and the residue agreed between them to be paid within a certain time) that he would deliver at such a place, within four days after such a Feast, four hundred pounds weight of good and merchantable wax; but the defendant, not regarding his promise and undertaking, and intending to defraud the plaintiff * * * did deliver to the plaintiff at the said place three hundred and seventy three pounds weight of wax, falsely and deceitfully mixed with resin and turpentine." [To this declaration there was a plea of accord and satisfaction, which was held good.] And it seems for another cause, that although the plea were not good, still the plaintiff shall not recover; for if it appear to the Court that the plaintiff in any action had not good cause to have his action, the Court will never give judgment for him; here it appears in the beginning of the count, that for twenty marks, the moiety of which was in hand paid, and the other moiety was to be paid at a certain time agreed on between them; non constat whether that time was past, or to come, at the time of this action brought; and if it was past, as it shall be intended most strongly against the plaintiff, and the money not paid or legally tendered, then the contract and undertaking is void, for this word "for" makes the contract conditional; as for a marriage to be had I covenant to make an estate, etc.; if the marriage do not take effect I shall be discharged from this covenant. * * * [26]

BROCAS' CASE.

(In the King's Bench, 1588. 3 Leon. 219.)

Brocas, lord of a manor, covenanted with his copyholder, to assure to him and his heirs, the freehold and inheritance of his copyhold; and the said copyholder in consideration of the same performed, covenanted to pay such a sum: it was the opinion of the whole Court, that the said copyholder is not tyed to pay the said sum, before the assurance made, and the covenant performed: but if the words had been, In consideration of the said covenant to be performed, then he is bounden to pay the mony presently; and to have his remedy over by covenant.[27]

ceptions of justice' is quite indistinct. The distinction should constantly be borne in mind; but no grouping of cases into the two classes seems to be desirable. Neither will Express Conditions be excluded from this section.

[26] Part of the report is omitted.

[27] If a promise was stated to be in consideration of or "for" (pro) the performance promised by the other party, this was believed to make the promise expressly conditional. Y. B. 15 Hen. VII, f. 10 b, pl. 7; Thorpe v. Thorpe, 12 Mod. 455 (1701); Peeters v. Opie, 2 Wms. Saunders, 350 (1671). Similar fine verbal distinctions were drawn in Anon., 4 Leon. 50 (1590); Slater v. Stone, Cro. Jac. 645 (1622); Lock v. Wright, 1 Strange, 569 (1723); Thomas v. Cadwallader, Willes, 496 (1744).

LEA v. EXELBY.

(In the Queen's Bench, 1602. Cro. Eliz. 888.)

Assumpsit. Whereas the defendant was possessed of such a lease for years, the inheritance being the plaintiff's, in consideration the plaintiff promised to pay unto him such a sum of money such a day and place, that the defendant promised super solutionem inde to surrender unto him his lease: and alledgeth, that he at the day and place tendered the money, and that the defendant had not surrendered his lease. The defendant pleaded non assumpsit; and found against him: and it was moved in arrest of judgment, that the defendant was not to make the surrender but upon the payment of the money, or an express tender and refusal. And the plaintiff here hath alledged quod obtulit; but he saith not that the defendant refused, which is material, and issuable; and he might have taken issue upon the refusal, if it had been alledged: and although he hath pleaded non assumpsit, yet, the declaration being ill in substance, the defendant may well take advantage thereof.—Coke, Attorney-General, moved, that the declaration was good, and there needed not any tender and refusal to have been alledged; for it sufficeth to alledge that in consideration he assumed to pay such a sum, the defendant assumed to surrender; so there being an assumpsit against an assumpsit, it had been well enough.—But all the Court held, that if the promise had been in consideration he assumed to pay such a sum, that the defendant had assumed to surrender, that had been sufficient; for then he is to make his surrender, and he ought to take his remedy against the other for the nonperformance of his promise: but here it is, that he assumed to pay, and the other assumed to surrender it upon the payment, so as he would not trust to his promise; but when he had paid, he would then surrender it. And in the first case, he needed not alledge the performance of the promise; but here in this he ought. And when he saith quod obtulit, and saith not that the other accepted it or refused it, his allegation of the tender is not to any purpose; for he shall never say quod obtulit only, but he ought to plead further that none was there to receive it, or that he refused; or he ought to alledge payment; and here it is matter of substance, for want whereof the declaration is not good. Wherefore it was adjudged for the defendant.—And afterwards COKE said, that Willenhall's Case was adjudged, that tender without alledging a refusal was not good.

RAYNAY v. ALEXANDER.

(In the King's Bench, 1606. Yelv. 76.)

The plaintiff declar'd, that whereas the defendant was possessed of seventeen tod of wool, and whereas colloquium fuit betwixt them for fifteen tod of the seventeen tod, to be chosen by the plaintiff; the defendant in consideration of £6 to be paid on such a day, &c. promised to deliver the plaintiff prædictas fifteen tod of wool, and said in facto, that he was ready at the day to pay the defendant £6 yet the defendant had not deliver'd the plaintiff the fifteen tod of wool, to his damage, &c. And upon non assumpsit pleaded, it was found for the plaintiff; and it was shewn in arrest of judgment, that the declaration was not good, because the plaintiff had not shewn, that he had chosen fifteen tod out of the seventeen, and that is quasi a condition precedent; and an act to be first performed by the plaintiff before the defendant is bound by his promise to do anything: quod fuit concessum per totam curiam. But, per POPHAM, Chief Justice, if the defendant had sold one of the tods of wool before election made by the plaintiff, that had destroy'd the election, and made the promise absolute, and had been the breach of it: the same law if the defendant would not have permitted the plaintiff to see the wool that he might make election; for that had excused the act to be done by the plaintiff, and had been a default in the defendant. And the matter aforesaid is much enforced by the word prædictas in the declaration; for that can be referr'd to nothing but the communication, by which the plaintiff of his own shewing ought to make election: then the plaintiff omitting it in his declaration shews the fault is in himself, which ought to be removed before he can charge the defendant: but if the communication had been, that the plaintiff should chuse fifteen tod of seventeen, and the plaintiff had declar'd the promise to be to deliver fifteen tod generally, without saying prædictas, there, if the promise had been found, the plaintiff should have judgment; for the colloquium might be conditional, and the promise absolute. Quod nota. But the judgment was, nil capiat per billam.[28]

[28] In accord, where the plaintiff or some third party must do an act before it is possible for the defendant to perform as promised: Thomas v. Cadwallader, Willes, 496 (1744), defendant promised to repair with timber to be furnished by plaintiff; Armitage v. Insole, 14 Q. B. 728 (1850), defendant promised to deliver coal free on board ship at Cardiff; plaintiff must first name the ship; Cadwell v. Blake, 6 Gray (Mass.) 402 (1856), post, p. 722; Coombe v. Greene, 11 M. & W. 480 (1843), covenant to repair as directed by a surveyor to be appointed by the plaintiff.

NICHOLS v. RAYNBRED.

(In the King's Bench, 1615. Hob. 88.)

Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will be both nuda pacta.[29]

PORDAGE v. COLE.

(In the King's Bench, 1669. 1 Wms. Saund. 319.)[30]

Debt upon a specialty for £774 15 s. The plaintiff declares that the defendant, by his certain writing of agreement made at, &c. by the plaintiff by the name, &c. and the defendant by the name, &c. and brings the deed into Court, &c., it was agreed between the plaintiff and defendant in manner and form following, (viz.) that the defendant should give to the plaintiff the sum of £775 for all his lands, with a house called Ashmole-House thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheel-

[29] That this case is truly representative of the law for two centuries, see, in accord, Spanish Ambassador v. Gifford, 1 Rolle Rep. 336 (1616); Holder v. Taylor, 1 Rolle, Abr. 518 (1614); Thorpe's Case, March, 75 (1639); Caton v. Dixon, 1 Rolle, Abr. 415, pl. 8 (1639); Bragg v. Nightingale, 1 Rolle, Abr. 416, pl. 15 (1649); Ware v. Chappel, Style, 186 (1649), with a dissent; Gibbons v. Prewde, Hardres, 102 (1657); Hunlocke v. Blacklowe, 2 Wms. Saunders, 156 (1670); Beany v. Turner, 1 Lev. 293 (1670), land sale; Hays v. Bickerstaffe, 2 Mod. 34 (1675), lease; Cole v. Shallett, 3 Lev. 41 (1682), charter party; Blackwell v. Nash, 1 Str. 535 (1722), sale of stock; Martindale v. Fisher, 1 Wils. 88 (1745), wagering contract; Terry v. Duntze, 2 H. Bl. 389 (1795), installment building contract; Moggridge v. Jones, 14 East, 486 (1811).

For a modern throwback to this ancient law, see Prest v. Cole, 183 Mass. 283, 67 N. E. 246 (1903).

In Thomas v. Cadwallader, Willes, 496 (1744), it was said by Willes, J.: "I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other. * * * If therefore this were a new point, I should be inclined to be of opinion that though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff; but this has been so often determined otherwise, that it is too late now to alter the law in this respect."

[30] Part of the report is omitted.

barrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5s. as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of £775 a week after the Feast of St. John the Baptist the next following (all other moveables, with the corn upon the ground, except). And although the defendant has paid five shillings, parcel, &c. yet the said defendant, although often requested, has not paid the residue to the damage, &c. The defendant prays oyer of the specialty, which is entered in hæc verba, to wit: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, Esquire, that the said Bassett Cole shall give unto the said doctor £775 for all his lands, with Ashmole-House, thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5s.; the money to be paid before Midsummer 1668; all other moveables, with the corn upon the ground, excepted." And upon oyer thereof the defendant demurs. And Withins, of counsel with the defendant, took several exceptions to the declaration: * * * 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money. And it was argued by Withins, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part: Trin. 12 Jac. 1, between Holder v. Tayloe, 1 Rol. Abr. 518 (C) pl. 2, 3; Ughtred's case, and Sir Richard Pool's case, there cited, and Gray's case: and that the word "pro" made a condition in things executory. And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court, that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said, that both parties had sealed it; and therefore, judgment was given

for the plaintiff which was afterwards affirmed in the Exchequer-Chamber, Trin. 22 of King Charles the Second.[31]

[31] In accord: Mattock v. Kinglake, 10 Adol. & El. 50 (1839), time named for payment, but not for conveyance; Wilks v. Smith, 10 M. & W. 355 (1842), same; Dicker v. Jackson, 6 C. B. 103 (1848); Sibthorp v. Brunel, 3 Exch. 826 (1849). Contra; Marsden v. Moore, 4 H. & N. 500 (1859).

Where the plaintiff has made no promise or covenant, so that the defendant would have no affirmative remedy, the courts were astute to import a condition precedent to the defendant's duty. See Lock v. Wright, 1 Str. 569 (1723); Collins v. Gibbs, 2 Burr. 899 (1759); Austin v. Jervoyse, Hob. 69 (1615), plaintiff's promise voidable for infancy.

Footnote by the reporter, Serjeant Williams:

"Almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained, what covenants are independent, and what dependent; and of course, when it is necessary to aver performance in the declaration, and when not. Thus if A covenant with B to serve him for a year, and B covenant with A to pay him £10, it is held that these are independent covenants, and A may maintain an action against B for the money before any service; but if B had covenanted to pay him £10 for the service, these words make the service a condition precedent, and A cannot enforce payment of the money until he has performed the service. So where A covenants with B to marry his daughter, and B covenants to convey an estate to A and the daughter in special tail, it is said that though A marry another woman, or the daughter another man, still A may have an action against B on the covenant; but if B had covenanted to convey the estate for the cause aforesaid, the marriage is a condition precedent, and no action will lie until it be solemnized. 15 H. 7, 10, pl. 17; Bro. Covenant, 22; 12 Mod. 460, Thorpe v. Thorpe; Hob. 106, Lampleigh v. Brathwait. * * * So where B covenanted with C his copyholder, to assure to him and his heirs the freehold and inheritance of his copyhold, and C, in consideration of the same performed, covenanted to pay such a sum, it was adjudged that this was a condition precedent, and B must make the assurance before he is entitled to the money; but if the words had been, in consideration of the said covenant to be performed, B might bring an action for the money before he made the assurance. 3 Leon. 219, Brocas's case. And lastly, where articles of agreement were made between A and B and a covenant by A, that, for the consideration thereafter expressed, he should convey certain lands to B in fee, and B, on his part, for the consideration aforesaid, covenanted to pay a sum of money to A; it was held, that these were independent covenants, and A might bring an action for the money before any conveyance of the lands. 1 Rol. Abr. 415, pl. 8 S. C. cited 12 Mod. 463, Thorpe v. Thorpe, 1 Ld. Raym. 665, 666, 1 Lutw. 251, 252. There are many other authorities of a similar nature which I refer the reader to. 1 Rol. Rep. 336, Spanish Ambassador v. Gifford; Yelv. 133, 134, Bettisworth v. Campion; Hob. 88, Nichols v. Raynbred; 1 Lev. 293, Beany v. Turner; Hard. 102, 103, Gibbons v. Prewde; 1 Str. 535, Blackwell v. Nash; Ibid. 712, Dawson v. Myer; 1 Wils. 88, Martindale v. Fisher. Hence it appears that the Judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties. For the rule which is contained in them all seems clear and indisputable; that where there are several covenants, promises, or agreements, which are independent of each other, one party may bring an action against the other for a breach of his covenants, &c. without averring a performance of the covenants, &c. on his, the plaintiff's part; and it is no excuse for the defendant to allege in his plea a breach of the covenants, &c. on the part of the plaintiff; according to Justinian's rule in the civil law, 'Qui actionem habet ad rem recuperandum, ipsam rem habere, videtur.' Justin. de Regulis Juris, 361. But where the covenants, &c. are dependent, it is necessary for the plaintiff to aver and prove a performance of the covenants, &c. on his part, to

entitle himself to an action for the breach of the covenants on the part of the defendant; and so are also 7 Rep. 10 a. b. Ughtred's case; Doug. 690, 3d ed. Kingston v. Preston, cited in Jones v. Barkley. The difficulty lies in the application of this rule to the particular case. It is justly observed, that covenants, &c. are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. 1 T. R. 645, Hotham v. East India Company; 6 T. R. 668, Porter v. Shepard; Ibid. 571, Campbell v. Jones; 7 T. R. 130, Morton v. Lamb. In order therefore to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose.

1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act. Dyer, 76 a. in margine; 1 Salk. 171, Thorpe v. Thorpe; S. C. 1 Ld. Raym. 665, 1 Lutw. 250, 12 Mod. 461; 1 Vent. 177, Peters v. Opie, per Hale C. J.; 2 Saund. 350, S. C.; 1 Salk. 113, Callonel v. Briggs; 2 H. Black, 389, Terry v. Duntze; 6 T. R. 572, Campbell v. Jones. This seems to be the ground of the judgment in this case of Pordage v. Cole, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed. * * * [Rule 1 is often approved today. See Mass. Biog. Soc. v. Russell, 229 Mass. 524, 118 N. E. 662 (1918); Glaser v. Donnelley (N. M.) 170 Pac. 63 (1918); Allard v. Belfast, 40 Me. 369 (1855); Powers Reg. Co. v. Hoffmann, 169 Ill. App. 657 (1912). But cf. Roberts v. Brett, 11 H. L. C. 337 (1865)].

But, 2. When a day is appointed for the payment of money, &c. and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance. 1 Salk. 171, Thorpe v. Thorpe, 2d Resolution, 12 Mod. 462, 1 Ld. Raym. 665, 1 Lutw. 251; Dyer 76 a. pl. 30.

3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. [The cases of Boone v. Eyre, 1 H. Bl. 273, and Campbell v. Jones, 6 T. R. 570, were here discussed.] Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. * * *

4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 1 Vent. 147, Large v. Cheshire; 1 H. Black. 270, Duke of St. Albans v. Shore.

5. Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without shewing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale. 1 Salk. 112, 113, Callonel v. Briggs; Ibid. 171, Thorpe v. Thorpe; 2 Salk. 623, Lancashire v. Killingworth; Doug. 691, 3d Ed., Kingston v. Preston; Ibid. 684, Jones v. Barkley; 4 T. R. 761, Goodisson v. Nunn; 6 T. R. 665, Porter v. Shephard; 7 T. R. 125, Morton v. Lamb; 8 T. R. 366, Glazebrook v. Woodrow; 2 Saund. 352, Peeters v. Opie, note

CALLONEL v. BRIGGS.

(In the Court of King's Bench, 1703. 1 Salk. 112.)

An agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, &c. Et per HOLT, C. J. If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender; for transferring in the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance: 1 Saund. 319. If I sell you my horse for £10 if you will have the horse I must have the money; or, if I will have the money, you must have the horse; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months

KINGSTON v. PRESTON.

(In the King's Bench, 1773. 2 Doug. 689, Quoted in Jones v. Barkley, 2 Doug. 684.)

"It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated:—That, by articles made the 24th of March, 1770, the plaintiff, for the considerations therein-after mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercer, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he

(5); 2 H. Black. 178, French v. Campbell; Ibid. 123, Phillips v. Fielding; 2 Saund. 106, Holdipp v. Otway; 1 East, 203, Rawson v. Johnson; Ibid. 619, Heard v. Wadham; 4 East, 477; Hall v. Cazenove; 6 East, 555, Martin v. Smith."

In Thorpe v. Thorpe, 12 Mod. 455 (1701), Holt, C. J., constructed similar rules, and said: "What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A shall have the horse of B and A agree that B shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed before his doing what he undertakes of his side, it must be then averred; as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse."

would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house.—Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, &c., and execute such deeds of partnership, and, further, that the plaintiff should, and would, at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly, to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to £4,000.—Then the plaintiff averred, that he had performed, and been ready to perform, his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and quarter.—The defendant pleaded, 1. That the plaintiff did not offer sufficient security; and, 2. That he did not give sufficient security for the payment of the £250, &c.—And the plaintiff demurred generally to both pleas.—On the part of the plaintiff, the case was argued by Mr. Buller, who contended, that the covenants were mutual and independent, and therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff, in a separate action. On the other side, Mr. Grose insisted, that the covenants were dependent in their nature, and therefore, performance must be alleged: the security to be given for the money, was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement, so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security, (who might, and, indeed, was admitted to be worth nothing,) for the performance of his part.—In delivering the judgment of the Court, Lord MANSFIELD expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an

action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.—His Lordship then proceeded to say, that the dependence, or independence, of covenants, was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the Court, it would be the greatest injustice if the plaintiff should prevail: the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent.—Judgment was accordingly given for the defendant because the part to be performed by the plaintiff was clearly a condition precedent."

CLARK v. GULESIAN.

(Supreme Judicial Court of Massachusetts, 1908. 197 Mass. 492, 84 N. E. 94.)

Action by F. Warren Clark against Moses H. Gulesian for breach of contract. From a judgment for defendant, entered on sustaining a demurrer to the declaration, plaintiff appeals. Reversed.

The following is plaintiff's amended declaration: "And the plaintiff says that on or about the 16th day of February, A. D. 1907, the defendant requested the plaintiff to estimate the cost of erecting and completing and requested the plaintiff to make an offer of a price for which the plaintiff would erect and complete a building on the corner of Harcourt and Irvington streets in the city of Boston in accordance with certain plans and specifications then and there shown by the defendant to the plaintiff. And the defendant promised and agreed that if the said offer of a price for erecting and completing said building was accepted by the defendant the defendant would execute and deliver to the plaintiff a good and sufficient bond in the sum of twenty thousand dollars conditioned on the performance in all respects on the part of the defendant of a contract for the erection and completion of said building in accordance with plans and specifications at the price named in said offer. And the plaintiff says that he estimated the cost of said building and made an offer of a price, to wit, the sum of $77,500, for which the plaintiff would erect and complete said building. And the plaintiff says that the defendant then and there duly accepted said offer, and the defendant made an oral contract with the plaintiff under the terms of which contract the plaintiff en-

tered into an agreement with the defendant to erect and finish said building in accordance with said plans and specifications, and the defendant agreed to pay the plaintiff the sum of seventy-seven thousand five hundred dollars ($77,500) for the erection and completion of said building from time to time as the work progressed and to execute and deliver a good and sufficient bond in the sum of $20,000 conditioned on the performance on the part of the defendant of all the obligations of said contract. And the plaintiff says that he has been always ready and willing to carry out said contract, but the defendant thereafter neglected and refused to execute and deliver any bond in accordance with his aforesaid contract, promise and agreement, and by reason of said neglect he has been unable to carry out said contract and prevented from carrying out said contract to the great damage of the plaintiff."

Braley, J. The declaration after allegations of preliminary negotiations, sets forth the oral building contract into which the parties entered. By its terms, the plaintiff contracted to erect and complete a building according to certain plans and specifications, for which the defendant agreed to pay a fixed sum "from time to time as the work progressed," and to furnish a bond to secure the performance of his promise. The contract having contained no provisions as to the time within which the building was to be begun and finished, or the bond given, the plaintiff became entitled to a reasonable time within which to perform, while the delivery of the bond was intended to be concurrent with the making of the contract. It evidently was the intention of the parties that full compensation was not to be made until completion, even if installments were to be advanced as the work progressed, and the contract being indivisible, performance by one party was conditioned, upon performance by the other. Fullam v. Wright & Colton Wire Cloth Co., 196 Mass. 474, 82 N. E. 711. But while the principal purpose was the erection of the building, yet the giving of security for the payment of the price, was intended to be a precedent condition, before performance by the plaintiff could be demanded. Cadwell v. Blake, 6 Gray, 402. The plaintiff alleges his readiness to have gone forward, but it is averred that the defendant absolutely refused to execute and deliver the bond, and this refusal prevented him from performance. By his unqualified refusal the defendant placed himself in default, and the plaintiff had the right either to rescind the contract, leaving him without any cause of action, or to treat it as terminated, and bring suit for such damages as he had suffered from the breach. Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520, 521, and cases cited.

The necessary averments, upon proof of which the plaintiff is entitled at least to nominal damages having been stated with substantial certainty, the declaration is sufficient, and the demurrer not well taken. Rev. Laws, c. 173, § 6.

Judgment reversed. Demurrer overruled.

MORTON v. LAMB.

(In the Court of King's Bench, 1797. 7 Term R. 125.)

In an action on the case the plaintiff declared against the defendant, for that whereas on the 10th Feb. 1796, at Manchester, in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant, had then and there bought of the defendant 200 quarters of wheat at £5 0s. 6d. per quarter, such price to be therefore paid by the plaintiff to the defendant, he, the defendant, undertook and then and there promised the plaintiff to deliver the said corn to him (the plaintiff,) at Shardlow, in the county of Derby, in one month from that time, viz. of the sale; and then he alleged that although he (the plaintiff) always, from the time of making such sale for the space of one month then next following and afterwards, was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise, &c. did not in one month from the time of the making of such sale as aforesaid, or at any other time, deliver the said corn to the plaintiff at Shardlow, or elsewhere, although he (the defendant) was often requested so to do, &c. The defendant pleaded the general issue; and at the trial the plaintiff recovered a verdict.

Holroyd obtained, in the last term, a rule calling on the plaintiff to shew cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery. He said this was necessary on the principle established in many cases, particularly in Thorpe v. Thorpe, Salk. 171, Callonel v. Briggs, Ib. 113, Kingston v. Preston, 2 Dougl. 689, Jones v. Barkley, 2 Dougl. 684, and Goodison v. Nunn, 4 T. R. 761, that when something is to be done by both parties to a contract at the same time, as in this case the tendering of the money and the delivery of the corn, there the party suing the other for non-performance of his part, must aver an offer at least at the same time to perform what was to be done by himself.

Law, Wood, and Scarlett, now shewed cause. The covenants here are mutual and independent, and each party has a remedy by action against the other for non-performance of his part. But if there be any precedence between them, the delivery of the goods ought, in the regular order of things, to precede the payment of the price. In neither case can the averment contended for be necessary. The distinction is taken in many cases, that where two things are to be done, and the time of doing it is mentioned for one and not for the other, there the thing for doing which the time is stipulated must be done first, and so averred to be. * * * Here the first act to be done was by the defendant, namely, the carrying of the corn to Shardlow; by not doing which he broke his agreement, and a cause of action ac-

crued to the plaintiff according to that class of cases, wherein agreements of this sort have been construed to give mutual remedies to the parties. But admitting that he was not bound to deliver the corn there until the plaintiff was prepared to pay for it; still that ought to come from the defendant by way of excuse, and the tender of payment was not necessary to be averred by the plaintiff as a condition precedent to the right of action. * * *

Holroyd, contra.[32]

Lord KENYON, C. J. If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time, and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is, whether that should or should not have been alleged. The case decided by Lord Holt in Salk. 112 [Callonel v. Briggs], if indeed so plain a case wanted that authority to support it, shews that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a Court of Justice, must shew that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it: but they do not appear to me to be applicable. In the one in Saunders [2 Saund. 250] the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell v. Jones [6. T. R. 570] I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which

[32] Arguments of counsel have been abridged and the concurring opinions of Grose and Lawrence, JJ., omitted.

the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

Rule absolute.[33]

GOODISSON v. NUNN.

(In the Court of King's Bench, 1792. 4 Term R. 761.)

This was an action of debt to recover £21 on certain articles of agreement, the substance of which was stated in the declaration. The defendant craved oyer of the agreement by which the plaintiff agreed that he would on or before the 2d of September then next, "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise, advise, or require, well and sufficiently grant, sell and release, assign and surrender, or otherwise convey to the defendant all that copyhold tenement lying," &c. In consideration whereof the defendant covenanted to pay to the plaintiff the sum of £210 on or before the 2d day of September next ensuing; on failure of complying with the before mentioned agreement the defendant was to pay to the plaintiff the sum of £21; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay to the defendant the sum of £21. It was further agreed between the parties, that the plaintiff should take up the copyhold as follows: (that is to say) "That the plaintiff should take it up either for the defendant or his wife, as they should agree at the time; that the plaintiff should take it up for himself; that each party should pay share and share alike towards the expences attending the taking it up." The defendant then pleaded, 1st, Non est factum; 2dly, That the plaintiff did not on or before the 2d day of September next, &c., by such conveyances, assurances, surrenders, ways and means in the law rea-

[33] Unless a contract for the sale of goods expressly sets the time of delivery and the time of payment, it is normally to be implied that they are to be performed concurrently, and a tender of performance by one is a condition precedent to the duty of the other. Atkinson v. Smith, 14 M. & W. 695 (1845); Dunham v. Pettee, 8 N. Y. 508 (1853); Long v. Addix, 184 Ala. 236, 63 South. 982 (1913); Bloxam v. Sanders, 4 B. & C. 941 (1825); Tipton v. Feltner, 20 N. Y. 423 (1859); Allen v. Hartfield, 76 Ill. 358 (1875); Hapgood v. Shaw, 105 Mass. 276 (1870); Isherwood v. Whitmore, 11 M. & W. 347 (1843), the goods must be tendered, so that they can be examined and identified: Brown v. Rushton, 223 Mass. 80, 111 N. E. 884 (1916 [cf. Prest v. Cole, 183 Mass. 283, 67 N. E. 246 (1903)]); Diem v. Koblitz, 49 Ohio St. 41, 29 N. E. 1124, 34 Am. St. Rep. 531 (1892).

If a time is set for delivery earlier than the time set for payment the promise to deliver is independent and the promise to pay is dependent. Staunton v. Wood, 16 Q. B. 638 (1851); Dey v. Dox, 9 Wend. (N. Y) 129, 24 Am. Dec. 162 (1832).

sonably devised, advised, and required, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey to the defendant the said premises in the said articles of agreement mentioned, &c. 3dly, That the plaintiff did not on or before the 2d day of September, &c., or at any time since, well and sufficiently grant, sell, and release, assign and surrender, or otherwise convey, to the defendant, the said premises, &c. 4thly, That the plaintiff at the time of the making of the articles, &c. had nothing in the said premises, whereby he could be enabled to grant, &c., to the defendant the said premises, &c.

To the last three pleas the plaintiff demurred generally.

Lord KENYON, C. J. This case is extremely clear, whether considered on principles of strict law or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay £210; and, if he did not carry the contract into execution, he was to pay £21; and now not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was £40,000 it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases, cited by the plaintiff's counsel, have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go: but I think that the Judges misapplied that principle. It is admitted in them all that where they are dependent covenants, no action will lie by one party unless he have performed, or offered to perform his covenant. Then the question is, Whether these are, or are not, dependent covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate he was to receive the purchas-money; and when the other parted with his money he was to have the estate. They were reciprocal acts, to be performed by each other at the same time. It seems, from the case in Strange [Blackwell v. Nash, 1 Strange, 535], that the Judges were surprized at the old decisions; and in order to get rid of the difficulty, they said that a tender and refusal would amount to a performance: it is true they went farther, and said that "in consideration of the premises," meant only in consideration of the covenant to transfer, and not in consideration of the actual transferring of the stock: but to the latter part of that judgment I cannot accede. It is our duty, when we see that principles of law have been misapplied in any case, to over-rule it. The principle is admitted in all the cases alluded to, that, if they be dependent covenants, performance, or the offer to perform, must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited; and I am glad to find that the old cases have been over-ruled; and that we

are now warranted by precedent as well as by principle to say that this action canot be maintained.

Judgment for the defendant.[34]

SHERMAN v. LEVERET et al.

(Superior Court of Connecticut, 1790. 1 Root, 169.)

Action declaring that the defendants, on the 2nd of October, A. D. 1786, made a written contract and bargain with the plaintiff, which is in the words following, viz. October 2d, A. D. 1786, agreed that David Leveret, Jr. and Co. give Peter Sherman £170 lawful money for his store, land and barn, in Washington; half to be paid next spring, in cash when Sherman is to quit said store, and half the spring after, in good neat, saleable cattle, with interest after next spring until paid. Peter Sherman, David Leveret, Jr. and Co.—and the plaintiff says that by said store, land and barn, mentioned in said writing, was meant the store then occupied by the plaintiff, and a small tract of land on which it stood and lay contiguous to it, and a small barn standing thereon: and the plaintiff says that the defendants entered upon said land sometime in April, A. D. 1787, in pursuance of said written bargain and agreement, and improved the same, and the plaintiff quitted said store upon the request of the defendants, pursuant to said agreement, and fulfilled everything on his part to complete and carry the same into execution; but the defendants have wholly neglected to fulfill said bargain and contract on their part, and have never made said payments, promised in said agreement, although often requested—Damage £200, dated 15th November, A. D. 1788.

Plea—Not guilty. Issue to the court—Judgment that the defendants are not guilty.

LEVERET AND BELLAMY v. SHERMAN.

Action declaring that on the 2d of October, A. D. 1786, they purchased of the defendant a piece of land, lying in Washington, containing about three-quarters of an acre, together with a store and barn thereon standing, and that the plaintiffs and the defendant did enter into the following agreement, viz. Washington, October 2d, 1786, agreed that David Leveret, Jr. and Co. give to Peter Sherman £170, lawful money, for his store, land and barn, in said Washington, one-half to be paid next spring, in cash, when said Sherman is to quit said store and execute a warranty deed of the same to said Leveret and Co. and half the spring following, in good neat cattle, on interest from the first payment till paid; and the plaintiffs say that the defend-

[34] Buller and Grose, JJ., delivered concurring opinions.
See quotation from Willes, J., in the note to Nichols v. Raynbred, ante, p. 508.

ant did not quit said store nor execute a warranty deed to the plaintiffs in the spring succeeding October, A. D. 1786, according to said agreement, but continued in possession of said premises, and utterly refused to quit or convey the same to the plaintiffs, whereby an action has accrued to the plaintiffs to recover of the defendant their just damages, which is £100, lawful money, writ dated 15th November, A. D. 1788. Plea—Not guilty. Issue to the court.

Judgment—That the defendant is not guilty.

The two preceding cases were heard and tried by the court together, and upon the evidence, the court found that neither of the parties had performed or made any tender of performing their parts of the agreement. The question then came up, whether, as they were mutual covenants, one was the consideration of the other; and so a performance not necessary to be laid in the declaration, nor to be proved on the trial.

The defendants, in the first action, insisted that the plaintiff, by the stipulations in the agreement, was to do the first act, viz. was to quit the store, etc. and to give a deed of the premises the then next spring; when, and not till that was done, did the duty of paying arise; but it was the opinion of the court, that by the terms of the contract; the quitting the store, etc., and giving a deed of the premises, the then next spring, when half of the price was to be paid, were concurrent, concomitant acts, to be performed by each of the parties at the same time; and that neither had right to recover, without a performance of his or their part of the agreement, or at least an offer to perform it

GREEN v. REYNOLDS.

(Supreme Court of New York, 1807. 2 Johns. 207.)

This was an action of covenant. By articles of agreement entered into between the parties, the plaintiff, for the consideration therein after-mentioned, covenanted to execute and deliver to the defendant a good and sufficient deed for eighty-four acres of land, in Pittstown, in the county of Rensselaer, on the first day of May, 1806. The defendant, on his part, covenanted to pay to the plaintiff, one thousand dollars, on the first day of May, 1806, and the further sum of eight hundred and seventy-five dollars, on the first day of May, 1812. The declaration was for the non-payment of the one thousand dollars, but did not aver that the plaintiff had tendered a deed on the first day of May, 1806. There was a general demurrer to the declaration, and joinder in demurrer.

Allen, in support of the demurrer.[35]

[35] Allen here cited Jones v. Barkley, Doug. 689 (1781); Goodisson v. Nunn, 4 T. R. 761 (1792); Campbell v. Jones, 6 T. R. 570 (1796); Kingston v. Preston, Doug. 688 (1773); Callonel v. Briggs, 1 Salk. 113 (1705); Morton v. Lamb, 7 T. R. 130 (1797).

KENT, C. J. It has been decided in this court, in regard to a contract for the delivery of stock, that the delivery, and payment of the money were dependent covenants, and that the plaintiff must aver a performance, or an offer to perform, before he could bring his action.

Allen was stopped by the court, who desired to hear the other side.

Foot, contra. The principle laid down in the authorities cited by the counsel, on the other side, apply to cases where the whole consideration is to be paid, not where a part of the money is to be paid, on the day the deed is to be delivered, and the residue afterwards. In the present case, a part only of the money was to be paid, so that the covenants are not mutual and dependent conditions, but each party has his remedy without averring a performance.

PER CURIAM. The covenants in this case are clearly dependent. The one thousand dollars, being in part of the consideration for the deed, and to be paid on the same day the deed was to be delivered, the fair intent, and good sense of the contract is, that the money is not to be paid, until the deed is ready for delivery. The declaration, therefore, is defective in not averring a tender of the deed by the plaintiff. We are of opinion, that the defendant is entitled to judgment; but the plaintiff may amend his declaration on payment of the costs.

Judgment for the defendant.[36]

NOYES v. BROWN et al.

(Supreme Court of Minnesota, 1919. 142 Minn. 211, 171 N. W. 803.)

Action by Williard L. Noyes against Edward Richard Brown and others, with answer only by defendant Brown. Verdict directed for defendant Brown and from an order denying his motion for a new trial, plaintiff appeals. Order reversed.

LEES, C. This action was brought to recover all deferred payments of the purchase price of 40 acres of land in Saskatchewan, Canada,

[36] In accord: Glazebrook v. Woodrow, 8 T. R. 366 (1799); Marsden v. Moore, 4 H. & N. 500 (1859); Kane v. Hood, 13 Pick. (Mass.) 281 (1832); Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535 (1855); Lemle v. Barry (Cal.) 183 Pac. 148 (1919); Gregory v. Keenan (D. C.) 256 Fed. 949 (1919); Parker v. Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253 (1822); Todd v. State Bank of Edgewood, 182 Iowa, 276, 165 N. W. 593, 3 A. L. R. 971 (1917); Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53 (1909).

Where a contract has been made for the sale of land, the continued existence of the buildings thereon is generally held not to be a condition precedent to the buyer's duty to pay the price. Especially is this true if the time for performance has arrived, or if the buyer has taken possession before the loss. The rule is explained partly on the theory that in equity the buyer is the owner, and res perit domino. See Paine v. Meller, 6 Ves. 349 (1801); Ames' Cases on Equity, 227, citing many cases; Sewell v. Underhill, 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) 233, and note, 184 Am. St. Rep. 863, 18 Ann. Cas. 795 (1910). The contrary rule is adopted in a few jurisdictions. Thompson v. Gould, 20 Pick. (Mass.) 134 (1838); Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65 (1871). See, also, post, 8̣2.

sold to defendants by one Upton under a written contract thereafter assigned to plaintiff.

The answer interposed by defendant Brown, upon whom alone the summons was served, was a general denial.

There was a trial by jury and a directed verdict for defendant. Plaintiff appeals from an order denying his motion for a new trial. Defendant has not appeared in this court, and the case has been submitted on the brief and oral argument of plaintiff's counsel.

The motion for a directed verdict was based on three grounds, which may be stated as follows: That an action at law on a contract for the sale of land to recover the purchase price will not lie; that plaintiff failed to plead or prove that he had tendered a deed to defendant or was able and willing to convey the land to him; and that defendant was entitled to a deed from Upton, his immediate vendor, who had disabled himself from conveying by transferring his interest in the land to plaintiff.

Unaided by brief or argument by defendant's counsel, we have attempted to discover a theory upon which the ruling of the trial court might be sustained.

1. In Freeman v. Paulson, 107 Minn. 64, 119 N. W. 651, 131 Am. St. Rep. 438, it was held that a vendor of land is not entitled to recover the purchase price from his vendee in an ordinary action at law, but is limited to a recovery of the damages he has sustained by reason of the breach of the contract, if legal, as distinguished from equitable, relief is sought.

In that case, the vendee was to make an initial payment when the contract was executed, and final payment upon the delivery of the deed. In the case at bar the contract provides for the payment of $1,000 on the day of its execution and of $4,000 in four equal semi-annual installments. It recites that the times of such payments shall be "a condition precedent and of the essence of this agreement"; that the vendee will "punctually pay the sums of money above specified as each of the same becomes due"; that if he makes the payments as stipulated then "upon request at the office of the vendor * * * at the city of Saskatoon, and the surrender of this agreement, [he] shall be entitled to a conveyance of said land in fee simple"; that if he fails in the strict performance of his part of the agreement, the vendor shall have the right to declare the contract null and void by notice in writing to that effect, "but that no forfeiture shall take away the right of the vendor to recover the purchase money"; that the vendee "accepts title of the vendor, and the said vendor, * * * or assigns, as the case may be, shall not be bound to furnish any abstract of title nor to produce any title deeds nor other evidence of title whatever, or to answer any requisition on title"; and that the vendee, after the execution of the contract, shall have the right of possession of the land.

Appellant contends that these provisions distinguish this contract from the one considered in Freeman v. Paulson, supra. We are of the opinion that this contention must be sustained.

In the Freeman Case final payment of the purchase price and the execution of the deed were to be concurrent acts. Here payment of the purchase price is expressly made a condition precedent to the right of the vendee to a conveyance. In the ordinary contract for the sale of land the vendee's covenant to pay and the vendor's to convey are mutual and dependent, but here the covenant to pay is to be performed before the vendor's covenant to convey becomes operative. When final payment is made, the vendee is to get his deed "upon request at the office of the vendor" and the surrender of the contract.

In a contract to convey as soon as the vendor obtained title to the land, this court held that "where, by the terms of a contract, the time to perform the covenant on the one side is to happen * * * before the time for the performance of the covenant on the other side, the former is not dependent on the latter." State v. Winona, etc., Co., 21 Minn. 472.

Where the contract provided that the time for paying the consideration was a date prior to that for the transfer of the property, it held that the payment of the consideration was intended to be a condition precedent to the obligation to transfer. Robson v. Bohn, 27 Minn. 333–344, 7 N. W. 357. It has also held that "the question whether covenants are to be held to be dependent on or independent of each other turns upon the intention of the parties, to be ascertained from the subject-matter and terms of their contract. Such intention is paramount, to which, when once discovered, all technical forms of expression must yield." Reynolds v. Lynch, 98 Minn. 58, 107 N. W. 145.

The doctrine of these three cases is fully supported by the decisions of other courts. Early cases recognized nice and refined distinctions in determining the character of covenants. The rule is now thoroughly settled that the intention of the parties is the vital thing, that it is to be ascertained from the sense of the entire contract rather than from any particular form of expression, and that the order of time in which it is intended that performance shall take place is a controlling circumstance. Rules were formulated long ago in a note to Pordage v. Cole, 1 Saund. 319 i. This is one of them:

"If a day be appointed for payment of money, or part of it * * * and the day is to happen, or may happen, before the thing which is the consideration of the money * * * is to be performed, an action may be brought for the money * * * before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money."

In Paine v. Brown, 37 N. Y. 228, this rule was cited with approval.

Following the lead of New York, the courts in many other states have since given their approval to the rule. It is unnecessary to rehearse the cases here. They are collected in 13 C. J. § 540.

The following language quoted from Collins v. Schmidt, 126 Wis. 227, 105 N. W. 671, exactly fits the case at bar: "Under a contract like this, where conveyance is only to be made upon demand after completed payment, the promise of payment is absolute and may be enforced by suit without tender of conveyance. The duty of the vendor to convey is neither a condition precedent to payment nor an act which may be demanded concurrently therewith."

2. The consideration which led to the adoption of the rule that an action at law to recover the purchase price in an executory contract for the sale of land will not lie was first stated in the early case of Laird v. Pim, 7 M. & W. 474, as follows: "The question is: How much worse off is the plaintiff by the diminution of the value of the land, or the loss of the purchase money in consequence of the non-performance of the contract? It is clear that he cannot have the land and its value, too."

We find this thought expressed in substantially the same language in subsequent cases and by text-writers. Porter v. Travis, 40 Ind. 556; Prichard v. Mulhall, 127 Iowa, 545, 103 N. W. 774, 4 Ann. Cas. 789; Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910; Bensinger v. Erhardt, 74 App. Div. 169, 77 N. Y. Supp. 577; 2 Warv. Vnd. § 937; 2 Suth. Dam. § 569. It would be manifestly unjust to give the vendor the purchase money and allow him to keep the land. If such were the result of permitting a recovery of the purchase price we should hesitate to sanction a recovery. The situation which has troubled the courts and which is presented in this case may be thus stated:

A vendor whose contract entitles him to receive the purchase price before he can be called upon to convey, or who is to have a reasonable time after he gets his money within which to convey, cannot logically be denied the right to sue for and recover the purchase price after it falls due; but, if he may get judgment and collect it before conveying, a vendee whose contract is not recorded and who is not in possession may be deprived of the land through a wrongful conveyance to another, or through judgments against the vendor, and, if his vendor is contumacious, he may be put to the expense of a suit in equity to get title to the land after paying for it. The situation has been met in various ways by different courts. Some have cast logic aside, and while permitting a recovery of all but the last installment of the purchase price, have refused to allow it to be recovered in an action at law, no matter how trifling it may be. The rule adopted in these cases is that the vendor may sue for each installment as it falls due except the last. If he waits until all the installments are due, and then sues for the whole obligation, or, having been paid all but the last installment, he sues for that, he must first tender a deed, and cannot recover

in the absence of such tender. Biddle v. Coryell, 18 N. J. Law, 377; 38 Am. Dec. 521; Robinson v. Harbour, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671; First Nat. Bank v. Agnew, 45 Wis. 131; Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126.

Another line of cases holds that there may be a money judgment for the entire purchase price, but that its enforcement will be stayed until the vendor deposits in court a deed, to be delivered to the vendee upon payment of the judgment. There is little practical difference between a judgment with execution stayed until a vendor deposits a deed and a judgment for the purchase money at the end of a suit for specific performance. The right to the latter remedy is well established. Freeman v. Paulson, supra; O. W. Kerr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112, Ann. Cas. 1912C, 538.

The former course of procedure has been termed an "irregular expedient to give a judgment at law the effect of specific performance, * * * of doubtful propriety in jurisdictions where * * * the distinction between actions at law and in equity is still preserved." Prichard v. Mulhall, supra. The expedient may be irregular, but its adoption is sanctioned in cases entitled to the highest consideration. Loud v. Pomona Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; Rindge v. Baker, 57 N. Y. 209–224, 15 Am. Rep. 475. The following statement is found in Freeman on Executions, § 32, and appears to be well fortified by numerous decisions:

"The power of courts to temporarily stay the issuing of execution is exercised in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ"—citing among other cases Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310.

See, also, Richardson v. Merritt, 74 Minn. 354, 77 N. W. 234, 407, 968, and Eaton v. Cleveland, etc., Ry. Co. (C. C.) 41 Fed. 421.

Our conclusion is that if a vendor in such an action as is now before us, obtains judgment for the purchase price, it is the duty of the trial court to stay execution thereon until the deed is deposited with the clerk of court, to be delivered to the vendee on payment of the judgment, and that, the stay should be continued long enough to give the vendee a reasonable opportunity to ascertain whether the deed conveys the title in compliance with the terms of the contract. The views expressed in Knoblauch v. Foglesong, 37 Minn. 320, 33 N. W. 865, point to the conclusion we have reached on this phase of the case.

3. The complaint does not plead a tender of a deed, or ability and willingness on the part of the vendor to convey.

It would seem that such allegations have no place in an action to recover the purchase price when the covenant to pay it is independent of the covenant to convey.

Lewis v. Prendergast, 39 Minn. 301, 39 N. W. 802; one of the first cases to refer to the necessity of pleading an offer to perform, was a case where the covenants were held to be concurrent and dependent. That was an action for specific performance. In Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653, an action for damages for breach of a contract for the sale of land, it was said by the present Chief Justice that, "generally speaking, where the stipulations of the contract are concurrent and dependent, a tender of performance before suit is necessary, * * * and in those cases where the time of performance is past an allegation of the failure and refusal by defendant to perform, the first act of performance being by the terms of the contract cast upon him, sufficiently states a right of action."

The language quoted precisely fits the case at bar, and the rule there laid down dispenses with necessity of pleading an offer to perform in such a case as we have here. The same rule was laid down in Gale v. Best, 20 Wis. 48, and in Shenners v. Pritchard, 104 Wis. 287, 80 N. W. 458.

There is nothing inconsistent in Freeman v. Paulson, supra. Had the contract in that case been similar in its terms to the contract now in question, the practice we have sanctioned here would have been applicable.

4. The provisions of the contract relating to the title defendant was to receive have been sufficiently pointed out. They do not entitle him to a deed with personal covenants by his vendor. If he receives a conveyance of title in fee, he will get all that the contract provides for. Such title may come from his vendor's assignee, or from any other source, provided it conveys the fee to him. The case does not fall within the rule stated in McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661, but is governed by Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787, and McManus v. Blackmarr, 47 Minn. 331, 50 N. W. 230.

Order reversed.

McRAVEN v. CRISLER.

(Supreme Court of Mississippi, 1876. 53 Miss. 542.)

CHALMERS, J.[37] * * * By the defendant's sixth plea she averred "that the original note was given by her in consideration that the plaintiff would sell and convey to her by proper deed of conveyance the land," &c.; and that no deed had been tendered before suit brought. A deed was filed with the declaration, which, by the judgment of the court, was ordered to remain on file, and be delivered on payment of the judgment. Was there any obligation to tender it before the institution of the suit? There was no written contract to convey the land,

[37] The statement of facts and a part of the opinion have been omitted.

nor any proof of a parol promise to do so. The question must therefore be tested by the averments of the plea.

It will be observed that there is no allegation that the deed was to be made at or before the payment of the note, nor is any time specified when the execution of the deed was to take place. The note was payable one day after date. While it is true that the courts will hold the covenant to pay and the covenant to make title as dependent, unless a contrary intention clearly appears, it is no less true that the covenants must be regarded as independent, where the time of payment precedes the time fixed for delivering the deed, or where no time for making title is specified. Gibson v. Newman, 1 How. 341; Leftwich v. Coleman, 3 How. 167; Rector v. Price, 3 How. 321; Robinson v. Harbour, 42 Miss. 795, 97 Am. Dec. 501, 2 Am. Rep. 671.

The case of Gibson v. Newman, supra, was much like the one at bar. In that case, as in this, there was no written obligation to convey, and the question was determined by the language of the plea. There, as here, the plea failed to aver any period when the deed was to be made; and upon this ground the covenants were held to be independent. That case is cited and approved in Robinson v. Harbour, ubi supra, the latest authoritative exposition of this court on the much-vexed question of dependent and independent covenants.

The demurrer to the plea in the case at bar was properly sustained.

Judgment affirmed.

NORTHRUP v. NORTHRUP.

(Supreme Court of New York, 1826. 6 Cow. 296.)

On demurrer to the defendant's plea. The plaintiff declared on a covenant, which, on oyer, was as follows: The defendant covenanted to pay a certain rent due and in arrear, to one D. Tomlinson, on a certain farm, and all which should become due on the 25th of March, 1825; the whole to be paid on that day; and the plaintiff covenanted, that on the defendant's so paying the rent, he, the plaintiff, would give up and discharge a certain bond and mortgage. The action was for not paying the rent at the day.

Plea, that the plaintiff did not, on the 25th day of March, 1824, give up and discharge the bond and mortgage, nor tender, nor offer to do so, on that day, or before or since.

General demurrer and joinder.

CURIA per SAVAGE, C. J. The plea is bad. The payment of the money to Tomlinson, on the day specified, is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous; but was naturally to be subsequent. A general averment of his readiness to perform, is all that can be necessary or proper. To aver a tender was certainly not necessary.

Lord Mansfield, in Jones v. Barkley, Doug. 690, makes three classes of covenants; 1. Such as are mutual and independent, where separate actions lie for breaches on either side; 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends on the prior performance of the other; 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance. I consider the plaintiff's covenant as clearly belonging to the second class. The defendant's covenant was absolute. The cases cited by the defendant's counsel relate to the third class.

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs.

Judgment for the plaintiff.[38]

INTERNATIONAL TEXT-BOOK CO. v. MARTIN.

(Supreme Judicial Court of Massachusetts, 1915. 221 Mass. 1, 108 N. E. 469.)

Action by the International Text-Book Company against Charles D. Martin, to recover the balance due on a written contract between plaintiff and defendant's minor son, which contract the defendant had guaranteed in writing. Verdict directed for the plaintiff, and defendant excepts. Exceptions overruled.

LORING, J.[39] By the written agreement between the plaintiff and the defendant's son, the son subscribed "for a scholarship in the International Correspondence Schools, covering a course of correspondence instruction in telephone engineering," and he promised to "pay for said scholarship the sum of" $78.40, in installments of $5 each, the first installment to be paid at the time of signing the subscription and the remaining installments "within each and every period of four weeks hereafter until said price is paid in full." It was further agreed that in case of default in the payment of any one of said installments when due and payable the whole of the amount remaining unpaid should thereupon at the option of the plaintiff become due and payable. The contract contained these further provisions:

"It is agreed as follows: First: That the price hereinafter agreed to be paid for said scholarship shall include: (a) All charge for instruction in all subjects of the course for which said scholarship calls until I am qualified to receive a diploma or certificate of proficiency, provided I complete said course within five years from the date hereof. * * * Fourth: That this subscription, when accepted by you, shall not be subject to cancellation, and that you shall not be required to refund any part of the money paid for said scholarship."

[38] In accord: Morris v. Sliter, 1 Denio (N. Y.) 59 (1845), plaintiff covenanted to convey "after defendant shall have paid."

[39] That part of the opinion dealing with the second defense is omitted.

In addition to the foregoing the following words were printed at the bottom of the contract: "We do not refund money paid for scholarship."

The defendant guaranteed "the payment to you [the plaintiff] of the price agreed to be paid for the within-mentioned scholarship in accordance with the terms of the within subscription." Both contracts were dated August 22, 1910.

The son pursued his studies under the plaintiff's instruction for some four months and paid four installments in addition to that paid when the contract was signed. He then (on or about January 1, 1911) stopped studying and refused to make any further payments. This action on the guaranty was brought on January 5, 1912, to recover the unpaid installments amounting to $53.40.

The defendant admitted that he signed the contract and that he read it before he signed it. That included the plaintiff's contract with the son, which by the terms of the contract of guaranty was incorporated into the guaranty contract. Two defenses were set up: First, that on or about January 1, 1911, when he was not in default in the payment of the installments due from him, the son elected not to go on with the instructions called for by the contract; and, second, that certain misrepresentations were made by the agent of the plaintiff when the contract was signed by the son.

The first defense is in effect based on the assumption that the contract sued on was a contract to pay $5 a month for instructions to be given to the son by the plaintiff until the sum of $78.40 had been paid, or, if that contention be not sound, that under the circumstances we have stated the plaintiff is not entitled to recover the contract price but is entitled to recover damages only for breach of the contract by the son. The latter defense is stated in the fourth and fifth rulings asked for by the defendant, and set forth in the note.[40]

It is plain that the contract is not a contract for instruction by the month, to be paid for and furnished until $78.40 should have been paid. By the terms of the contract between the son and the plaintiff, the son subscribed "for a scholarship in the International Correspondence Schools covering a course of correspondence instruction in telephone engineering" to be given until he was qualified to receive a diploma or certificate of proficiency, provided he completed the course

[40] "4. Although the performance of the contract on the part of the plaintiff was prevented by the refusal to perform on the part of Walter G. Martin, subscriber, yet the plaintiff is not entitled to the entire contract price less the amount paid, but only to the amount of damages caused by the breach of contract on the part of the subscriber, Walter G. Martin.

"5. By the terms of the written agreement, the plaintiff had to make expenditures for stamps, typewriting, corrections on papers, etc. The facts as to these expenditures are especially within the knowledge of the plaintiff, but as the plaintiff has not offered the necessary evidence to show what these expenses will amount to, it will be impossible for you to fix the damages and therefore you will find for the defendant."

within five years from the date of the agreement. That is to say, the son had five years in which to complete the course and the plaintiff was bound to carry on the instruction agreed to be given for that period, or until the son should be qualified to receive a diploma within that period. The payments to be made by the son were to be made in 16 installments (15 of which were for the sum of $5 each and the sixteenth for the sum of $3.40), and these installments were to be paid every four weeks, beginning with the date of the signing of the contract. The case comes within the first rule of Sergeant Williams in his note to Pordage v. Cole, 1 Saunders, 319, 320. That rule is in these words:

"If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent."

This again was founded upon the judgment of Chief Justice Holt in Thorp v. Thorp, 12 Mod. 455, 461. In other words the promise contained in this contract which the plaintiff now seeks to enforce was an independent, not a dependent, promise.

In case of independent promises the promisor has to perform his promise and if he does not get what he pays for his remedy is by a cross-action. In the case at bar the plaintiff has been ready and willing at all times to go on with the son's instruction, but the son has refused to study. The plaintiff has not been guilty of any breach of its agreement. Under these circumstances the defendant's contention comes to this: The maker of an independent promise who renounces his right to the thing paid for by him can show that fact in reduction of the sum the promisee is entitled to recover under the independent promise. The case of International Text-Book Co. v. Martin, 82 Neb. 403, 117 N. W. 994, seems in effect to be a decision that there is such a right to reduce the amount to be recovered in such a case. It was there held that the burden was on the defendant to prove the benefit ensuing to the plaintiff by the defendant's renunciation, and in the absence of proof of such a benefit that the sum stipulated for had to be paid.

If that be so ordinarily, or if ordinarily there is a question as to that, it is disposed of in the case at bar by the terms of the contract between the plaintiff and the son, which was guaranteed by the defendant and by reference made part of the contract of guaranty. It is there expressly provided that: "This subscription, when accepted by you [the plaintiff], shall not be subject to cancellation, and that you will not be required to refund any part of the money paid for said scholarship," and "We [the plaintiff] do not refund money paid for scholarship."

The direct effect of these two provisions is confined to the return of money paid by the scholar. But indirectly they affect the construction of the contract. If money paid for the "scholarship" is not to be returned under any circumstances, it is plain that as matter of construction the contract between the plaintiff and the son was a contract by which the son bought a "scholarship," that is to say a right to be instructed in telephone engineering for a period of five years or until he became qualified to receive a diploma before the expiration of that time. He was not bound to study at all if he did not wish to. On the other hand although he was at liberty to study when he wished at any time during the five years, he was bound to pay for the "scholarship" in installments the last of which came due in one year and three months after the signing of the contract. What he paid for was the right to the instruction, and the sum to be paid for that right was to be paid whether the son did or did not exercise his right to be instructed.

The defendant has placed great reliance on International Text-Book Co. v. Schulte, 151 Mich. 149, 151, 114 N. W. 1031; International Text-Book Co. v. Jones, 166 Mich. 86, 88, 131 N. W. 98, 99; International Text-Book Co. v. Marvin, 166 Mich. 660, 668, 132 N. W. 437; International Text-Book Co. v. Roberts, 168 Mich. 501, 506, 134 N. W. 460. The doctrine established by the first two of these cases and recognized by the other two is stated in these words in the second case: "It is the rule in this state that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract. The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform" brought on by the refusal of either party to go on.

It was accordingly held in the first two cases that the only sum which could be recovered was the damage proved by the plaintiff; and there being no affirmative proof of damages suffered by the plaintiff in those cases it was held that the plaintiffs were entitled to nominal damages only. That doubtless is the rule in case of dependent promises. For example where A. agrees to buy of B. a chattel and to pay a specified sum for it. If A. refuses to go on with the contract before the title to the chattel passes all that B. can recover is damages. See for example Barrie v. Quimby, 206 Mass. 259, 92 N. E. 451. But see in this connection White v. Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; National Cash Register Co. v. Dehn, 139 Mich. 406, 102 N. W. 965, where it was held that even in case of sales of chattels the rule does not apply in case it is agreed that payment is to be made before the title passes. The case at bar does not come within the rule stated in the Michigan cases because in the contract here in question the promise to pay was an independent promise.

For these reasons we are of opinion that the exceptions taken to the refusal to give the fourth and fifth rulings asked for must be over-

ruled. This conclusion was reached in International Text-Book Co. v. Anderson, 179 Mo. App. 631, 162 S. W. 641. * * *

Exceptions overruled.[41]

(b) Partial Failure of Performance

BOONE v. EYRE.

(In the King's Bench, 1777. 1 H. Bl. 273, note.)

Covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of the negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation and so had not a good title to convey.

To which there was a general demurrer.

Lord Mansfield. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.[42]

[41] In accord: Massachusetts Biographical Soc. v. Russell, 229 Mass. 524, 118 N. E. 662 (1918); La Salle Extension University v. Ogburn, 174 N. C. 427, 93 S. E. 986, Ann. Cas. 1918C, 887 (1917); International Correspondence Schools v. Ayres, 106 L. T. 845 (1912); International Correspondence Schools v. Irving (Ct. Sess. Scot.) S. C. 28 (1915). Cf. International Text-Book Co. v. Jones, 166 Mich. 86, 131 N. W. 98 (1911); and Clark v. Marsiglia 1 Denio (N. Y.) 317, 43 Am. Dec. 670 (1845); Wigent v. Marrs, 130 Mich. 609, 90 N. W. 423 (1902).

[42] See in general accord: Campbell v. Jones, 6 T. R. 570 (1796), sale of patent with promise to teach; Ritchie v. Atkinson, 10 East, 295 (1808), freight pro rata allowed after delivery of half a load; Havelock v. Geddes, 10 East, 555 (1809), charter party, delay; Davidson v. Gwynne, 12 East, 381 (1810) same; Fothergill v. Walton, 8 Taunton, 576 (1818); Carpenter v. Cresswell, 4 Bing. 409 (1827), sale of business with covenant not to interfere; Franklin v. Miller, 4 Adol. & El. 599 (1836); Stavers v. Curling, 3 Bing. N. C. 355 (1836), wages due in spite of some breaches of duty; Seeger v. Duthie, 29 L. J. C. P. 253, 30 Ib. 65 (1860); White v. Beeton, 7 H. & N. 42 (1861); Pust v. Dowie, 32 L. J. Q. B. 179, 34 L. J. Q. B. 127 (1865); Deep Vein Coal Co. v. Jones,

PICKENS v. BOZELL.

(Supreme Court of Indiana, 1858. 11 Ind. 275.)

DAVISON, J.[48] Bozell brought this action against Pickens, upon a written agreement, which bears date October 6, 1854, and is as follows:

"This agreement made, &c., between Joseph Bozell and Henry Pickens, witnesseth: That Bozell has leased, and by these presents doth lease, to said Pickens, for the term of two years from the first of March, 1855, twenty-five acres of upland, and forty acres of bottom land, described, &c.; and is to furnish house and garden, pasture for one cow, and firewood off the place; and is to put the farm in good repair. Pickens is to farm the land as follows: The upland is to be put in oats, and he is to pay Bozell one-third of the same in the shock. The bottom land, he, Pickens, is to farm in corn, and pay Bozell twenty-two and one-half bushels of corn per acre, to be delivered on the premises. Pickens is to have all the pasture of the corn ground, and two-thirds of the pasture of the oats ground," &c.

In the complaint, it is averred that the defendant failed to deliver to the plaintiff, on the premises or elsewhere, any of said rent corn for the year 1856, except six hundred and twenty bushels—leaving unpaid and undelivered two hundred and eighty bushels, which was, at the time the same should have been delivered on the premises, worth forty cents per bushel—wherefore, &c.

Defendant demurred to the complaint, but his demurrer was overruled, and thereupon he answered by a general denial, and also by way of counterclaim. * * *

Verdict in favor of the plaintiff for $10.58, upon which the Court rendered judgment, &c.

The only point made in the argument of the cause relates to the action of the Court in overruling the demurrer to the complaint. That pleading is said to be defective because it fails to allege the performance of certain stipulations which the plaintiff agreed he would perform, namely, that he would "furnish the defendant a house and garden, and pasture for one cow, and put the farm in good repair." This construction does not seem to be correct. In the agreement before us, the promises are evidently mutual. Those of which the plaintiff has failed to allege performance, constitute only a part of the consideration of the defendant's contract; and where, in such case, he has actually received a partial benefit from the

49 Ind. App. 314, 97 N. E. 341 (1912); Statesville Flour Mills Co. v. Wayne Distributing Co., 171 N. C. 708, 88 S. E. 771 (1916).

See discussion in Grant v. Johnson, 5 N. Y. 247 (1851); and cf. Glazebrook v. Woodrow, 8 T. R. 366 (1799); Kane v. Hood, 13 Pick. (Mass.) 281 (1832); Ellen v. Topp, 6 Ex. 424, 155 Eng. Rep. 609 (1851); Cadwell v. Blake, 6 Gray (Mass.) 402 (1856).

[48] Part of the opinion is omitted.

consideration of the engagement on his part, and the plaintiff's failure to perform may be compensated in damages, the stipulations of the parties will be construed independently; and the result is, that an action for a breach may be maintained against the defendant without alleging performance. 1 Chit. Pl. 323,a; Pordage v. Cole, 1 Saund. 320,b; Bennet v. Executors of Pixley, 7 Johns. (N. Y.) 249; Tompkins v. Elliot, 5 Wend. (N. Y.) 496; Obermyer v. Nichols, 6 Bin. (Pa.) 159, 6 Am. Dec. 439; Bream v. Marsh, 4 Leigh (Va.) 21; Gourdin v. Davis, 2 McCord (S. C.) 514. And this doctrine is plainly consistent with the new rules of pleading; because, under them, the defendant may, in every such case, set up in his defense, by way of counterclaim, the plaintiff's failure to perform, in reduction of damages. 2 R. S. 1852, p. 41, § 59. True, where the mutual promises go to the whole consideration on both sides, performance must be averred; but in the case at bar, the main consideration of the defendant's stipulation to pay rent, was not the furnishing of the house, &c., but the use and occupation of the leased premises for a stated term. The record, in this instance, sufficiently shows that he took possession, and occupied under the lease; hence, it would be unequal and unjust to hold that the plaintiff cannot sue for the rent without alleging performance. Bryan v. Fisher, 3 Blackf. 316.

PER CURIAM. The judgment is affirmed, with 10 per cent. damages and costs.[44]

[44] In Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 135 C. C. A. 162 (1915), a breach by the plaintiff, for which judgment had been obtained against him, was held not to privilege the defendant not to perform his part. The court said: "These questions are controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract, gives to the injured party the right to rescind the contract or to recover damages for the breach; or, stated conversely a breach of a covenant, which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party. Kauffman v. Raeder, 108 Fed. 172, 47 C. C. A. 278, 54 L. R. A. 247 (1901); Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536 (1907); Neenan v. Otis Elevator Co. (C. C.) 180 Fed. 997, 1000 (1910). While every breach of a contractual obligation confers a right of action upon the injured party, it is thus seen that every breach does not operate as a discharge. A breach which permits a rescission of the contract, discharging the other party, must be of an absolute part of the obligation—that is, a breach of that part of the obligation which goes to the whole consideration, and may be made, first, when the party renounces his liabilities under it; second, when by his own act he makes it impossible to perform; or, third, by failing fully to do what he promised. When this occurs, the party offended against may consider the contract rescinded and himself exonerated, or sue upon the contract for such damages as he has thereby sustained." See, also, Krebs Hop Co. v. Livesley, 51 Or. 527, 92 Pac. 1084 (1908).

In McAllister-Coman Co. v. Matthews, 167 Ala. 361, 52 South. 416, 140 Am. St. Rep. 43 (1910), the court said: "Every breach of a contract is, of course, inconsistent with the contract; but every breach by one party does not authorize the other to renounce it in toto."

Topp did not nor would faithfully serve the plaintiff according to the tenor and effect, true intent and meaning of the said indenture, but on the contrary thereof, the said Richard Topp, during the said term of five years in the said indenture mentioned, to wit, on the said 22nd of July, 1849, did unlawfully absent himself from the service of the plaintiff, and hath from thence hitherto remained and continued absent from the service of the plaintiff, contrary to the tenor and effect of the said indenture and of the said covenant of the defendant in that behalf made as aforesaid, to the plaintiff's damage, &c.

The defendant, after setting out the indenture on oyer, pleaded, that the plaintiff, at the time of the making of the said indenture, as in the declaration mentioned, exercised the art and carried on the business of an auctioneer, appraiser, and corn-factor, as therein mentioned; and that the apprenticeship and covenants aforesaid were made with the plaintiff as such auctioneer, appraiser, and corn-factor, and not otherwise; and that, after the making of the said indenture, and before the accruing of the cause of action, &c., to wit, on &c., the plaintiff voluntarily and of his own free will gave up, relinquished, abandoned, and ceased to exercise and carry on, and hath not, at any time since, exercised and carried on the art and business of a corn-factor as aforesaid. Verification.

Replication, that the plaintiff relinquished his business as a corn-factor aforesaid with the full knowledge and consent of the defendant in that behalf; and that, from the time of such relinquishment continually until the accruing of the cause of action in the declaration mentioned, the said Richard Topp, with full knowledge of such relinquishment as aforesaid, continued, with the consent of the defendant in that behalf, to serve the plaintiff under the said indenture. Verification.

Special demurrer to the replication, inter alia, on the grounds that the consent of the defendant to the relinquishment by the plaintiff of his business of a corn-factor aforesaid, and to the continuing of the said Richard Topp to serve the plaintiff as in the replication mentioned, is not alleged to have been given or contained by or in any deed or instrument under the seal of him the defendant; and that the contract in the declaration mentioned could not in law be varied or altered by parol, or by any consent other than a consent given or contained in some deed or instrument under seal; and that the replication is a departure from the declaration; that the contract relied upon in the declaration is a contract to employ and serve in the art and mystery of an auctioneer, appraiser, and corn-factor; and the replication sets up some new alleged contract to employ and serve in the art and mystery of an auctioneer and appraiser only.

Joinder in demurrer.

The demurrer was argued in Easter Term last (April 26th, 1850), before Pollock, C. B., Parke, B., Rolfe, B., and Platt, B., by Macnamara for the defendant, in support of the demurrer, and by Taprell for the

plaintiff; and the Court took time to consider their judgment; but afterwards Pollock, C. B., said that, as a difference of opinion existed among certain members of the Court, they wished to hear the case reargued. The case was accordingly re-argued in Hilary Term last (Jan. 20), before Pollock, C. B., Parke, B., Alderson, B., and Platt, B., by

Macnamara for the defendant, in support of the demurrer. * * *

Thirdly. The exercise of the trades, or rather the non-abandonment of any one of them by the master, is a condition precedent to the service of the apprentice, or, in other words, they are dependent covenants. The non-exercise of the trade for a few days merely would not justify the apprentice in leaving; but the relinquishment of any of them would. The doctrine of dependent covenants is fully discussed in the notes to Pordage v. Cole, 1 Wms. Saund. 320 b.; and Cutter v. Powell, 2 Smith's Leading Cases, 9; where the most important cases bearing upon the subject are cited. The principle was laid down by Lord Mansfield in Boone v. Eyre, 1 H. Bla. 273, n.; 2 W. Bla. 1312, which has been often recognized and acted upon. "The distinction is very clear," said that learned Judge; "where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." The question seems to be, whether, notwithstanding the breach, the contract can be substantially carried out, and whether adequate compensation can be obtained for such breach. The reason of the rule is, that the damages would be unequal if a breach of a comparatively unimportant part of the contract afforded a ground for rescinding it altogether. The chief tests to be applied appear to be the materiality and importance of the covenants broken, and the difficulty of assessing damages thereupon. There is a close analogy between these questions and those which relate to penalties and liquidated damages. In the latter instance, the importance of the matter, the performance of which is secured by a penalty, and the difficulty of estimating the damages for its breach, are the main points to be considered: Galsworthy v. Strutt (1 Exch. 659). The rule adopted for the construction of covenants as dependent or independent is this:—That the good sense of the case, the nature of the instrument, and the intention of the parties, are to decide the question. * * *

Taprell contra. * * * [46]

The judgment of the Court was now delivered by

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. The breach assigned is, that the

[46] Part of the argument of counsel is omitted.

apprentice did not nor would faithfully serve the plaintiff according to the tenor and effect of the indenture; but, on the contrary, did on the 22nd of July, 1849, unlawfully absent himself from the service of the plaintiff, and has thenceforth continued absent from such service. [The Lord Chief Baron, after stating the pleadings, proceeded:] On the part of the plaintiff it was scarcely contended that the replication could be supported. It is obviously bad. Such parol consent cannot entitle the plaintiff to maintain an action of covenant in this form, which is founded entirely on the deed under seal. The case therefore resolves itself into the only question really argued before us, which was, whether the plea was good.

On the part of the plaintiff it was contended, that the plea afforded no answer to the plaintiff's cause of action, on two grounds: first, Mr. Taprell contended, that all which the plaintiff undertook to do was to teach three trades; and that he might continue to do this, although he had ceased to carry on one of them; and that the plea contained no averments that he was unable so to do.

But this objection is ill founded. The breach complained of is, that the apprentice did not nor would serve the plaintiff according to the tenor and effect and true intent and meaning of the indenture. Now, looking to the indenture, we see that the real engagement was this—the son Richard, with the consent of the defendant, his father, "put himself apprentice to the plaintiff," described in the indenture as "auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve;" and then the defendant, at the end of the deed, bound himself to the plaintiff for the due performance of that engagement. What then was it which the defendant covenanted that his son should do? To become the plaintiff's apprentice to learn his art, i. e. the act of an auctioneer, appraiser, and corn-factor, and to serve with him after the manner of an apprentice. Now, service with a man after the manner of an apprentice imports, according to the meaning of those words as ordinarily understood, that the party served should be carrying on the trade which the apprentice is to learn; otherwise the one is teaching and the other learning the trade, not as master and apprentice but as instructor and pupil. When therefore the one party ceases to carry on the trade, he by his act makes it impossible for the other to serve him after the manner of an apprentice; and he cannot be heard to complain that the other party has not done that which he has wilfully made it impossible that he should do.

The other objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in Boone v. Eyre, 1 H. Bl. 273, n. (a), and followed in Campbell v. Jones, 6 T.

R. 570, and other cases collected in the note to 1 Wms. Saund. 320 c. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should therefore, be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter ex post facto; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of Boone v. Eyre, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us: but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable in futuro, yet the immediate cause of action is the breach of

the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will therefore be for the defendant.

Judgment for the defendant.[47]

GRAVES v. LEGG et al.

(In the Court of Exchequer, 1854. 9 Exch. 709, 156 Eng. Rep. 304.)

The declaration stated, that it was on the 19th of May, 1853, through Messrs. H. & R., brokers at Liverpool, agreed between the plaintiff and defendants in manner following, that is to say, the plaintiff then agreed to sell to the defendants, and the defendants to buy of the plaintiff, about 300 to 350 bales white-washed Donskoy fleece wool, to arrive at 10½d. per pound, laid down either at Liverpool, Hull, or London, deliverable at Odessa during August then next, old style, to be shipped with all despatch, warranted fair average quality; but should they prove otherwise, to be taken with a fair allowance; which it was mutually agreed between buyer and seller should be assessed by the said Messrs. H. & R., subject to the safe arrival of the wool in good condition at any of the ports stated, and the names of the vessels to be declared as soon as the wools were shipped; customary allowances, payment cash in fourteen days, less 1½ per cent. discount from the date of finishing loading. Which agreement being made, afterwards, the said wool, being 333 bales of wool of the quality and description in the said agreement mentioned, was, during the said month of August, old style, delivered, to wit, by the growers thereof at Odessa, to wit, to the agents of the plaintiff in that behalf, and was with all despatch then shipped there on board a certain vessel called the "Science," which said vessel

[47] See, also, Chanter v. Leese, 4 M. & W. 296, 5 M. & W. 698 (1838), plaintiff agreed that defendant might make and sell under several patents; one patent was void; the defendant was held privileged to repudiate the whole, nothing having as yet been done under the contract; Jansen v. Schneider, 78 Misc. Rep. 48, 138 N. Y. Supp. 144 (1912), where one agreed to instruct another to become an aviator for $250, but did not complete the instruction as to the construction of the machine within a reasonable time, the breach went to the essence; Vigers v. Cook, [1919] 2 K. B. 475, an undertaker is entitled to nothing if he performs the service in all except that he fails to preserve the body so that it can be taken into the church.

then sailed from Odessa with the said wool on board thereof, and afterwards, to wit, on the 22nd of November, 1853, arrived at Liverpool with the said wool on board safe and in good condition, and according to the terms of the said contract; and the plaintiff says, that the defendants have had notice of all the said premises, and that a reasonable time for the defendants to accept the said wools after the same arrived, and to fulfil their part of the contract, and pay for the said wools, has long since elapsed; and that he, the plaintiff, has at all times performed and fulfilled and been ready and willing to perform and fulfil all conditions precedent to his right to have the said wools accepted and paid for, and to his right to maintain this action. Yet the defendants would not at any time accept nor pay for the said wools, or any part thereof.

Plea, that the defendants agreed with the plaintiff to buy the said wool in the declaration mentioned for the purpose of reselling the same in the way of their, the defendants' trade and business of wool dealers, and thereby acquiring gains and profits. And further, that wool is an article that fluctuates greatly in price in the market; and that the defendants could only resell the said wool as aforesaid when, and not before, the defendants had notice of the same being shipped, and when, and not before, the name of the vessel in which it was so shipped had been declared, according to the said contract in the declaration mentioned; of all which premises the plaintiff, at the time of the making of the said agreement, had notice; and further, that, although the plaintiff had such notice, yet the plaintiff did not declare to the defendants or either of them, the name of the vessel in which the said wool was shipped, or within the time at or within which he was by the agreement bound to declare the same, that is to say, as soon as such wool was so shipped, but omitted so to do, and delayed and omitted so to declare the name of the said vessel in which the said wool was so shipped as in the said declaration mentioned, or to give the defendants any notice of the same being so shipped, for a long and unreasonable time after the same was so shipped; and the defendants had not notice of the shipment of the said wool, or of the name of the vessel in which the same had been shipped, until after the expiration of a long and unreasonable time after the same had been so shipped, and after the plaintiff was bound and ought to have given and declared the same, and might and could have done so; and further, that, between the time when the name of the said vessel ought to have been declared according to the said agreement in the said declaration mentioned, and the time when it was first declared to the defendants, or when they first had any notice of the said ship having sailed with the said wool on board thereof, the price of wool in the market had greatly fallen, and the said wool thence continually remained so fallen in price, and the same, when the name of the said vessel was first declared, and when the defendants first had notice or knowledge of the same having been so shipped, would sell or could be

sold only for a much less sum of money than it would have done at the time when the plaintiff ought to and could have declared the name of the said vessel, or given the defendants such notice as aforesaid. Wherefore the defendants did not nor would accept or pay for the said wool, as in the said declaration mentioned.

Demurrer, and joinder.

The judgment of the Court was now delivered by

PARKE, B. The pleadings in this case are these: [His Lordship stated them, and proceeded:] The question raised by these pleadings is, whether the provision, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea.

This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea, that the wool was bought, with the knowledge of both parties, for the purpose of re-selling it in the course of the defendants' business; that it is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract.

The declaration having averred, according to the 57th section of the Common Law Procedure Act, the performance of conditions precedent generally, the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists. The loss which he avers to have sustained by that breach is immaterial. The only question is, whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject, in which it has been laid down that the general rule is, to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and under the new, the denial of such performance would be bad; and the cases of Campbell v. Jones, 6 T. R. 570, and Boone v. Eyre, 2 Black. Rep. 1312 and 1315, are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320 d. (and the Lord Chief Baron, in delivering the judgment of this court in Ellen v. Topp, 6 Exch. 441, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the con-

sideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe, that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in Campbell v. Jones, or Boone v. Eyre, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation, that the names of the vessels should be stated as soon as the wools were shipped, was originally a condition precedent, it is so still. No other benefit was taken under the contract itself, as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels; nor was any subsequently received by the acceptance of the goods or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross action on the contract to declare the names. In the state of things on this record, the simple question is, whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much, indeed, as the shipping of the goods at Odessa with all dispatch after the end of August. And with respect to the shipment itself, Mr. Blackburn did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent.

The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance, had they afterwards taken any benefit under the contract.

Judgment for the defendants.[48]

[48] The arguments of Blackburn and C. E. Pollock have been omitted.

KELSO & CO. v. ELLIS et al.

(Court of Appeals of New York, 1918. 224 N. Y. 528, 121 N. E. 364.)

Action by Kelso & Company against Charles H. Ellis, Sr., and another, copartners doing business under the firm name of Charles H. Ellis & Son. Judgment on directed verdict for plaintiff affirmed by Appellate Division (171 App. Div. 912, 155 N. Y. Supp. 1117), and defendants appeal. Reversed, and new trial granted.

POUND, J. Thomas Howard, under the name of Thomas Howard Company, dealt in advertising specialties in Brooklyn, N. Y. He had a plan for a piano contest whereby a merchant would offer a piano to be voted for by his customers and given to the contestant receiving the highest number of votes; the right to vote being dependent upon the purchases made at the store where the contest was being conducted, during a given period. The idea was so to stimulate trade beyond its usual activity as to enhance the sales of the merchant and thus put money in his purse. Careful and voluminous instructions for arousing public interest in the contest were an essential part of the plan. Other prizes were offered to contestants, but the interest centered around the piano. Howard did not deal in pianos himself, but when he obtained a customer for his scheme he placed an order with a manufacturer for a piano to be shipped to such customer. The plaintiff herein was a piano manufacturer. The defendants were merchants in Port Chester, N. Y. On October 24, 1913, they entered into a contract with Howard for the delivery at his earliest convenience of one T. Howard Company $750 player piano, mahogany finished, warranted and guaranteed for 10 years; five $500 certificates good on a T. Howard Company $750 piano, mahogany finished, warranted and guaranteed for 10 years; 20 dozens assorted pieces of flat silverware, permanently warranted. To be distributed by defendants the following: 200 nomination letters, 500 follow-up letters, 1,500 circulars, 1,000 postal cards, 40 posters, 50 bulletins, 150 $1, 100 $2, and 300 $5 trading books, 1 voting register, 1 Howard Company's instruction book, 2 sets of "Display Card" signs, instructions for newspaper advertising, to be done without expense to vendor, 54,000 certificates in four colors for piano votes in denominations of 5 to 25,000 votes; all the foregoing to be used in a piano advertising contest to open November 3, 1913, and close May 3, 1914.

In consideration therefor they gave their six negotiable promissory notes payable to Howard and due two, three, four, five, six, and seven months after date, aggregating $650. The defendants agreed to "keep the piano well displayed in my store," and it is a fair inference that it was the intention of the parties that the piano should be delivered for that purpose before the opening of the contest on November 3, 1913.

On December 4, 1913, Howard sent an order to plaintiff to deliver a player piano at once to the defendants. He had previously delivered to them some of the silverware and all of the printed matter which they

made use of in a voting contest. But the contest without a piano was like the play of Hamlet with the part of Hamlet left out. Plaintiff had sold pianos to Howard for over two years and had shipped many pianos to merchants for him, and had received from him notes of merchants to whom it had shipped pianos on his order. He had previously told it that he had an advertising plan; that he was supplying merchants with pianos all over the country and he had thus obtained from it a line of credit. It stenciled the name "T. Howard Company" on such pianos. But plaintiff did not ship the piano to defendants. Howard owed it upwards of $2,000 for pianos actually shipped and further credit was refused. On December 22, 1913, prior to the maturity of the first note in suit, Howard transferred the Ellis notes to it, and it gave him credit therefor on his general account as cash, knowing at the time that no piano had been delivered by it to defendants. It does not appear that plaintiff then had actual knowledge of the terms of the contract between Howard and defendants.

This action is brought to recover on the notes. The answer sets up many defenses and a counterclaim, none of which are substantial except the defense that the plaintiff was not a holder in due course; that it did not take the notes in good faith and did not take them for value. This defense calls for careful examination.

In the hands of Howard, the notes were subject to the defense that the contract was entire, that there had been no full performance by Howard, and that there was no obligation to pay until performance was complete. Defendants were constantly demanding performance by Howard on his contract to furnish the piano, and it cannot be said as matter of law that there was a waiver on their part of this condition of the contract. They therefore did not become liable to pay for or return even the articles received in part performance. "A party may retain, without compensation, the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction is under no obligation to pay until the performance is complete." Avery v. Willson, 81 N. Y. 341, 344 (37 Am. Rep. 503). The agreement to deliver the piano and the other articles and the agreement to pay the notes, being concurrent in time, were dependent, and Howard could not maintain an action against defendants without tendering full performance on his part. Where a promissory note is given for the purchase money on an executory contract for the sale of lands or chattels the law is the same as obtains in a case where the only promise to pay is found in the contract of sale itself, provided the action is between the original parties. Ewing v. Wightman, 167 N. Y. 107, 60 N. E. 322. * * * [49]

Judgment reversed and new trial granted.

[49] The court then held that there was evidence sufficient to go to the jury that the plaintiff received the note with knowledge of the defense as against Howard.

(c) Installment Contracts

HUNT'S CASE.

(In the Exchequer Chamber, 1588. Owen, 42.)

Hunt brought an action on the case against Torney, and declared that he being seised of lands in Swainton in Norf. in fee, secundum consuetudinem mannerii; the defendant did promise to the plaintiff, in consideration the plaintiff would permit him to occupy the same for the space of five years, that he would pay him at the Feast of All-Saints next coming, and so yearly twenty pounds at the Feasts of the Annunciation, and All-Saints by equall portions, during the terme aforesaid, and alledged that he had injoyed the lands by the space of a year and half, and so brought his action on the assumpsit. And Anderson was of opinion that untill the five years were expired, no money was to be paid, because the contract was intire. But all the other justices on the contrary, for the consideration was to pay a certain summe yearly, which made severall duties and so severall actions. For by Periam, if a man be bound to pay J. S. twenty pounds in manner and forme following, viz. ten pounds at such a day, and ten pounds at such a day, in this case the obligee cannot have an action of debt for the first, before the day of payment of the last ten pounds be past, because the duty in itself is an intire duty, but if a man be bound to pay J. S. ten pounds at such a day, and ten pounds at such a day, here the obligee shall have his action for the first, because the duty was in itself severall.

Anderson at another day said, that if a man makes a lease for ten years, rendring rent, in that case he may have an assumpsit for the rent due every year: so if I covenant with you to build you twenty houses, the covenantee shall have a severall action for each default.

Periam. That case of the assumpsit is much to the purpose, for an assumpsit is in the nature of a covenant, and is indeed a covenant without writing.

Rhodes cited this case: Gascoigne promised in consideration of a marriage of his daughter with such a man's son, to give seven hundred marks, and to pay a hundred marks every year, untill all the summ were paid, and it was held clearly in this Court, that a severall action might be brought upon every hundred pounds, but because the action was brought for all the seven hundred marks before the seven years were out, judgment was given against him, for if a man be bound in a bond of a hundred pounds to pay twenty pounds for so many years, he shall not have an action of debt until the last year expired. And after judgment was given for the plaintiff, viz. Mich. 29 Eliz. Rot. 2248.[50]

[50] S. c., sub nom. Hunt v. Sone, Cro. Eliz. 118.

GRANT v. JOHNSON.

(Court of Appeals of New York, 1851. 5 N. Y. 247.)

Covenant on articles of agreement for the sale of land, between the plaintiff (Grant) of the first part, and the defendant (Johnson) of the second part. "The party of the first part for the consideration of nine hundred and fifty dollars, to be paid as follows, to wit: two hundred dollars on the first day of April next, two hundred dollars on the first of April, 1847, the remainder in two annual payments of equal amount, to be paid on the first of April of the two succeeding years, together with interest from the first of April next, agrees to sell to the party of the second part a certain piece of land lying in the town of Neversink" (describing it.) "And the party of the first part, agrees to give to the party of the second part, the quiet and peaceable possession of said premises on the first of November next, with the exception of certain privileges granted to Nicholas Wakeley, and certain other privileges granted to Teunis Misener," &c. "And the said party of the first part further agrees to give to the said party of the second part a good and sufficient deed for the same on the first of May next, if the above conditions are complied with."

The agreement contained a further stipulation, which it is unnecessary to mention, and was executed under the hands and seals of the parties, on the twenty-fourth day of August, 1845.

The declaration assigned as a breach, the non-payment of the second instalment of two hundred dollars, payable on the first of April, 1847; but it contained no averment of the tender of a deed of the premises, before, on, or subsequent to the first day of May, 1846, or a readiness or willingness to execute one, in accordance with the covenant of the plaintiff.

The defendant interposed several pleas, which, as no question arose upon them, it is unnecessary to mention more particularly.

At the trial the plaintiff proved the agreement, and rested. The defendant moved for a non-suit, on the ground that the plaintiff was bound to show the delivery or tender of a deed before he could recover the second instalment.

The judge decided that the covenants were independent, and that the plaintiff could recover without showing either a delivery or tender of a deed. To this decision the defendant excepted.

It was then admitted that the defendant had received possession of the premises according to the contract, and had paid the first instalment. He then offered to prove, that no deed of the premises in question had been tendered to him up to the fifteenth of July, 1846. The court rejected the evidence as not constituting a legal defence, and the defendant excepted. The jury, under the direction of the judge, found a verdict for the plaintiff for the amount of the second instalment, and interest. Upon a bill of exceptions presenting the above facts,

a motion for a new trial was made before the supreme court in the third district, and denied. An issue of law arising upon a demurrer to the replication of the plaintiff presenting the same question, had previously been decided by the same court in favor of the plaintiff. The new trial was denied, and the defendant's demurrer overruled, upon the ground that the covenants were independent, and that the plaintiff could recover without averring or proving performance, or an offer to perform the covenant on his part. See 6 Barb. 337. From this decision the defendant appealed to this court.

GARDINER, J.[51] The question in this case is, whether the plaintiff can sustain an action for the second installment of the purchase-money secured by the agreement, without averring and proving the delivery, or an offer to deliver a deed of the premises.

The parties have declared that certain payments were to be made, and certain acts performed by them respectively, at the times specified in the agreement. They must be held to have intended the performance of these acts, when, and of course in the order of time indicated in their covenants. The plaintiff was to give the defendant possession on the 1st of November, 1845. The performance of this requirement preceded any thing to be done by the defendant, and it might consequently have been enforced without any offer upon the part of the defendant; but, if no possession had been given, the plaintiff could not have recovered the $200 to be paid by the vendee on the 1st of April, 1846.

The possession, however, was given, and the first $200 paid, and on the 1st of May, 1846, the vendee was entitled to his deed as the thing next to be done in the order prescribed by the parties in their agreement. It was not executed, nor a willingness to execute it either averred or proved. The payment of the $200 for which the suit is brought was fixed upon a day subsequent to that agreed upon for the delivery of the deed. The case is, therefore, brought directly within the letter and spirit of the 2d rule suggested by Sergeant Williams in his note to Pordage v. Cole, 1 Saund. 320b, that, "when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained without averring performance."

The plaintiff relies upon the 3d rule of Sergeant Williams in his note to the case above cited, that "where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained, without averring performance." The rule is not free from obscurity. It was given by Lord Mansfield originally in Boone v. Eyre, 1 H. Bl. 273, note a. The defendants in that suit, after having received a conveyance of the equity of redemption of a

[51] The court's discussion of several cases and the concurring opinion of Foot, J., are omitted.

plantation, and the negroes upon it, when sued for a part of the consideration, set up a breach of a collateral covenant on the part of the plaintiff, relating to the title and possession of the negroes, in bar of the action. The warranty extended both to the estate and negroes. 4 Mees. & W. 311. The covenant of the plaintiff, it will be perceived, embraced the whole and every part of the subject conveyed. If the title failed to a single negro, or the defendant was evicted from an acre of the land, the covenant was intended to afford redress, and enable a jury to apportion the damages according to the agreement of the parties. A "breach of the plaintiff's covenant might be paid for in damages," because a failure of title as to any part of the consideration could be compensated according to the standard fixed by the parties. In other words, the consideration for the defendant's promise was divisible, and the damages arising from a breach of the covenant of warranty were apportioned to each parcel of that consideration, by the agreement itself. This, it is supposed, is what is meant by the expression above quoted, that the breach may be paid for in damages. 5 Mees. & W. 701. Accordingly it is stated in the note to Pordage v. Cole, supra, that "when the consideration for the payment of the money is entire and indivisible, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, an action is not maintainable."

The doctrine is thus stated in Chanter v. Leese, 4 Mées. & W. 311, "The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated. If, indeed, he does accept a partial performance, and to a certain extent enjoys the benefit of that for which he has stipulated, it may become a question whether he may not be liable upon an implied contract to pay for what he has had. And when the consideration is in its nature capable of being divided, and the payment apportioned by the terms of the contract, there may be still a right to recover the portion due on the original contract." This decision was affirmed in the exchequer chamber (5 Mees. & W. 701), in 1839, and may be considered as the established doctrine in England at that day.

The rule of Lord Mansfield, according to its original application, and as expounded in the decision above mentioned, is reasonable. It brings us back to the contract to learn the intention of the parties. Courts are not required to speculate upon the inequality of loss to the parties, or to look beyond the agreement to its performance, in order to ascertain its character, as suggested by some judges and commentators. 1 Saund. 320a. These inquiries are proper where the question arises, whether the plaintiff has any remedy for what he has done, or parted with, or whether the defendant is not estopped by his acts subsequent to the agreement, from insisting upon a condition precedent in his favor. Much of the confusion in the books, it is believed, arises from confounding the doctrine of waiver by matters ex post facto, with a rule of construction applicable to the agreement as it came

from the hands of the parties. Havelock v. Geddes, 10 East, 555. A defendant may waive the performance by the plaintiff, in case of a covenant clearly dependent, and thus render himself liable in some form of action (Mitchell v. Darthez, 2 Bing. N. C. 555; Lucas v. Godwin, 3 Id. 737), but it is only when the consideration is divisible, and the payments are apportioned by the agreement to the different parts of the consideration, that the covenant becomes independent, and a recovery can be had upon the original contract without averring performance, or an excuse for non-performance.

A covenant, therefore, which goes only to a part of the consideration, is not necessarily independent. Nor is it conclusive upon this point that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance that one or any number of covenants in an agreement are independent, render others so. * * *

The question then returns, was the consideration in this case divisible, and were the payments apportioned by the agreement to the different parts of the consideration within the principles above stated? According to the contract, the $950 to be paid by the defendant, as therein stipulated, was the entire consideration for a complete title to the premises. The possession was incident to the title, the whole of which the defendant was to receive as the consideration for his payments. He received one element of a complete title, to-wit, the possession, on the 1st of November, 1845. He then paid on the 1st of the following April all that he was to advance by the terms of the agreement, until the fee should be added to the possession by a conveyance from the plaintiff, and the title of the defendant be then perfected. The plaintiff refuses or neglects to convey, and yet by this action claims the purchase-money of the defendant.

If we assume that the consideration of the defendant's undertaking was divisible, yet by the terms of the agreement he was to receive both the possession and a deed of the premises before he could be called upon for the payment of the installment in controversy. These things were "to be done to him" according to the rule of Lord Holt, adopted in Cunningham v. Morrell, 10 Johns. 206, 6 Am. Dec. 332. He was not to trust to the personal responsibility of the plaintiff. Dey v. Dox, 9 Wend. 134, 24 Am. Dec. 137. The plaintiff had covenanted that the thing stipulated should be performed before the defendant could be required to pay. Nor by the contract were the payments to be made by the defendant apportioned to any particular part of the consideration. He was not to pay any thing for the possession as distinguished from the fee of the land, but a gross sum for both by separate installments. If he had refused to accept a deed, all that the plaintiff could have recovered would have been the balance of the purchase-money with interest. On the contrary had the plaintiff refused to convey, the recovery on the part of the defendant would have been confined to the difference between the contract price and the actual

value of the land with interest. In a word, the covenant sought to be enforced against the defendant in this action went to the whole consideration on the other side, and depended on it.

The judgment of the supreme court should be reversed.

HILL v. GRIGSBY et al.

(Supreme Court of California, 1868. 35 Cal. 656.)

This was an action upon nine promissory notes made jointly by defendants to plaintiff, dated June 1st, 1865. The complaint was in the usual form.

The answer of the defendants admitted the execution of the notes, and as a defense to the action alleged, that at the time the notes were executed, the plaintiff as vendor, and the defendants as vendees, entered into a contract for the sale and purchase of one undivided half interest in a quartz mill and certain real property in the State of Nevada; that the defendants agreed to pay the sum of eighteen thousand dollars for the property, to be paid by installments, and that the notes sued on were given for the last nine installments; that plaintiff executed a bond conditioned for the conveyance of the property upon full payment of the purchase money; that the whole amount of purchase money was due at the time this action was commenced, and that this action was brought to recover the unpaid portion of the purchase money, including the note given for the last installment; that about ten thousand dollars of the purchase money had been paid; that the notes and bond were executed and delivered contemporaneously, and are parts of one contract for the sale and purchase of said property.

The answer further alleged that plaintiff, before the commencement of this action, executed and delivered to one William G. Hill a deed of conveyance of the identical property described in said bond; that plaintiff had not performed, or offered to perform, on his part, the conditions of said bond; that neither plaintiff nor said William G. Hill had tendered a deed for said property, and that they had not offered to convey the same upon payment of the purchase money or otherwise. * * *

On the plaintiff's motion, the court struck out of the answer all the defensive matter alleged therein, upon the ground that it is redundant and immaterial. To which ruling the defendants duly excepted.

The plaintiff had judgment as demanded, and the defendants appealed.

The other facts are stated in the opinion of the Court.

By the Court, RHODES, J.[52] The leading question is, whether plaintiff is entitled to recover upon certain promissory notes representing

[52] Part of the statement of facts and part of opinion have been omitted.

the unpaid portion of the purchase money for certain real estate, sold by the plaintiff to the defendants, without conveying or offering to convey the property. The solution of the question depends upon the construction to be given to the bond or covenant of the plaintiff. The bond, after reciting the purchase and terms of payment, proceeds as follows:

"Now, therefore, the said Hill agrees and binds himself, on condition that the said Grigsby and Smittle shall pay the sum of eighteen thousand dollars, less eight thousand two hundred dollars heretofore paid, with interest, as aforesaid, to execute and deliver to the said Smittle and Grigsby a good deed, conveying all his right, title, and interest of, in, and to the one undivided half interest in said mill and premises herein as aforesaid, which if he shall well and truly do, the above obligation to be null and void and of no effect; otherwise, the above obligation to be and remain in full force and effect. The said deed to be executed by the said Hill as soon as the full sum of eighteen thousand dollars and interest, as above provided, is paid, and to be sufficient to convey to said Grigsby and Smittle one undivided half interest in and to said mill, free from all incumbrance."

In the first clause the plaintiff covenants to convey on condition that the defendants pay the price. These acts were plainly intended to be simultaneous, that is to say, the payment in full and the conveyance. The words "on condition" are susceptible of no other interpretation. The second clause was added as if to put the matter beyond question. There the covenant is, to convey as soon as the full sum is paid. The conveyance must, of necessity, be executed concurrently with or before payment in full, or it will not be executed as soon as such payment is made.

Neither argument nor illustration will make the meaning of the covenants in respect to the time for their performance more apparent.

When the meaning of the terms employed in the covenants is ascertained, the application of the rules of law governing the performance of the covenants is not difficult. In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or upon the time of payment of the money, or as soon as it is paid—and they all mean the same thing—the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform, on his part; and performance, or the offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part. Barron v. Frink, 30 Cal. 488.

When the purchase money is payable in installments, and the conveyance is to be executed on the last day of payment, or upon the payment of the whole price, or at any previous day, the covenants to pay the installments falling due before the time appointed for the execution

of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey.

The covenants to pay the installments falling due on or after the day appointed for the conveyance are dependent covenants, and the vendor, in his suit to recover the same, whether he sues for those alone or joins installments that became due before the time, must show a conveyance or offer to convey. In these respects, contracts of all kinds are governed by the same rule as covenants.

Questions covering the greater portion, if not the entire ground occupied by those presented here, were considered at an early day in this Court, and the decisions accord with the views here expressed. Osborne v. Elliott, 1 Cal. 337; Folsom v. Bartlett, 2 Cal. 163. See, also, Barron v. Frink, 30 Cal. 486. It is very correctly said in Bank of Columbia v. Hagner, 1 Pet. 455, 7 L. Ed. 219, that "in contracts of this description the undertakings of the respective parties are always considered dependent unless a contrary intention clearly appears"; and the reason assigned, as well as the rule, would be applicable here were the words of the covenant of doubtful import. "A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the purchase money enforced upon him, and yet be disabled from procuring the property for which he paid it." The authorities in support of these principles are very numerous, and there is a greater degree of uniformity among them than is usual on a question presented, as this has been, in so many different aspects. Pordage v. Cole, 1 Wm. Saund. 320; Jones v. Gardner, 10 Johns. (N. Y.) 266; Gazley v. Price, 16 Johns. (N. Y.) 267; Parker v. Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253; Williams v. Healey, 3 Denio (N. Y.) 367; Johnson v. Wygant, 11 Wend. (N. Y.) 48; Bean v. Atwater, 4 Conn. 3, 10 Am. Dec. 97; Lester v. Jewett, 11 N. Y. 453; Hunt v. Livermore, 5 Pick. (Mass.) 395; Kane v. Hood, 13 Pick. (Mass.) 281; 1 Pars. on Cont. 42; 2 Smith L. C. 17. * * *

We are of opinion that the portion of the answer setting up the contract of sale, and alleging the failure of the plaintiff to convey, or offer to convey, to the defendants the interest in the premises sold to them, is a good defense to the action, and that the order striking it out was erroneous.

Judgment reversed, and cause remanded for further proceedings.[53]

[53] In accord: Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535 (1855); Gray v. Hinton (C. C.) 7 Fed. 81 (1881); Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362 (1889); Irwin v. Lee, 34 Ind. 319 (1870); Soper v. Gabe, 55 Kan. 646, 41 Pac. 969 (1895). See, also, Cunningham v. Morrell, 10 Johns. (N. Y.) 203, 6 Am. Dec. 332 (1813); Glenn v. Rossler, 156 N. Y. 161, 50 N. E. 785 (1898).

Observe that mutual promises may be dependent, even though the agreement of which they form a part is evidenced by several entirely separate documents, for these will be construed together. Hunt v. Livermore, 5 Pick. (Mass.) 395 (1827); Bryne v. Dorey, 221 Mass. 399, 109 N. E. 146 (1915). In Ewing v.

GRAY v. MEEK.

(Supreme Court of Illinois, 1902. 199 Ill. 136, 64 N. E. 1020.)

This suit was brought in the circuit court of Cook county by S. M. Meek, defendant in error, against Adolph Gray, plaintiff in error, on a certain written contract and supplemental contract between the parties. The original contract of October 25, 1890, provided: That Gray was to act as the agent of Meek in selling about 80 lots that Meek owned in a certain subdivision. That Gray was to have the exclusive right of selling these lots for one year, and no longer, at prices averaging $130.50 per lot for all inside lots, and $175 for corner lots and lots fronting on Milwaukee avenue; the first payment to be not less than $5 down, and monthly payments to be not less than $2.50, all deferred payments to draw 6 per cent. interest per annum. That Meek agreed to convey the lots when paid for according to the agreement. That, of the cash paid in on the contracts of sale, one-half should go to Meek, and one-half to Gray, as his commission, less 10 per cent. on such half (the ten per cent. to be kept back until final settlement), and all amounts over and above the stipulated prices for the lots realized on the sales should go to Gray in full payment for his services in making such sales. That, in case any lots remained unsold at the end of the year, Gray was to buy such remaining lots, and Meek to sell them to him, at the above prices, and to allow the 10 per cent. kept back to apply on the purchase price of the lots so remaining, and Gray to pay the balance on the same terms and at the same prices as provided on sales to others. After the expiration of the year provided in this contract, * * * the plaintiff sued for the agreed price of the lots remaining unsold. The plea was the general issue. The jury found a verdict for $5,468.03 for the plaintiff below, being the total amount claimed by him to be due on the contract, and judgment was entered for the same. The appellate court affirmed the judgment, and the defendant below has brought the case before us on writ of error.[54]

CARTER, J. * * * It is next urged by plaintiff in error that the defendant in error is not entitled to a recovery on the basis of the agreed price of the lots, but that the true measure of damages is the difference between the agreed price and the fair market value at the

Wightman, 167 N. Y. 107, 111, 60 N. E. 322 (1901) the court said: "Some learned text-writers have asserted the doctrine that promises contained in unilateral contracts cannot be dependent, though each is given in consideration of the other, and have criticised the cases in this country holding a contrary rule. Whatever may be the force of the arguments of those writers, or whatever the rule in England, the general current of authority in this and other states is opposed to that doctrine." Where a note is given for a return promise, it should not be called a "unilateral contract," even though the promises are contained in separate instruments.

[54] The terms of a supplemental contract and a small part of the opinion are omitted.

time Gray agreed to take and pay for the lots in question. This contention is not tenable. Meek sued on the contract, by which Gray agreed to pay the stipulated prices for the lots unsold at the expiration of the contract. When this contract was extended, he again agreed to take the lots unsold at the expiration of the extension, and to pay the stipulated prices, and both contracts contained specific directions as to the application of moneys received towards paying for these lots to be taken by Gray.

It is also urged that there was no tender of a deed for these lots from Meek to Gray pleaded or proved. There was no tender pleaded, but no advantage was taken of this in apt time. The only proof in regard to a tender is the evidence of Meek that he offered Gray a deed for these lots, and the further offer he made in a letter to give him a deed and take a mortgage back. Nothing further was elicited in regard to the tender. No tender was necessary, under the terms of the contract, until the last payment became due, as Meek did not agree to make a conveyance until the lots were paid for. But demanding the whole amount due on these lots, he should have tendered a deed. A purchaser of property to be paid for in installments, where there is no time fixed for the delivery of the deed, is not entitled to receive his deed until the last payment is made; nor is a purchaser obliged to part with his money before he receives the deed. Duncan v. Charles, 4 Scam. 561; Weiss v. Binnian, 178 Ill. 241, 52 N. E. 969. The lots were to be paid for, $5 down, and monthly payments of not less than $2.50. The time for all payments by Gray had elapsed when suit was brought. The obligation to pay all but the last installment was absolute and unconditional. By neglecting to enforce payment on these installments as they became due. and by waiting until the last one became due and the time for making the conveyance had elapsed, the promise to pay the previous installments, once absolute and independent, did not become mutual and dependent. Duncan v. Charles, supra; Sheeren v. Moses, 84 Ill. 448. To remedy this error respecting the failure to tender a deed, defendant in error offers to enter a remittitur in this court for the amount of the last payment on these lots, 33 in number, and interest thereon, namely $94.87. * * *

As the judgment below was too large by the amount of the last payment and interest thereon, to wit, $94.87, and as the defendant in error remits that amount, the judgment will be affirmed as to the balance, except as to costs in the appellate court. The judgment for such costs will be reversed, and all costs incurred in this court up to the time of entering the remittitur will be taxed against the defendant in error. Remittitur allowed and judgment affirmed.[55]

[55] See, also, Loud v. Pomona Land & Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822 (1894); Sheeren v. Moses, 84 Ill. 448 (1877); Bowen v. Bailey, 42 Miss. 405, 2 Am. Rep. 601 (1869).

WITHERS v. REYNOLDS.

(In the Court of King's Bench, 1831. 2 Barn. & Adol. 882.)

Assumpsit for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after last Hilary term, the agreement proved was as follows:

"John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stablekeeper, and delivered on his premises as above" (i. e. at Long Acre, London) "till the 24th of June 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June 1830, according to the terms of this agreement.

"[Signed] Joseph Withers, John Reynolds."

The straw was regularly sent in from the 20th of October 1829, when this agreement was made, till the end of January 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant £11. 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered: and he then told the plaintiff that he would send no more straw unless it was paid for on delivery: and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own shewing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden C. J. was of this opinion: but directed a verdict for the plaintiff, reserving the point. A rule nisi was afterwards obtained for entering a nonsuit.

Campbell and R. V. Richards now shewed cause. Two things independent of each other were stipulated by this contract to be done by the respective parties: the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract. Weaver v. Sessions

(6 Taunt. 154) And, according to that case, he ought at least to have shewn that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross action, but has no defence to this.

Platt, contra. The only question is upon the construction of this agreement. It is true, no time of payment was specified, but in the absence of any express stipulation, the money would be payable on demand as often as it became due; and here the words, "to pay thirty-three shillings per load for each load so delivered," intimate that the price of each load was to be due as soon as it was delivered. [Here he was stopped by the Court.]

Lord TENTERDEN, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery, (as he did, in substance, when he insisted on keeping one load on hand,) the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds, that the plaintiff shall pay that sum "for each load of straw delivered on his premises," from the date of the agreement till the 24th of June 1830. That prima facie imports that each load was to be paid for as delivered.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw: but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

Rule absolute.[56]

[56] In accord: Stephenson v. Cady, 117 Mass. 6 (1875). Cf. West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791 (1900).

GILL v. JOHNSTOWN LUMBER CO.

(Supreme Court of Pennsylvania, 1892. 151 Pa. 534, 25 Atl. 120.)

Action by John L. Gill against the Johnstown Lumber Company for services for driving logs. Verdict was directed for defendant, and plaintiff appeals. Reversed.

HEYDRICK, J. The single question in this cause is whether the contract upon which the plaintiff sued is entire or severable. If it is entire, it is conceded that the learned court below properly directed a verdict for the defendant; if severable, it is not denied that the cause ought to have been submitted to the jury. The criterion by which it is to be determined to which class any particular contract shall be assigned is thus stated in Parsons on Contracts, 29–31: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." The rule thus laid down was quoted with approval and applied in Oil Co. v. Brewer, 66 Pa. 351, and followed in Rugg v. Moore, 110 Pa. 236, 1 Atl. 320. It was also applied in Ritchie v. Atkinson, 10 East, 295, a case not unlike the present. There the master and freighter of a vessel of 400 tons mutually agreed that the ship should proceed to St. Petersburgh, and there load from the freighter's factors a complete cargo of hemp and iron, and deliver the same to the freighter at London on being paid freight, for hemp £5 per ton, for iron 5s. per ton, and certain other charges, one half to be paid on delivery and the other at three months. The vessel proceeded to St. Petersburgh, and when about half loaded was compelled by the imminence of a Russian embargo upon British vessels to leave, and returning to London delivered to the freighter so much of the stipulated cargo as had been taken on board. The freighter, conceiving that the contract was entire, and the delivery of a complete cargo a condition precedent to a recovery of any compensation, refused to pay at the stipulated rate for so much as was delivered. Lord ELLENBOROUGH said: "The delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery."

Applying the test of an apportionable or apportioned consideration to the contract in question, it will be seen at once that it is severable. The work undertaken to be done by the plaintiff consisted of several items, viz., driving logs, first, of oak, and, second, of various other kinds of timber, from points upon Stony creek and its tributaries above Johnstown to the defendant's boom at Johnstown, and also driving

cross-ties from some undesignated point or points, presumably understood by the parties, to Bethel, in Somerset county, and to some other point or points below Bethel. For this work the consideration to be paid was not an entire sum, but was apportioned among the several items at the rate of $1 per 1,000 feet for the oak logs; 75 cents per 1,000 feet for all other logs; 3 cents each for cross-ties driven to Bethel; and 5 cents each for cross-ties driven to points below Bethel. But while the contract is severable, and the plaintiff entitled to compensation at the stipulated rate for all logs and ties delivered at the specified points, there is neither reason nor authority for the claim for compensation in respect to logs that were swept by the flood to and through the defendant's boom, whether they had been driven part of the way by plaintiff, or remained untouched by him at the coming of the flood. In respect to each particular log the contract in this case is like a contract of common carriage, which is dependent upon the delivery of the goods at the designated place, and, if by casus the delivery is prevented, the carrier cannot recover pro tanto for freight for part of the route over which the goods were taken. Whart. Cont. § 714. Indeed, this is but an application of the rule already stated. The consideration to be paid for driving each log is an entire sum per 1,000 feet for the whole distance, and is not apportioned to parts of the drive.

The judgment is reversed, and a venire facias de novo is awarded.[57]

KELLY CONST. CO. v. HACKENSACK BRICK CO.

(Court of Errors and Appeals of New Jersey, 1918. 91 N. J. Law, 585, 103 Atl. 417, 2 A. L. R. 685.)

Action by the Kelly Construction Company against the Hackensack Brick Company. Judgment for plaintiff on a directed verdict, and defendant appeals. Affirmed.

TRENCHARD, J.[58] The plaintiff below brought this action to recover damages for the refusal of the defendant to perform a contract to deliver brick. A verdict was directed for the plaintiff at the Bergen circuit and the defendant appeals. We are of the opinion that the judgment must be affirmed.

No objection is made to the amount of the verdict directed. The defendant's contention is that it was legally justified in its refusal to complete its contract. We think that contention is unsound, and we find no error in record.

[57] In Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382 (1857), the plaintiff was given judgment at the contract rate for transporting 49,000 feet of lumber, where the contract was to transport a lot of about 75,000 feet at the rate of $2.25 per thousand, a flood having prevented the loading of the balance. See, further, Snook v. Fries, 19 Barb. (N. Y.) 313 (1855); Ming v. Corbin, 142 N. Y. 334, 37 N. E. 105 (1894); Barnes v. Leidigh, 46 Or. 43, 79 Pac. 51 (1905); Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736 (1892).

[58] Part of the opinion is omitted.

The plaintiff had a contract for the building of a high school at Englewood. It placed a written order with the defendant for the "furnishing and delivering and stacking on the job all the common hard brick required by the plans and specifications for the Englewood High School at $7 per thousand; brick to be delivered as required by us and sufficient brick to be kept on the job so that we will always have approximately 50,000 brick stacked until the completion of the job." This order the defendant accepted in writing. Neither the order nor the acceptance fixed any time for payment. The defendant after delivering some of the brick, refused to complete the contract, and a verdict was directed on the basis of the difference between the contract price and that which the plaintiff was required to pay in the market for the remainder of the brick contracted for. The defendant's contention is that it was legally justified in refusing to complete its contract by reason of the admitted fact that the brick already delivered in part performance of the contract had not been paid for. But that contention is unsound in law. Where, as here, the sale is of a specified quantity of brick (i. e., sufficient to complete a building according to stated specifications), the contract is entire, and a failure to pay when a part delivery has been made does not excuse the seller from completing delivery; no time for payment being stated in the contract. Baker v. Higgins, 21 N. Y. 397.

And this is so notwithstanding section 42 of the Sale of Goods Act (C. S. p. 4657), enacting that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," etc. This section does not require payment with each delivery where, as here, such deliveries are made pursuant to an entire contract for goods the quantity and character of which necessitates delivery in installments. * * *

The judgment will be affirmed, with costs.[59]

MINTURN, J., dissents.

POLLAK v. BRUSH ELECTRIC ASS'N.

(Supreme Court of the United States, 1888. 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474.)

This writ of error brings up for review a judgment in favor of the Brush Electric Association of St. Louis, plaintiff below, against the plaintiff in error for the sum of $6,458.10. Besides the common count for goods and merchandise sold to the defendant, Pollak, the complaint contains a special count, based on a written agreement between the parties, executed November 13, 1883. By the first article of that agreement Pollak agreed to pay to the plaintiff the sum of $7,942, as follows: "Seven thousand dollars in cash on the execution of this agreement, and the sum of nine hundred and forty-two dollars on the 1st day of January, 1884, in full settlement and satisfaction of

[59] Certain installment contracts were held "entire" in Consumers' Bread Co. v. Stafford Mills Co., 152 C. C. A. 527, 239 Fed. 693 (1917); Karales v. Los Angeles Creamery Co., 36 Cal. App. 171, 171 Pac. 821 (1918).

all claims and demands due by Pollak & Co. and the Brush Electric Light and Power Company of Montgomery, Ala., to the said Brush Electric Association of St. Louis; and the Brush Electric Association agrees to transfer, or cause to be transferred, to said Ignatius Pollak, without recourse, all the shares now held by the said Brush Electric Association and the Brush Electric Company of Cleveland, Ohio, in the said Brush Electric Light and Power Company of Montgomery, Ala."

The remaining articles of the agreement are in these words:

"Second. The said Brush Electric Association of St. Louis agrees to furnish to the said Ignatius Pollak one number 8 dynamo-electric machine, one automatic dial for said machine, and forty arc lamps of two thousand candle power each, of different styles, for which the said Ignatius Pollak agrees to pay to the said Brush Electric Association of St. Louis by the 1st day of January, 1885, twelve per cent. of the cost of said machinery, as per card-rate hereto attached, signed by the parties, and made a part of this agreement, which card-rate is agreed by the parties to be the cost of said machinery. This twelve per cent., it is agreed by the parties, is to be considered a rental of said machinery, dial, and lamps for the term of one year, and which are furnished to enable the said Ignatius Pollak to comply with his contract with the city council of Montgomery to light the streets of the city of Montgomery with electric lights.

"Third. It is further agreed that in case the city council of Montgomery shall conclude to adopt the Brush electric light for the future lighting of the streets of the said city of Montgomery, Ala., after the expiration of the time of the present contract between said Pollak and Company and the city council of Montgomery, that the said Ignatius Pollak will pay to the said Brush Electric Association of St. Louis, Mo., by the 1st day of January, 1885, the cost of said machinery, dial, and lamps, as fixed and ascertained by said card-rate hereto attached." [This card-rate fixed the total cost at the sum of $6,180.]

[There were further provisions not material to the point now under consideration. The city council did in fact adopt the Brush light for a future period thus fulfilling the express condition of article Third.]

Mr. Justice HARLAN. * * * [60] 4. It is also contended that the plaintiff was not entitled to recover, except upon averment or proof that it had transferred or offered to transfer to the defendant the shares of stock held by it and by the Brush Electric Company of Cleveland, Ohio, in the Brush Electric Light & Power Company of Montgomery. This cannot be, unless, as insisted, his promise to pay, in the contingency named in the third article of the agreement of November 13, 1883, the sum of $6,180, was in consideration of the plaintiff's promise to transfer, or have transferred to him, the above shares.

[60] The statement of facts has been abridged and part of the opinion omitted.

In support of this position the case of Bank v. Hagner, 1 Pet. 455, 465, 7 L. Ed. 219, is cited. It was there said that the inclination of the courts strongly favors as obviously just that construction of contracts which makes the covenants or promises of the parties dependent, rather than independent. After observing that the seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money, without an equivalent in return, the court said: "Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender or refusal."

But it is clear, as said in Railroad Co. v. Howard, 13 How. 307, 339, 14 L. Ed. 157, that covenants are to be considered dependent or independent, according to the intention of the parties, to be deduced from the whole instrument. It is manifest that the covenant of the plaintiff in relation to the transfer of stock in the Brush Electric Light & Power Company is wholly independent of the agreement in relation to the machine, dial, and lamps in question. The consideration for such transfer, and for the settlement and satisfaction of all claims due by Pollak & Co. and by the Brush Electric Light & Power Company to the plaintiff, was the payment by Pollak of a certain amount, part in cash on the execution of the agreement of November 13, 1883, and the balance on the 1st of January, 1884. On the other hand, the consideration for Pollak's agreement to pay, in a certain contingency, a specified sum for the machine, dial, and lamps, was his becoming the absolute owner of those articles, upon the happening of that contingency. The cost of the articles was fixed by the agreement at a certain aggregate sum, without reference to the transfer of the above-mentioned stock. There is nothing whatever in the contract indicating that the payment for the machine, dial, and lamps was to depend, in any degree, upon the transfer of the stock, or that the transfer of the stock was to depend upon the adoption of the Brush electric light by the city. The covenants were wholly independent; and therefore it was not essential to the plaintiff's right to recover that it should allege or prove that its agreement to transfer or have transferred to the defendant the above-described stock had been performed. That may be the subject of a separate suit.

As the court below correctly interpreted the agreement between the parties, and as the evidence showed that the contingency happened which entitled the plaintiff to recover the sum specified in the agreement as the value of the property, the direction to the jury to find for the plaintiff was right. Goodlet v. Railroad Co., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; Kane v. Railroad Co., 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339. The judgment is affirmed.[61]

[61] Where the parties have made two separate contracts for the sale of coal, the breach of one does not justify the injured party in refusing to perform the other. Hanson & Parker v. Wittenberg, 205 Mass. 319, 91 N. E. 383 (1910).

SIMPSON et al. v. CRIPPIN et al.

(In the Court of Queen's Bench, 1872. L. R. 8 Q. B. Cas. 14.)

Declaration on a contract to supply from 6,000 to 8,000 tons of coal, to be delivered in equal monthly quantities during the period of twelve months, from the 1st of July, 1871. Breach, that the defendants did not deliver the coal monthly, and had refused wholly to deliver the coal and to perform the contract.

Plea, inter alia: that the plaintiffs were not ready and willing to accept the coals, and that the defendants were prevented from delivering the coals, and performing the agreement, by the acts, neglects, and defaults of the plaintiffs.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it appeared that the defendants were coal proprietors, and the plaintiffs were coal merchants. On the 10th of June 1871, the plaintiffs wrote to the defendants the following letter: "We agree to take from you about 6,000 to 8,000 tons of your best Wigan four-feet coal, at 5s. 6d. per ton of 21 cwt. to the ton, put into our wagons at the colliery. Delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½% discount."

The defendants, by letter also dated the 10th of June, replied as follows: "We agree to supply you from 6,000 to 8,000 tons of our best four-feet Wigan coal, properly screened, and free from slack, to be delivered into your wagons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next—strikes of our workmen, accidents, and other circumstances beyond our control excepted—at 5s. 6d. per ton of 21 cwt. Terms, cash monthly, less 2½% discount."

On the 8th of July the defendants wrote, complaining that the first week for the fulfilment of the contract had terminated without the plaintiffs sending wagons or orders for coals. The correspondence continued, the defendants requesting that wagons might be sent and the plaintiffs promising to comply. During the month of July the plaintiffs took from the defendants only 158 tons of coal. On the 1st of August the defendants wrote to the plaintiffs, that inasmuch as the latter had only taken 158 tons during the month of July, and as the sole inducement for the defendants to entertain the contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months, which they had failed to perform, the defendants gave notice that the contract was cancelled. On the 2nd of August the plaintiffs replied, stating that they would not allow the contract to be cancelled.

On these facts the learned judge told the jury, that as the plaintiffs did not intend to break the contract month by month, and only broke

it for the first month's delivery, that did not justify the defendants, in point of law, in cancelling the contract, and left the question of damages to them.

The jury found a verdict for the plaintiffs for £475, leave being reserved to move to enter a verdict for the defendants.

A rule was afterwards obtained upon the ground that under the circumstances the plaintiffs had disentitled themselves to sue for the breach of the contract, and that the defendants were entitled to cancel the contract, and refuse to deliver the residue of the coal.

BLACKBURN, J. I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that Hoare v. Rennie, 5 H. & N. 19, is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle Hoare v. Rennie was decided. If the principle on which that case was decided is that, wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow Pordage v. Cole, 1 Wms. Saund. 319. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. Hoare v. Rennie was questioned in Jonassohn v. Young, 4 B. & S. 296.

Rule discharged.[62]

MERSEY STEEL & IRON CO., Limited, v. NAYLOR, BENZON & CO.

(In the House of Lords, 1884. L. R. 9 App. Cas. 434.)

Appeal from an order (dated June 13th, 1882) of the Court of Appeal (Jessel, M. R., Lindley and Bowen, L. JJ.) reversing an order of Lord Coleridge, C. J.

[62] The concurring opinions of Mellor and Lush, JJ., are omitted. See in accord, Samuels v. W. H. Miner Chocolate Co., 235 Mass. 312, 126 N. E. 771 (1920).

EARL OF SELBORNE, L. C.[63] * * * Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in Freeth v. Burr [L. R. 9 C. P. 208], which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is

[63] Part of the opinion of Lord Selborne and also the concurring opinions of Lords Blackburn, Bramwell, and Watson are omitted. Withers v. Reynolds, 2 B. & Adol. 882 (1831), was expressly distinguished on the ground that there was a repudiation in that case.

In Freeth v. Burr, L. R. 9 C. P. 208, (1874), there was a contract to sell 250 tons pig iron, price payable 14 days after delivery of each instalment. The seller was very dilatory and the buyer feared that the later instalments would not be delivered. The buyer therefore withheld payment on the first instalment to secure himself against loss to be caused by future non-delivery, thinking erroneously that he was privileged to do this. The seller at once repudiated the contract, prices of iron having risen greatly. The buyer sued for damages for non-delivery and was given judgment, the court holding that his failure to pay on time did not "evince an intention no longer to be bound by the contract" and that a mere partial failure of performance without any abandonment or repudiation of the contract does not terminate the duty of the other party.

Of this case Sir Frederick Pollock (Wald's Pollock on Contracts [Williston's Ed.] 330) says: "As a positive test the rule of Freeth v. Burr is doubtless correct; that is, a party who by declaration or conduct, 'evinces an intention no longer to be bound by the contract,' entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? * * * All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach."

one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1,000 tons monthly commencing January next;" and as to the time of payment, "Payment, net cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act 1862 (§ 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently bona fide, because they doubted, on the advice of their solicitor, whether that section of the act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist—namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in

the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On February 10th, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added: "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion, and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on February 10th, 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it, and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon February 17th, 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered, but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and, according to the view which has been taken in the Court of Appeal of the effect of § 10 of the Act of 1875, and in

which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, "Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

NORRINGTON v. WRIGHT et al.

(Supreme Court of the United States, 1885. 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.)

GRAY, J. This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars ($45.00) per ton of 2240 lbs. customhouse weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia. Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count sets forth the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the

goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about 1,000 tons a month, in March, April, May, June, and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, they gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete

delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments. and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments, (designated by the names of the vessels,) had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants,

the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 Best & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728, 17 L. Ed. 768; Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. Mersey S. & I. Co. v. Naylor, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June

inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley v. United States, 96 U. S. 168, 171, 172, 24 L. Ed. 622. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was

still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of Hoare v. Rennie, 5 Hurl. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 Hurl. & N. 28. So in Coddington v. Paleologo, L. R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in Simpson v. Crippin, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for 12 months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt v. Lawrence, 1 Q. B. Div. 344, in which the contract was for the purchase of 4,500 quarters, 10 per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them. Such being the condition of the law of England as declared in the lower courts, the case of Bowes v. Shand, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March $^{\text{and}}_{\text{or}}$ April, 1874, per Rajah of Cochin." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February; and for the rest, consisting of 1,030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning, —to say that it puts an additional burden on the seller without a cor-

responding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." Pages 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract." Pages 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the House of Lords, two cases were determined in the Court of Appeal. In Reuter v. Sala, 4 C. P. Div. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October $\substack{\text{and}\\\text{or}}$ November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared

to the buyer in writing within 60 days from date of bill of lading," the seller, within the 60 days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and five tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In Honck v. Muller, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig-iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in Mersey Co. v. Naylor, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. Div. 648, and following the decision of the Court of Common Pleas in Freeth v. Burr, L. R. 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment. The Lord Chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture, therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery 1,000 tons monthly, commencing January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the Court of Appeal dicta were uttered tending to approve the decision in Simpson v. Crippin, and to disparage the decisions in Hoare v. Rennie and Honck v. Muller, above cited, yet in the

House of Lords Simpson v. Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck v. Muller, distinguished Hoare v. Rennie and Honck v. Muller from the case in judgment. 9 App. Cas. 144, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of Hoare v. Rennie and Coddington v. Paleologo, as well as in the later cases of Reuter v. Sala and Honck v. Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson v. Crippin and Brandt v. Lawrence, and to accord better with the general principles affirmed by the House of Lords in Bowes v. Shand, while it in no wise contravenes the decision of that tribunal in Mersey Co. v. Naylor. In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are Hill v. Blake, 97 N. Y. 216, which accords with Bowes v. Shand and King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603, which approves and follows Hoare v. Rennie. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In Shinn v. Bodine, 60 Pa. 182, 100 Am. Dec. 560, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan v. McKee, 77 Pa. 228, and in Scott v. Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the supreme judicial court of Massachusetts in Winchester v. Newton, 2 Allen (Mass.) 492, resembles that of the House of Lords in Mersey Co. v. Naylor.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk v. Spence, 4 Camp. 329; Graves v. Legg, 9 Exch. 709; Reuter v. Sala, above cited.

Judgment affirmed.[64]

[64] In accord: Hjorth v. Albert Lea Machinery Co., 142 Minn. 387, 172 N. W. 488 (1919); El Paso Grain & Milling Co. v. Lawrence (Tex. Civ. App.)

BLACKBURN v. REILLY.

(Court of Errors and Appeals of New Jersey, 1885. 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159.

In case. In error to the Essex circuit court.

Blackburn, the plaintiff below, a Virginia dealer in bark, entered into a contract on May 13, 1882, to sell to the defendant below, Reilly, a Newark tanner, for use in his business, 52 car-loads of bark at the price of $18 per ton, to be delivered at the rate of one car-load per week until the whole should have been delivered. Under this contract five car-loads were actually delivered. This was stored by Reilly in a loft over his tannery with other bark. It was all paid for at the contract price by July 3, 1882, but none of it was used until July 15th. Reilly claims that it was then found to be musty, lumpy, and unfit for the purpose for which it had been bought; and shortly after Reilly notified Blackburn not to send any more,—first by mail, alleging that he was overcrowded, and shortly afterwards in a personal interview, alleging its unmerchantable condition. * * *

DIXON, J. * * * The other question discussed on the argument was whether the defendant had the right to refuse to receive any more bark in case he could satisfy the jury that the five loads of bark delivered were not equal in quality to the requirements of the contract.[65] The contract provided that the plaintiff should deliver, and the defendant should receive, one car-load of bark weekly for a year at $18 a ton, payable on delivery. It belongs to a class of agreements sometimes called continuing contracts of sale, because they are to be completely performed, not by single acts of delivery and payment, but by a series of such acts at stated intervals. The rule to be applied in determining whether the express obligations of such contracts remain after one or more breaches by either party has been the subject of much discussion of late years, and has given rise to some contrariety of judicial opinion. We do not feel constrained by the phases of the present case to enter at any length upon the details of this discussion. In our opinion the rule established in England by the judgment of the House of Lords in Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in S. C., 9 Q. B. Div. 648, is one which in ordinary contracts of this nature will work out results most conformable to reason and justice. The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in

214 S. W. 512 (1919); Hoare v. Rennie, 5 H. & N. 19 (1859); King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603 (1878); Pope v. Porter, 102 N. Y. 366, 7 N. E. 304 (1886). Contra: Gerli v. Poidebard Silk Mfg. Co., 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611 (1894); and see Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692 (1884).

[65] Parts of the report not dealing with this question are omitted.

default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain. It also accords with the ancient doctrine laid down by Serjeant Williams in his notes to Pordage v. Cole, 1 Saund. 320b, that where a covenant (of the plaintiff) goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the contract on the part of the defendant without averring performance in the declaration. It of course is inapplicable where the parties have expressed their intention to make performance of a stipulation touching a part of the bargain a condition precedent to the continuing obligation of the contract; and peculiar cases might arise where the courts would infer such an intention from the nature and circumstances of the bargain itself,—cases in which the courts would see that the partial stipulation was so important, so went to the root of the matter, (to use a phrase of Blackburn, J., in Poussard v. Spiers, 1 Q. B. Div. 410,) as to make its performance a condition of the obligation to proceed in the contract.

The case in hand is one of ordinary character, and therefore the question under the rule is whether the circumstances would warrant an inference by the jury that the plaintiff purposed to abandon the contract, or no longer to be bound by its terms. This question is, we think, not doubtful. The plaintiff had delivered five car-loads, which had been accepted and paid for by the defendant without any intimation that they were not satisfactory; was ready to deliver the sixth, when the defendant requested delay; and was prevented from further deliveries only by the peremptory refusal of the defendant to receive any more. Against this refusal the plaintiff protested, then proposed an arbitration, and threatened suit if the defendant should persist, and finally brought this action for damages. In the force of all this there is not a shadow of reason for saying that the plaintiff had abandoned or repudiated the contract. If the five deliveries of defective bark had been made against notice and remonstrance, it might have suggested the idea that the plaintiff meant to disregard his obligations; but by the defendant's acceptance of and payment for the bark without objection this ground for a possible inference of repudiation is wanting in the case. We regard it as incontestable that the deliveries were made in recognition of the binding force of the agreement. The defendant, therefore, was not discharged. Cahen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203, was precisely like the case before us. The plaintiff had agreed to sell the defendant glass, to be delivered in installments. He had made several deliveries, which had been accepted and paid for by the defendant. Subsequently the defendant

complained of the quality, and refused to receive any more. The suit was for damages resulting from the refusal, and the plaintiff recovered. Scott v. Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753, was also similar; but there the defendant contended that the conduct of the plaintiff in the delivery of the defective coal was fraudulent, yet the court held the defendant would not be thereby discharged.

There was no error in the ruling of the trial justice on this proffered defense. The judgment below should be affirmed.[66]

MILLAR'S KARRI & JARRAH CO. v. WEDDEL, TURNER & CO.

(In the King's Bench Division, 1908. 100 Law T. [N. S.] 128.)

The contract was in the following terms:

Sold for account of Messrs. Weddel, Turner, and Co. to our principals; 1100 pieces Tasmanian blue gum at 2s. 9d. per foot cube, cost, freight, and insurance, and safe port in the United Kingdom, destination to be declared by buyers on or before being advised that bills of lading are ready for signature. All to be 14 in. by 14 in. square by 65 ft. long. The timber to be hewn die square without camber, sound, straight grown, and of good merchantable quality and condition. Shipment of about half the quantity to be made in June, July, August next at buyers' option, and the balance to be shipped October, November, December next at buyers' option. To be paid for by net cash on presentation of and in exchange for shipping documents. Any question arising under this contract to be decided by the brokers hereto, but should either of the principals elect to do so they may call for arbitration in the usual manner.[67]

BIGHAM, J. The question in this case is whether the award is bad on its face. The material facts are as follows: On the 15th Feb., 1907, Weddel and Co. sold to Millars and Co. 1100 pieces of Tasmanian blue gum timber at a c. f. and i. price; the wood was to be of a certain size and hewn in a certain way; it was to be without camber, sound, straight grown, and of good merchantable quality and condition. The shipment was to be made in Tasmania in two parcels —namely, about one-half in June and the remainder in October, the destination being the United Kingdom. The payment was to be made against delivery of the shipping documents. The shipments were not made in the required proportions, but the buyers appear to have

[66] In accord: Cahen v. Platt, supra; Jonassohn v. Young, 4 B. & S. 296 (1863); John Deere Plow Co. v. Shellabarger, 140 Tenn. 123, 203 S. W. 756 (1918); Willett Seed Co. v. Kirkeby-Gunderstrup Seed Co., 145 Ga. 559, 89 S. E. 486 (1916). Contra: Lindsborg Milling & Elevator Co. v. Danzero (Mo. App.) 193 S. W. 606 (1917).

[67] The statement of facts is condensed.

made no point of this. The first shipment consisted of 750 pieces; the second of 350 or thereabouts. The shipping documents in respect of both shipments arrived before the goods, and were duly taken up by the buyers. When the first parcel arrived the buyers examined the wood and found it did not accord with the requirements of the contract. They refused to accept it and demanded all their money back, intimating their intention to refuse to take the second shipment upon the ground that the first shipment was such a departure from the contract as to justify a refusal to accept either parcel.

The vendors denied the statements of the buyers as to the first lot, and contended that in any event there was no justification for refusing to take the second lot. The dispute was then referred to Mr. Alfred Lyttelton, who, after hearing the evidence, made the award now complained of. It is in these terms: "I award that the 750 pieces did not comply with the terms of the contract, and I further award that the said shipment was and is so far from complying with the requirements of the contract as to entitle the buyers to repudiate and to rescind the whole contract, and to refuse to accept the said shipment and all further shipments under the said contract."

It is this award which is said to be bad on its face. It is argued that it violates the well-known rule of law that where goods are sold to be delivered in different instalments a breach by one party in connection with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But I do not agree. The rule, which is a very good one, is, like most rules, subject to qualification. Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated, and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty. This is the effect of section 31, subsec. 2 of the Sale of Goods Act 1893, which reads as follows: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or pay for, one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a

severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." In the present case, says the umpire, the first shipment, consisting of much more than half the whole, was so bad as to lead to the inference that the second shipment, which was to be made at the same place and on behalf of the same parties, would also be bad. That is the sense in which I read what he has written. Can it be said that such an inference could not reasonably be drawn from the conduct of the sellers in relation to the first shipment? I think not. The umpire has so found, and has expressed his finding in intelligible language. I think, therefore this motion must be dismissed.

WALTON, J. I agree, and for the reasons which have been stated, I only wish to add that it appears to me that there are two flaws in the argument which was addressed to us in support of this motion. It has been said, in the first place, that the award can only be supported on the ground that what the sellers did amounted to a repudiation of the whole contract—that that means or involves an intention to repudiate the whole contract, and it has been said that, granting everything here, it is plain that there was no intention to repudiate, because the sellers were insisting that they were performing their contract as far as they had gone, and insisting that they were entitled to have the contract performed in the future. I think that that is a fallacy. Of course, the idea of repudiation, which is the word used in section 31 of the Sale of Goods Act, does, no doubt, in a sense involve an intention to repudiate; but, to constitute a repudiation, as Sir George Jessel pointed out in the Mersey Steel & Iron Company v. Naylor (supra), it is not necessary that the party should say, "I will repudiate the contract," or "I intend to repudiate the contract." If, in fact, he is repudiating the contract, he is doing so, although he may be contending that he is performing the contract, and may be intending and expressing an intention to perform what is left of the contract. As Sir George Jessel said in the passage which I have referred to, there may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally the intention must be inferred from the acts of the parties. The second flaw which I think is involved in the argument is this, that a defective delivery of one instalment cannot per se amount in effect to a repudiation. I think that is the foundation of a great deal of the argument that has been addressed to us. I desire to point out that I cannot find in the old cases, and certainly not in section 31 of the Sale of Goods Act 1893, any such statement of the law. All that the Sale of Goods Act, and we need not look back further than the words of that Act, says is that in the case of defective delivery in the case of one instalment, it is a question in each case depending on the circumstances of the contract whether the breach of contract—that is, in this particular case, whether the defective delivery—is a repudiation

of the whole contract (that is the plain meaning of the words), or whether the defective delivery is a severable breach giving rise to a claim for compensation, but not to the right to treat the whole contract as repudiated. I gather that that plainly means that the defective delivery may, having regard to the terms of the contract and to circumstances of the case, amount in effect to a repudiation of the whole contract. Now, what has the umpire found here? He has found that there was a defective delivery amounting to a breach of contract, and he has found that the defective delivery, under the circumstances of the case, was such a breach as amounted in effect to repudiation. He may or may not have been right in such a finding; we do not know what the evidence was upon which he came to that conclusion; we do not know whether there was any evidence upon which he was justified in coming to such a conclusion; but that question is not before us. It seems to me that the terms of the award follow quite properly—I do not mean to say in exact words, but in effect—the terms of the section, and that there is no ground for saying that the award is bad on the face of it. Therefore, I think this motion fails.

Motion dismissed.

JENSEN v. GOSS et al.

(District Court of Appeal of California, 1919. 39 Cal. App. 427, 179 Pac. 225.)

Action by Fred Jensen against Charles E. Goss and another. From a judgment for plaintiff, defendants appeal. Reversed.

WASTE, P. J. This is an appeal from a judgment for $231 for damages found to have been suffered by plaintiff by reason of the failure of defendants to deliver to him hay under a written contract dated June 1, 1916, by the terms of which the hay was to be paid for "on the 13th day of each month following delivery." The defense is that plaintiff refused to pay for the hay as required by the contract, thereby releasing defendants from further performance on their part.

The testimony of and in behalf of defendants is corroborated by the evidence and admissions of plaintiff while on the stand, and fails to support the findings of the trial court. Plaintiff never met his obligations to pay as required. On the 15th day of July, the first month following deliveries of hay, one of the defendants personally called on him and demanded payment of the "money due according to his contract." Defendant promised "that in a matter of a few days he would pay." He made no payment until the 28th of the month, when he paid $275 on account.

Defendants continued to deliver hay as required by the plaintiff, and the latter continued his dilatory payments. Statements of the account were regularly sent to him on the 13th of each month. Collectors of the defendants repeatedly called on him. Members of the

firm (defendants) as repeatedly conversed with him on the telephone, demanding payment. This condition of affairs continued until October 3d, after which defendants delivered no more hay. At that time plaintiff owed them $920, on account of which he made three payments of $200 each, the last on December 12th.

On December 14th one of the defendants personally called on plaintiff and demanded payment of $320.22, the balance due. Plaintiff, admitting that he "would pay him, that he had some money then," refused to pay until defendants delivered two more carloads of hay. There was some conversation relative to the quality of the hay delivered by the defendants, but refusal to pay the balance due was not predicated on that ground. Defendant told him that he considered the contract canceled. The same day defendants' attorneys made demand for "immediate payment of the" balance due, and notified plaintiff that, unless such payment was made upon receipt of the demand and notice, defendants would, by reason of the breach of the contract by plaintiff in failing to make payments for said hay as provided therein, refuse to deliver any further amount of hay.

Plaintiff did not pay the balance until December 21st, at which time, through his attorneys, he requested the defendants to deliver two carloads of hay. No hay being delivered, the plaintiff four or five days later went to the barn of defendants and personally demanded delivery of the hay, and was informed by them that the contract was at an end. After giving further orders to defendants for delivery of hay, no one of which was filled, plaintiff commenced this action.

In view of the evidence in the case, we have looked to respondent to sustain the findings and judgment of the trial court by weight of authority. This he has not done. None of the cases cited by him, so far as we are able to find, relate to a mercantile contract such as the one here under consideration. They have to do with purchase of real estate on the installment plan, forfeitures, and equitable rights or leasehold interests. "In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally held that the parties have intended to make time the essence of the contract." 13 Corpus Juris, 688, and cases cited. The defendants were justified in rescinding the contract when plaintiff showed a clear intention to violate its provisions, and to withhold payments due until the delivery of more hay. Minaker v. California Canneries Co., 138 Cal. 239, 71 Pac. 110.

The rights of defendants to rescind were not waived, nor were they affected, by the fact that they did not stop delivery of hay immediately after failure of plaintiff to make his first payment as required. They had the right to rely, for a reasonable length of time at least, upon the promise of plaintiff to pay. San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 51 Pac. 335.

Had plaintiff rested his refusal to pay on the ground of a failure to deliver the quality of hay required by the contract, such posi-

tion would not aid him in this action. He could not offset any damages for such alleged breach on the part of defendants without showing performance on his own part of his own agreement. Minaker v. California Canneries Co., supra.

For the reasons above stated, the judgment is reversed.[68]

HARTON v. HILDEBRAND et al.

(Supreme Court of Pennsylvania, 1911. 230 Pa. 335, 79 Atl. 571.)

Suit by William E. Harton against William E. Hildebrand and another. From a decree dismissing the bill, plaintiff appeals. Reversed, and bill reinstated.

MESTREZAT, J.[69] We do not agree with the learned court below in dismissing this bill, which was filed to restrain the defendant Howley from selling and disposing of the houses until he had paid the debts due from Hildebrand, the other defendant, to the plaintiff Harton.

No exceptions were filed by either party to the findings of fact made by the learned trial court, and therefore the case must be disposed of upon those facts. They may be summarized as follows:

On June 1, 1901, Hildebrand entered into a contract with Harton for the erection of eight dwelling houses on certain lots fronting on Brackenridge avenue in the thirteenth ward of the city of Pittsburg. On June 9, 1901, Frank P. Howley made a deed to Hildebrand for these lots, and he proceeded at once with the erection of the buildings. On August 7, 1901, Michael P. Howley, father of Frank P. Howley, conveyed to Hildebrand 26 lots of ground on Avalon street in the thirteenth ward of the city of Pittsburg. Judgment notes were given to secure the purchase money, but they were withheld from record

[68] In the following cases nonpayment of part of the price as agreed was held to privilege the seller to make no more deliveries and to constitute a vital breach; Burt v. Garden City Sand Co., 237 Ill. 473, 86 N. E. 1055 (1909), buyer largely in arrears after definite notice that it would be fatal; Dudley v. Wye, 230 Mass. 350, 119 N. E. 790 (1918), prompt payment had been insisted on, and buyer gave weak excuses; Samuels v. W. H. Miner Chocolate Co., 235 Mass. 312, 126 N. E. 771 (1920), failure to pay and also failure to send more orders as agreed; National Machine & Tool Co. v. Standard Shoe Machinery Co., 181 Mass. 275, 63 N. E. 900 (1902); Kamps & Sacksteder Drug Co. v. United Drug Co., 164 Wis. 412, 160 N. W. 271 (1916), nonpayment plus bankruptcy; Kokomo Strawboard Co. v. Inman, 134 N. Y. 92, 31 N. E. 248 (1892), repeated failures to pay; Rugg v. Moore, 110 Pa. 236, 1 Atl. 320 (1885), failure to pay plus tortious taking of the goods; Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566 (1917), land sale; Hull Coal & Coke Co. v. Empire Coal & Coke Co., 113 Fed. 256, 51 C. C. A. 213 (1904); Phillips v. Seymour, 91 U. S. 646, 23 L. Ed. 341 (1875); Collins-Plass-Thayer Co. v. Hewlett, 109 S. C. 245, 95 S. E. 510 (1918); Beltinck v. Tacoma Theater Co., 61 Wash. 132, 111 Pac. 1045 (1910), advertising contract.

Of course, the condition of payment, like other conditions, can be waived. Fairchild-Gilmore-Wilton Co. v. Southern Refining Co., 158 Cal. 264, 110 Pac. 951 (1910).

[69] Parts of the opinion are omitted.

until the Prudential Trust Company, which was to furnish the money for the erection of the houses, had put on record as a first lien a mortgage from Hildebrand. On September 26, 1901, Hildebrand made a contract with Harton for the erection of 19 houses on the Avalon street property. This contract provided that the buildings should all be finished by April 1, 1902, and that the contract price should be $62,149, and should be paid "by the owner to the contractor in installments as follows: 70 per cent. of the above amount to be paid on estimated amount of work done as the buildings progress."

The Brackenridge avenue houses were completed in March, 1902. The houses on Avalon street were not finished or nearly finished by April 1, 1902, and Hildebrand and Harton agreed in the winter of 1901–1902 that no attempt should be made in the cold weather to complete these houses on April 1st. The contract price for the Brackenridge avenue houses was $18,000 and when they were completed in March, 1902, there was due from Hildebrand to Harton $5,573.61.

Harton began the Avalon street houses soon after making the contract and carried on the work until December when it was suspended, and began work again about March 1, 1902, and continued until about May 20, 1902, only nine of the houses, however, being begun at this or any later time by him; this action on his part being apparently acquiesced in by Hildebrand. On the latter date Harton presented to Hildebrand an estimate of the work already done on these houses, showing the value of the work done to date, the 70 per cent. of the amount required to be paid in installments, the amount of extra work done, the aggregate of the amount already paid him, and the balance of $2,496.26, which was then due and payable. This statement was admitted by Hildebrand in writing to be correct.

In May, 1902, a number of mechanics' liens were filed against the Brackenridge property; but no liens were ever filed against the Avalon street houses.

On May 22, 1902, Harton quit work on the Avalon street houses and declared that he would not go on with the contract because of the failure of Hildebrand to pay him the sum owing on the first and on the second contracts as above stated.

On June 14, 1902, Hildebrand conveyed to Frank P. Howley both the Brackenridge avenue and Avalon street properties, and as part of the same transaction an agreement was entered into between Hildebrand and Howley by which the latter accepted the conveyance, subject to all legal claims for labor and materials furnished in and about the erection of the houses. By this agreement, Howley assumed payment of these claims.

On July 31, 1902, Howley wrote Harton that if the latter was willing to go on under the contract he would aid him as much as he could in the construction of the buildings; that if he declined to go on he would complete the buildings himself. This notice was given under the sixth paragraph of the contract relating to the Avalon street houses, which

provides that, if the contractor at any time during the progress of the work fails to supply material or workmen, or causes any unreasonable suspension of work, the owner may terminate the contract and finish the buildings at the contractor's expense. Immediately upon the receipt of this communication Harton replied that as there was owing to him for a long time at least $2,500 on this contract which had not been paid, and as it was impossible by reason of the nonpayment for him to carry out the contract, that he thereupon declared the contract null and void. Howley then proceeded to finish the nine houses, which cost him $12,548 more than the contract price. * * *

The parties agree that the only question in the case is whether, under the circumstances existing at the time, Harton was justified in stopping work on the Avalon street houses on May 22, 1902, and, subsequently, in refusing to proceed with it on notice by Frank P. Howley, who was then the owner of the property. As noted above, the learned court below held that "under all the circumstances it was altogether unreasonable for Harton to rescind the contract for any such delay of payment as this." The court, it will be observed, does not find that the amount of the estimate of May 20, 1902, is not correct or was not due Harton at that date, or that Howley was dissatisfied with it; nor does the court base its decree against the plaintiff on either of those grounds. It, therefore, becomes important to ascertain what the circumstances were on May 22, 1902, when Harton declined to proceed under the Avalon street contract, and on August 1, 1902, when he declared the contract rescinded. While, as suggested by the counsel for the appellee, a balance due Harton under the Brackenridge avenue contract has no bearing upon the rights of the parties under the Avalon street contract and would not justify the rescission of the latter contract by Harton, yet it may not be out of place to note the fact that, at the date of the suspension of work by Harton on the Avalon street houses, Hildebrand was indebted to him under the Brackenridge avenue contract, which had been fully performed by Harton, in the sum of over $5,500. For the payment of this balance, Harton had no security, and Hildebrand had no property out of which it could be collected. * * *

The contract price was to be paid, as stipulated in the agreement, "by the owner to the contractor in installments as follows: 70 per cent. of the above amount to be paid on estimated amount of work done as the buildings progress." It is manifest, therefore, that estimates were to be made as the work progressed. While the contract does not state when the estimates were to be made, yet it clearly contemplated that when an estimate had been made that 70 per cent. of it was then due and payable. On May 20, 1902, an estimate of the work done and the material furnished was made, and it appeared by the estimate that there was due and payable from Hildebrand to Harton on the Avalon street contract the sum of $2,496.26. Hildebrand was the owner of the property, and the money was due from him. It is

not pretended that he made any offer to pay it or secure it. At that time he had no property, except the Brackenridge avenue and Avalon street properties. As found by the court, there was yet due Harton on the Brackenridge avenue contract over $5,500. That property was incumbered by a first mortgage to the Prudential Trust Company and by judgments entered on notes for the purchase price of the land. Hildebrand had signed a no-lien contract. By agreement of the parties another Prudential Trust Company mortgage of $60,000 was a first lien on the Avalon street property, and it was also subject to the judgments entered for the purchase money. It is therefore apparent that, for the balance due Harton for labor and material furnished in the construction of the Avalon street houses, recourse to that property or the Brackenridge avenue property would avail him nothing. Hildebrand was without means, and a pursuit of him by Harton would have simply resulted in the pursuer being mulcted in the cost in a vain endeavor to collect the claim.

These were the conditions existing at the time the estimate of the balance due Harton on the Avalon street contract was made on May 20, 1902, and on the second day thereafter when he declined to proceed with the work until the balance was paid. The same conditions prevailed on August 1, 1902, when he rescinded the contract. Both parties consented to the jurisdiction of equity, and that a chancellor should adjust their differences in accordance with equitable principles. Was it unreasonable, as held by the court below, for Harton to stop work under these circumstances? Was he compelled to proceed with the work, put his labor and material in it, and thus add to the amount already owed him by Hildebrand, with neither property nor any responsible party in view from whom he could compel payment? Is there any principle of equity or rule of law which would require him under these circumstances to proceed with the work simply for the benefit of Hildebrand's creditors and, possibly, for the improvement of Howley's property? Having due regard for the rights of the parties under the stipulations of their contract, these questions permit of but one answer, and that is in the negative. * * *

Hildebrand, the owner, had breached the Avalon street contract, and he was not in a position to demand its enforcement. Howley occupied no better position. The contract was entire as to the erection of the 19 houses, and divisible and severable as to the payment of the installments for the work and material furnished. Hildebrand's failure, therefore, to perform his part of the agreement by paying the estimate of May 20, 1902, gave Harton the right to declare the contract at an end. Rugg v. Moore, 110 Pa. 236, 1 Atl. 320; Easton v. Jones, 193 Pa. 147, 150, 44 Atl. 264, 265. In the last case it is said: "While plaintiff's failure in ability or intention to complete the work will be a good defense, even to an action for a payment stipulated to become due on a state of progress shown to be reached, yet a refusal to pay such an installment without that or other legal excuse is such a

breach of the contract as will justify a rescission, and entitle the plaintiff to recover pro tanto for the work." * * *

Decree reversed and bill reinstated.[70]

ST. REGIS PAPER CO. v. SANTA CLARA LUMBER CO.

(Court of Appeals of New York, 1906. 186 N. Y. 89, 78 N. E. 701.)

Action by the St. Regis Paper Company against the Santa Clara Lumber Company. From a judgment of the Appellate Division of the Third Department (93 N. Y. Supp. 1146), affirming a judgment entered on a decision of the Special Term (85 N. Y. Supp. 1034) in favor of defendant, plaintiff appeals. Reversed, and new trial granted.

CULLEN, C. J. This action was brought for the specific performance of a contract whereby the defendant agreed to cut and deliver to the plaintiff from 11,000 to 13,000 cords of pulp wood a year from a large tract of wild lands in the Adirondacks owned by the defendants, during the term of 10 years, at the price of $9 a cord, with the privilege to the plaintiff to obtain a renewal of the contract for an additional term of 10 years at $12 per cord. The case has been before this court on a previous appeal and is reported in 173 N. Y. 149, 65 N. E. 967. In that report will be found a statement of the parts of the contract material to this controversy. On the former appeal, this court, reversing the decisions of the courts below, held that the contract was one the performance of which a court of equity could properly enforce. After our decision the case was tried on its merits and judgment was rendered by the trial court in favor of the defendant on the ground that the plaintiff had made default in the performance of that provision of the contract whereby the plaintiff agreed to make advances to the defendant for the cost of cutting and getting out the wood. The provision is as follows: "Party of the first part (defendant) shall commence to cut wood on or about the 15th day of August of each year for the following season's supply. Party of the second part (plaintiff) shall make such advances

[70] The failure and refusal of an owner to make a "progress payment" as required by a building (or other expensive) contract goes to the essence. American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44 (1913); Woodruff Co. v. Exchange Realty Co., 21 Cal. App. 607, 132 Pac. 598 (1913); Peet v. City of East Grand Forks, 101 Minn. 518, 112 N. W. 1003 (1907), city had no funds, large sum due; Newton v. Highland Imp. Co., 62 Minn. 436, 64 N. W. 1146 (1895); Howard County v. Pesha, 103 Neb. 296, 172 N. W. 55 (1919); Fernald Woodward Co. v. Conway Co. (D. C.) 229 Fed. 819 (1916).

"As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed." Guerini Stone Co. v. P. J. Carlin Const. Co., 248 U. S. 334, 39 Sup. Ct. 102, 63 L. Ed. 275 (1919).

of money to party of the first part as it may request during the progress of the work, but party of the second part need not advance more than approximately the cost of the work done. Payment for the said wood shall be made by the party of the second part to the party of the first part on the 15th day of each month for the wood delivered during the next preceding calendar month, after first deducting from the aggregate of the purchase price of the said wood one-tenth of the advances made upon that season's operations until such advances have been repaid." The judgment of the Special Term was affirmed by the Appellate Division by a divided court, and from the judgment of affirmance this appeal is taken.

The contract, dated the 29th day of August, 1899, was executed by the parties about the 1st of October in that year. For some time prior to the execution of the contract, however, the parties had been in negotiation concerning it, and during that interval, in contemplation of the contract, the defendant had built roads, constructed permanent camps, and incurred expenses for various items necessary for the prosecution of the work. Under the contract, the wood was to be delivered to the plaintiff at any point, the expense of the transportation to which should not exceed the cost of the transportation from Tupper Lake Junction to Watertown N. Y., and the delivery was to commence on or about the 1st day of June in each year. The ordinary method of taking out wood was to cut it, and haul it to the streams during the winter season, whence the next spring it was floated to the point of delivery. No deliveries would be, therefore, made to the plaintiff till June, 1900. On October 7th the defendant demanded the sum of $2,500 on account of expenses already incurred by it, with which demand the plaintiff complied on October 18th. On October 26th the defendant demanded the sum of $5,000 on account, and on November 17th an additional sum of $5,000. On account of these two demands, the plaintiff, on December 5th, paid the sum of $7,500. Now, while the whole controversy and the decision of the court below proceed on the failure of the plaintiff to properly respond to the defendant's demands for advances, it would be impracticable to give within the limits of an opinion even an abstract of the details of the correspondence between the parties. It is sufficient to say that from October 26, 1899, to March 24th following, the defendant made repeated demands for advances, while the plaintiff insisted that the advances asked for by the defendant were largely in excess of those ordinarily made for the purpose of taking pulp wood from the forest. On March 24, 1900, which was the date of the last demand by the defendant prior to its notification to the plaintiff that the contract was rescinded by it, the account between the parties, as found by the trial court, stood as follows: The defendant had expended $37,132.80; the plaintiff had advanced the defendant the sum of $25,000.

On March 24th the defendant sent to the plaintiff the following letter: "Malone, N. Y., March 24th, 1900. The St. Regis Paper Co., Water-

town, N. Y.—Dear Sirs: In response to my notice to you some time since you sent me check for $5,000 on the Santa Clara Lumber Co. pulp-wood contract, which I at once forwarded to the company in New York. I have to-day received a letter from the company, saying that they have received $25,000 which was $12,500 short of the actual cost of the wood in its present condition, and they request me to ask you to remit at least $5,000 more; that the annoyance that they experience in getting these advances is so great that they feel very much disinclined to continue trying to fulfill the contract on their part unless the advances can be more promptly made. Hoping that you will remit at least $5.000 I remain, Very respectfully yours, John P. Badger."

To which the plaintiff made this reply: "Watertown, N. Y., March 26th, 1900. John P. Badger, Esq., Malone, N. Y.—Dear Sir: Your favor of the 24th inst. at hand and noted. We have advanced the Santa Clara Lumber Co. $2 per cord upon the quantity of pulp wood which they claim to have cut, and we have advanced this amount promptly upon receiving their several requests. As we have already explained to you, this is the amount which is ordinarily advanced to cover the cost of pulp wood delivered to the stream. We understand that the Santa Clara Lumber Co. have spent an unusual amount of money this year in establishing permanent camps and roads with a view of reducing the expense of maintenance in the future. We also understand that they have been lumbering upon their own account. We could hardly be expected to share in unusual expenses, and in view of the fact that they are conducting extensive operations of their own, it seems to us the only way we can arrive at the amount to advance is to take the customary amount. As we have heretofore said to you, however, the matter is merely one of interest, and we have suggested a friendly arbitration. You have consented to the arbitration, but, nevertheless, continue to make further requests for additional advances. Very truly yours, G. C. Sherman, Treas."

Nothing further passed till April 12th, when the defendant notified the plaintiff that on account of the latter's failure to make advances to the extent of the cost of work done the contract was rescinded, and at the same time sent to the plaintiff a certified check for $25,344.-79, the amount advanced by it with interest. It appears that at this time pulp wood had appreciated in price, and the defendant had made a contract for the sale of its wood to other parties on more favorable terms. The plaintiff refused to receive the check, and wrote the defendant insisting that the contract still continued in force, and thereupon the plaintiff brought this action for its specific performance.

The learned trial court found that the plaintiff failed and refused to "advance the cost of the work as requested by the defendant or any fair approximation thereof. That the defendant repeatedly notified the plaintiff of its intention to rescind the contract in case its requests were not complied with. * * * That the plaintiff did not make the ad-

vances, as requested, for approximately the cost of the work done, and that, with knowledge of the cost and of the terms of the contract, and with notice of the intention of the defendant to rescind if its requests were not complied with, deliberately and intentionally refused and neglected to make such advances, and that such refusal and neglect was not caused by any inadvertence or by any misunderstanding of the facts." If the testimony in any aspect justified this finding of the trial court, it is a complete answer to this appeal, for equity will not enforce a contract at the instance of a party who has deliberately and intentionally neglected and refused to comply with its requirements. But we think that there is no evidence to support this finding. Granting, as we must, for the trial court has so found, the fact, that the advances made by the plaintiff did not equal the expenditure incurred approximately by the sum of $12,500, that fact alone does not show that the plaintiff's default was deliberate and intentional.

We agree with the learned counsel for the respondent that the advances, which under the contract the plaintiff was obliged to make, were not limited by the ordinary and customary advances made to parties who get out wood for the market, but only by the sum which the defendant actually and properly expended towards cutting and hauling the lumber. Nevertheless, the contract was one which would naturally breed dispute and difference of opinion, for no definite amount to be advanced was specified. Whether outlay made for the work of a permanent character, such as the construction of roads and the building of camps, the defendant was entitled to demand from the plaintiff, under the provisions of the contract, is not wholly free from doubt. While the fact that the amounts called for by the defendant largely exceeded the usual advances in the business did not justify the plaintiff in refusing to accede to the defendant's demands, still it tended to excuse plaintiff's hesitation in complying. The contract contained a provision that all matters of difference that might arise between the parties respecting the contract or the fulfillment thereof should be determined by arbitration. We concede that this provision was too broad to be enforced by the courts. Nevertheless, granting its invalidity, the parties negotiated for an arbitration under it. These negotiations had not been terminated at the time of the defendant's rescission of the contract. There is nothing to show that the position of the plaintiff in this controversy was not taken by it in good faith. It was willing to help the defendant obtain money, for it expressly offered to discount the defendant's note for such amount as it might need. There is not a word from the plaintiff to be found in the correspondence tending to show an abandonment of the contract. On the contrary, it was constantly insisting on its performance.

It is true that the plaintiff erred in its construction of the contract and as to its liability to make advances thereunder, and, therefore, that it had not strictly performed the contract on its part. But that did not

necessarily debar it from relief. Of such a situation this court said by Judge Danforth in Day v. Hunt, 112 N. Y. 191, 19 N. E. 414: "These objections cannot prevail. On the contrary, the very fact that the plaintiff has not strictly performed his part, and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time according to the actual merits of the case. * * * There is nothing to show that either party abandoned the contract or wished or intended to do so. They differed merely as to the form of the mortgage, and, so far as appears, that difference only prevented the completion of the sale. Although wrong in his construction as to its proper force, the plaintiff cannot be said to be wholly without excuse."

There is this further, and to my mind controlling, factor in this case. There had been at least a part performance by the plaintiff and a substantial part, and courts of equity regard with more favor actions to enforce specific performance where there has been performance in part than where nothing has been done by either party under the contract. Thus Mr. Pomeroy writes (Equity Jurisprudence, § 812) of the specific performance of contracts for the sale of land: "But in some cases time almost ceases to be material, as where the vendee has paid the purchase money, or is in possession of the land, it is then said that time does not run against him." While the trial court has found that the defendant notified the plaintiff of its intention to rescind the contract, unless its requests were complied with, it must be borne in mind that this notice was of the most general character; that is to say, that if advances were not more promptly made the defendant would be unable to fulfill and would give up the contract. Nevertheless, despite these notices, the defendant continued to take such moneys as the plaintiff advanced. Such receipt operated to abrogate any right to rescind that might then exist. The last payment so made by the plaintiff was the sum of $5,000 on March 12th. The rule seems to be well settled that though a party to a contract is in default, if the other party continues to negotiate with him after such default the contract cannot be rescinded without reasonable notice to the party in default to comply with the contract within a specified time. Pomeroy's Eq. Jurisprudence, § 815.

In Webb v. Hughes, L. R. 10 Eq. 281, a contract for the sale of land was to be closed on February 26th. Negotiations were continued after the date set for closing, and on April 7th the purchaser gave notice of immediate abandonment. Specific performance was decreed, the vice chancellor saying: "But, having once gone on negotiating, beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown." In Parkin v. Thorald, 16 Beavan, 59, notice was given on October 21st that the contract must be performed on November 5th or otherwise would be abandoned. Specific performance was decreed, the length of notice being held insufficient.

The defendant's letter of March 24th, already recited in full, gave the plaintiff no notice that a certain amount must be paid by a certain time, but merely expressed the feeling of the defendant that it was "disinclined to continue trying to fulfill the contract on their part, unless the advances can be more promptly made." This was wholly insufficient as a notice of the defendant's election to abandon the contract unless by a certain time the plaintiff made the necessary advances. The defendant could not, under the circumstances, rescind the contract without notice. We are of opinion, therefore, that the judgments below were erroneous. It is unfortunate that the case should have been so long in litigation that during its pendency over half of the first contract term has expired. However, in case the plaintiff succeeds on a new trial the court may mold its decree in such form as, in view of the lapse of time and its effect on the interest of the parties, equity may require.

The judgment appealed from should be reversed, and a new trial granted, costs to abide the final award of costs.[71]

HELGAR CORP. v. WARNER'S FEATURES, Inc.

(Court of Appeals of New York, 1918. 222 N. Y. 449, 119 N. E. 113.)

Action by the Helgar Corporation against Warner's Features, Incorporated. From a judgment of the Appellate Division, modifying and affirming a judgment entered on a referee's report (171 App. Div. 910, 154 N. Y. Supp. 1125), both parties appeal. Affirmed in part and reversed in part.

CARDOZO, J. The plaintiff's assignor made a contract with the defendant for the sale of films for moving pictures. At least one film was to be delivered every month. Deliveries were to begin in November, 1913, and to end in October, 1914. The price was fixed at eight cents per foot, and payment for each film was to be made within 30 days after exhibition to the public. By way of additional compensation, the defendant was also to pay one-half of the net profits realized by it as the result of foreign sales.

The plaintiff, having received an assignment of the contract, delivered pictures of the value at the contract rate of nearly $10,000. The price was payable on December 24, 1913. The finding is that payment was then demanded, and that "the defendant refused and neglected to pay the same or any part thereof, nor did the defendant offer or tender a part payment of said amount or offer to pay the same in installments." Two days later this action was begun. The plain-

[71] In accord: Nelson v. San Antonio Traction Co., 107 Tex. 180, 175 S. W. 434 (1915), refusal to pay because of a wrong construction of the agreement: Myer v. Wheeler, 65 Iowa, 390, 21 N. W. 692 (1884). See, also, Fresno Canal & Irr. Co. v. Perrin, 170 Cal. 411, 149 Pac. 805 (1915).

tiff alleged its election to terminate the contract by reason of the breach. Judgment was demanded for the price of the films delivered, and also for the profits that would have been gained through the completion of the contract. The referee gave judgment for the price, but refused to award the profits. In his opinion, he put his refusal upon the ground that the failure to make punctual payment was not accompanied by acts or words evincing repudiation or abandonment. The Appellate Division added $2,000 to the judgment. This was the estimated value of foreign rights which attached to the sales already made. That value was thought to be recoverable as an incident to the price. With this modification, the judgment was unanimously affirmed. There are cross-appeals in this court.

The rights of vendor and vendee upon the breach of an installment contract are now regulated by statute. The rule is to be found in section 126, subdivision 2, of the statute governing sales of goods (Personal Prop. Law, Consol. Laws, c. 41, amended by L. 1911, c. 571): "Where there is a contract to sell goods to be delivered by stated installments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

The statute thus establishes a like test for vendor and for vendee. The earlier cases may not be wholly uniform. Wharton & Co. v. Winch, 140 N. Y. 287, 35 N. E. 589; Kokomo Strawboard Co. v. Inman, 134 N. Y. 92, 31 N. E. 248; Wolfert v. Caledonia S. I. Co., 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. (N. S.) 864. We do not need to reconcile them. We have departed from the rule of the English statute (St. 56 & 57 Vict. c. 71, § 31, subd. 2), which keeps the contract alive unless the breach is equivalent to repudiation. Note of Commissioners on Uniform Laws, American Uniform Commercial Acts, p. 98; Williston on Sales, pp. 809, 810; 25 Halsbury, Laws of England, p. 220. We have established a new test which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. "It depends in each case on the terms of the contract and the circumstances of the case" whether the breach is "so material" as to affect the contract as a whole.

The answer to that question must vary with the facts (Williston on Sales, p. 810). Default in respect of one installment, though falling short of repudiation, may under some conditions, be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing but a technical omis-

sion to observe the letter of a promise. Williston on Sales, p. 823; Nat. Machine Co. v. Standard Co., 181 Mass. 275, 279, 63 N. E. 900; Wharton & Co. v. Winch, supra. General statements abound that, at law, time is always of the essence. Williston, supra; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Booth v. S. D. Rolling Mills Co., 60 N. Y. 487; Schmidt v. Reed, 132 N. Y. 108, 30 N. E. 373. For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end. Williston, p. 823; Beatty v. Howe Lumber Co., 77 Minn. 272, 79 N. W. 1013, and cases there cited; Graves v. White, 87 N. Y. 463, 466. That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is willful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury.

The findings in this case do not enable us to say that the plaintiff was justified in its precipitate election to declare the contract at an end. There is a finding that payment was refused. That is inconclusive by itself. The refusal may have been nothing more than a declaration of inability to make payment on the instant. There is a finding that the defendant did not offer part payment or payment in installments. That again is inconclusive. It is not an ultimate, but at most an evidentiary, fact. The circumstances may none the less have indicated a temporary default to be followed promptly by full payment. The referee must have interpreted the situation in that way, for he states in his opinion that the default was not accompanied by any act or declaration that would indicate abandonment. If we were at liberty to look into the evidence and draw our own inferences we might reach a contrary conclusion. But the evidence is not open to our scrutiny. The plaintiff has not requested the referee to find the ultimate fact on which the right to the recovery of profits depends. It has not requested a finding that the breach was so material as to justify its hasty election to

declare the contract at an end. It has not requested a finding of the circumstances preceding or accompanying the default. There is not even a request which brings before us in due form the ruling that all profits must be excluded. The only request made specifies the extent of the loss, and includes elements of damage which the referee, in any view of the breach, was at liberty to reject. In these circumstances, we must hold the plaintiff to the rule which requires a request to find and an exception. Sherman v. Foster, 158 N. Y. 587, 597, 53 N. E. 504; Ostrander v. Hart, 130 N. Y. 406, 414, 29 N. E. 744; Burnap v. Nat. Bank of Potsdam, 96 N. Y. 125, 131; Thomson v. Bank of B. N. A., 82 N. Y. 1; Drake v. N. Y. Iron Mine, 156 N. Y. 90, 50 N. E. 785. The findings as made leave the character of the default equivocal. In the absence of an appropriate request for other findings, the evidence is not before us. The rule would be different if we were asked to go behind the findings for the purpose of affirmance. Ogden v. Alexander, 140 N. Y. 356, 35 N. E. 638; Ostrander v. Hart, supra. The plaintiff asks us to go behind them for the purpose of reversal. Its appeal must therefore fail.

The defendant complains of the increase of the judgment directed at the Appellate Division. We think the increase was erroneous. We have seen that the plaintiff was not at liberty to treat the entire contract as broken. Its cause of action was limited to the recovery of payments in default. But there has thus far been no default in respect of foreign sales. No foreign sales have yet been made. The award in that respect is an estimate of sales to be made hereafter. Until the conditions prescribed by the contract have been satisfied, the extra compensation is not payable. The plaintiff's recovery must be limited to payments already due.

The judgment of the Appellate Division to the extent that it modifies the judgment entered on the report of the referee should be reversed, and the judgment entered upon such report affirmed, with costs in this court to the defendant.

LOS ANGELES GAS & ELECTRIC CO. v. AMALGAMATED OIL CO.

(Supreme Court of California, 1909. 156 Cal. 776, 106 Pac. 55.)

Action by the Los Angeles Gas & Electric Company against the Amalgamated Oil Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Sloss, J. Action to recover damages for an alleged breach of contract. At the trial the defendant's motion for nonsuit was granted and a judgment of dismissal entered. From this judgment plaintiff appeals.

The contract involved was in writing, and was executed by the Associated Oil Company, as party of the first part, and the Los Angeles

Gas & Electric Company, the plaintiff herein, as party of the second part. The defendant Amalgamated Oil Company succeeded to all the rights and obligations of the Associated Oil Company under the contract, and may, for the purposes of this discussion, be considered as having in the first instance entered into said contract with plaintiff. In the interest of brevity, we shall herein designate the plaintiff as the "gas company" and the defendant as the "oil company."

By the terms of the contract, which is dated the 1st day of February, 1905, the oil company agrees to sell and deliver to the gas company, and the latter agrees to purchase and receive from the former, a sufficient quantity of crude oil to operate all plants now or hereafter to be operated by the gas company in its business of manufacturing gas and electricity in the city of Los Angeles over and above the amounts heretofore contracted for to be delivered to the gas company by others than the oil company during the term of the contract. The term of the agreement is declared to be from February 1, 1905, to December 31, 1910, inclusive. In addition to various provisions regarding the character of oil to be furnished, the manner of delivery, and deductions for impurities, the contract provides that the gas company shall give three days' notice of its requirements, and fixes the purchase price at 45 cents per barrel, payments to be made on the 15th day of each month for all oil delivered during the preceding calendar month.

The complaint alleges that, after making various deliveries during the years 1905 and 1906, the defendant on December 31, 1906, notified the plaintiff that it no longer considered itself bound by the contract. On several occasions during January and February, 1907, the gas company, plaintiff, requested and demanded of the defendant oil company that it furnish and deliver to plaintiff a quantity of crude oil aggregating 24,700 barrels. Of this amount 11,616 barrels was the quantity of oil sufficient (over and above the oil otherwise contracted for as provided in the aforesaid contract) to operate plaintiff's plants. The plaintiff, it is alleged, has duly performed all the obligations imposed on it under the contract; but defendant has refused to deliver any of the oil demanded during said months of January and February, 1907. The lowest market value of oil of the quality described in the contract since the 1st day of January, 1907, was 75 cents per barrel. The prayer of the complaint is for $3,484.80, being the difference between the contract price and the market value of the 11,616 barrels, which, as plaintiff claims, the defendant should have delivered.

Of the answer it will be sufficient to say that it denies that "plaintiff has duly, or at all, performed all, or any, of the obligations imposed on it under the said contract."

At the trial there was no dispute about the terms of the contract, the refusal to deliver on demand as alleged, or the market value of oil at and after the refusal. The gas company did not, however, make any attempt to show that it had during the period prior to January, 1907, demanded or received from the oil company, a quantity of oil

(over and above amounts otherwise contracted for) sufficient to operate its plants. The motion for a nonsuit was based on the failure to produce evidence on this point, and, stating the same proposition in more general terms, that plaintiff had failed to prove its allegation that it had duly performed all the obligations imposed on it under said contract.

By the agreement the gas company agreed to take of the oil company, and pay for, all the oil required by it over and above specified exceptions. The oil company agreed to deliver, as called for, all such oil at a given price. If the contract is to be construed as entire with respect to these covenants—in other words, if such covenants were mutually dependent—the court below was clearly right in holding that plaintiff could not recover for a failure to deliver without alleging and showing either performance, or a sufficient excuse for the nonperformance, of its obligation to take of defendant all oil required to operate its gas and electric plants. Daley v. Russ, 86 Cal. 115, 24 Pac. 867; Easton v. Montgomery, 90 Cal. 307, 318, 27 Pac. 280; 25 Am. St. Rep. 123; Marchant v. Hayes, 117 Cal. 670, 49 Pac. 840.

The appellant's contention is that the contract was severable into as many distinct agreements of sale as there were months in the term during which deliveries were to be made. We do not regard this position as tenable. Whether a contract is entire or severable is a question of interpretation. The intent of the parties is to be ascertained from a consideration of the language employed and the subject-matter of the contract. 2 Parsons' Contracts, (9th Ed.) 672; Sterling v. Gregory, 149 Cal. 120, 85 Pac. 305. It is, no doubt, well settled, as has been repeatedly declared by this court. that "when the price is expressly apportioned by the contract, or the apportionment may be implied by law, to each item to be performed the contract will generally be held to be severable." More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Herzog v. Purdy, 119 Cal. 99, 51 Pac. 27; Sterling v. Gregory, supra. But this rule is not universal. It is subject to the limitation that a contract will be treated as entire, even when the obligations of the one party consist of different acts to be separately paid for, where the nature and character of the agreement show that it was intended to be entire. Thus, in Norris v. Harris, 15 Cal. 227, Field, C. J., said: "But a contract, made at the same time for different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties. * * *" Similarly, in Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736, cited by this court in Sterling v. Gregory, supra, the "more reasonable rule" is said to be that, "where there is a purchase of different articles at different prices at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties."

In the case of the contract before us, we have no doubt that the

subject-matter and the stipulations of the parties were such as to make the taking of the oil contracted for essential to the right to demand further deliveries. The seller undertakes to hold itself in readiness to meet all the requirements of the buyer and to fill these requirements at a given price. In return it has the privilege of supplying at that price all oil that the buyer may require for its plant. These provisions—the obligation to furnish and the obligation to take all oil needed—are necessarily reciprocal. Each goes to the essence of the agreement. It is not to be supposed that the oil company would have been willing to bind itself to furnish oil for a term of years at 45 cents a barrel, regardless of the actual state of the market, unless it had been assured a continuous outlet for a large quantity at that figure. And, on the other hand, the gas company was, as must be assumed, undertaking to buy oil of the oil company at a fixed price in view of the fact that it was by the agreement securing a steady supply which would be sufficient for all its needs. To hold such a contract severable would open the way to great hardship and injustice. Either party could refuse compliance with the agreement when it desired, and still hold the other when conditions made such course advantageous. The one in default would, to be sure, be liable in damages for its breaches of the several contracts, but such liability would be far from an adequate protection to the other party. Let us suppose, for example, that for a period of two years after the making of the contract the market value of oil should be less than the contract price, and that during that time the gas company should find it to its interest to fill its requirements by purchasing of others than the defendant. In such event, the oil company would, under appellant's contention, be bound to continue to hold itself in readiness, during the entire term of the contract, to furnish oil if called for, and to seek its only relief for past breaches by actions for damages. While it could not know whether its future output would or would not be taken by the gas company, it could not safely enter into any contract to dispose of that output to others. Such construction of the contract would produce great confusion and uncertainty and would, to a great extent, deprive the parties of the substantial benefit of the respective covenants to take and to furnish all oil required.

The fact that the gas company does not agree to take any specified quantity of oil is of no consequence. It agrees to take all that may be needed in the operation of its plants. The exact quantity is subject to fluctuation with the conditions of its business, but the seller does not thereby forfeit the right to insist on furnishing all that shall be actually required. The agreement does not, in respect to the point under discussion, differ from one for the purchase and sale of a fixed quantity to be delivered and paid for in installments. While there is some conflict among the decided cases, the great weight of authority, at least in the United States, supports the proposition that such agreements are entire, and that a refusal without sufficient cause by the

seller to furnish, or by the buyer to take or pay for, any installment, justifies a repudiation of the contract by the party not in default. 2 Mechem on Sales, §§ 1144–1148. The rule has been applied alike to contracts for the sale of fixed quantities and to those calling for the delivery of amounts to be fixed by the requirements of the buyer's plant or business. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Williams Cooperage Co. v. Scofield, 115 Fed. 119, 53 C. C. A. 23; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Kokomo Strawboard Co. v. Inman, 134 N. Y. 92, 31 N. E. 248; George H. Hess Co. v. Dawson, 149 Ill. 138, 36 N. E. 557; King Phillip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Providence Coal Co. v. Coxe, 19 R. I. 380, 35 Atl. 210; Fullam v. Wright, etc., Co., 196 Mass. 474, 82 N. E. 711; Pacific Lumber Co. v. Iowa W. & P. Co., 35 Iowa, 308, 112 N. W. 771; Ross Meehan F. Co. v. Royer Wheel Co., 113 Tenn. 370, 83 S. W. 167. The same conclusion has been reached by this court in two cases. In Twomey v. People's Ice Co., 66 Cal. 233, 5 Pac. 158, the defendant agreed to furnish ice to plaintiffs for one year at the rate of $5 a ton; the vendor agreeing to sell ice to plaintiffs alone, and the plaintiffs agreeing to take ice from the defendant alone during the term of the contract. The plaintiffs having broken the contract by purchasing ice from third parties, it was held that this breach released defendant from any further performance. To the same effect, substantially, is Dunn v. Daley, 78 Cal. 640, 21 Pac. 377.

The holding that the contract is entire with respect to the covenants we have been discussing is in no wise inconsistent with the view that it is apportionable with respect to payments for oil actually delivered. 2 Parsons' Contracts (9th Ed.) 673, note. An action could be maintained for the price of any delivery as soon as it became due. This is the holding, and the extent of the holding in Veerkamp v. Hulburd, etc., Co., 58 Cal. 229, 41 Am. Rep. 265. But, as we have said, the contract may be entire with regard to the obligations to buy and sell the whole amount contracted for, notwithstanding the fact that payment for installments actually delivered may be enforced separately. Dunn v. Daley, supra; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639; 58 Am. Rep. 126; Milske v. Mantel Co., 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354.

For these reasons it must be held that the motion for nonsuit was rightly granted.

The judgment is affirmed.[72]

[72] Southern Colonization Co. v. Derfler, 73 Fla. 924, 75 South. 790, L. R. A. 1917F, 744 (1917) is an interesting case, where a partial nonperformance "went to the essence."

(d) Performance on Time as a Condition

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

(Circuit Court of Appeals of the United States, 1892. 52 Fed. 700, 3 C. C. A. 248.)

In Error to the Circuit Court of the United States for the District of Colorado. Reversed.

This was an action by the plaintiff in error to recover the contract price of certain stationery and advertising matter furnished the defendant. It was tried on the merits, and at the close of the evidence the court instructed the jury to return a verdict for the defendant, and this instruction is assigned as error. The plaintiff was a corporation of Wisconsin, engaged in lithographing and printing, and its principal place of business was at Milwaukee, in that state. The defendant was a corporation of Colorado, engaged in the business of milling, and its principal place of business was at Denver, in that state. In June, 1889, the plaintiff agreed to make new designs of certain buildings of defendant, with sketches of its trade-marks; to execute engravings thereof in a strictly first-class style; to embody these on the stationery described below; to submit to defendant for approval proofs thereof; to submit designs and proofs of hangers, on fine chromo plate, for advertising defendant's business, by the following fall; to engrave a strictly first-class vignette of one of defendant's plants; to submit a sketch and proof thereof to defendant; to furnish defendant with 10,000 business cards and 5,000 checks in August, 1889; to furnish, in the course of the year, letter heads, noteheads, bill heads, statements, bills, envelopes and cards to the defendant to the number of 331,100, and 5,000 hangers; and to furnish the vignette and 5,000 hangers more after the approval of the proofs thereof by the defendant. The defendant agreed to take and pay for this stationery, this vignette, and these hangers at certain agreed prices, which amounted in the aggregate to about $6,000. The plaintiff furnished the 10,000 cards and 5,000 checks required under the contract in August, 1889, and the defendant received and paid for them. The plaintiff introduced testimony to the effect that it strictly complied with and fully performed these contracts in every respect, except that it shipped the articles contracted for (which were not delivered in August) by rail from Milwaukee to the defendant, at Denver, in December, 1889, in five boxes, four of which did not arrive at Denver until 9:42 a. m., January 1, 1890, and the fifth did not arrive there until January 4, 1890; that before January 8, 1890, all of these articles were tendered to the defendant, and it refused to examine or receive them; that the sketches and proofs of the designs, trade marks, and hangers had been submitted to and approved by the defendant during the summer and fall of 1889, before

these articles were manufactured, and that the last proof was approved November 16, 1889; that on December 16, 1889, the defendant wrote the plaintiff to forward by express 2,000 statements and 3,000 envelopes "as per proofs submitted;" that the state of the art and process of lithographing is such that, after the general idea of a piece of work is conceived, it is customary to make first a pencil design, and, when this is found satisfactory, to prepare a colored sketch where colored work is required; that after the sketch is colored it is lithographed, that is, transferred to a stone; that each color requires a separate stone; and in these hangers there were nine colors; that it requires from two to three months to reproduce on stone a colored sketch like that used for the hangers; that the artists' work and the reproduction on stone were the most expensive parts of this work contracted for; and that the expense of the materials and printing was but a small part of the entire expense of the work.

Sanborn, Circuit Judge (after stating the facts). The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or is not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. Norrington v. Wright, 115 U. S. 183-203, 6 Sup. Ct. 12, 29 L. Ed. 366.

This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit $1,000, would not justify the owner of the land on which the house was constructed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. Ed. 384. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366; Rolling Mill v. Rhodes, 121 U. S. 255, 261, 7 Sup. Ct. 882, 30 L. Ed. 920.[73] But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. Tayloe v. Sandiford, 7 Wheat. 13, 17, 5 L. Ed. 384; Hambly v. Railroad Co. (C. C.) 21 Fed. 541, 544, 554, 557.

[73] In accord: McGowin Lumber & Export Co. v. Camp Lumber Co., 16 Ala. App. 283, 77 South. 433 (1918); Clark v. Fey, 121 N. Y. 470, 24 N. E. 703 (1890); Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885 (1885).

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale. Engraving Co. v. Moore, 75 Wis. 170, 172, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186; Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112; Hinds v. Kellogg (Com. Pl.) 13 N. Y. Supp. 922; Turner v. Mason, 65 Mich. 662, 32 N. W. 846.

[The Court then held that this contract was governed by the second rule and that performance exactly on time was not a condition precedent. The judgment of the lower court was reversed.] [74]

KING et al. v. CONNORS et al.

(Supreme Judicial Court of Massachusetts, 1915. 222 Mass. 261, 110 N. E. 289.)

CARROLL, J. In March, 1913, the plaintiffs agreed to sell and the defendants to buy the hotel property of the plaintiffs in Greenfield, Massachusetts, "on or before May first next, for the sum of thirty thousand dollars." One thousand dollars was deposited with Charles H. Keith "on account of the purchase price of said property." The remainder was to be paid as follows: "Fourteen thousand dollars in cash * * * upon the delivery of a good and sufficient warranty deed of the premises, clear of all incumbrances except taxes assessed April 1, 1913, on or before the first day of May next, and the balance of the purchase price, viz., fifteen thousand dollars, is to be paid * * * by mortgage on the premises."

The agreement was in writing, and in addition to the real estate therein described it included all the personal property in the hotel, with the exception of that in three rooms over the barroom and a few other articles specially mentioned; it further provided that if the defendants failed to comply with its conditions the one thousand dollars already deposited with Keith was to be paid to the plaintiffs, "in full as agreed upon and liquidated damages."

[74] See, also, Thurston v. Arnold, 43 Iowa, 43 (1876); Coleman v. Applegarth, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417 (1887); Hubbell v. Von-Schoening, 49 N. Y. 326 (1872); Austin v. Wacks, 30 Minn. 335, 15 N. W. 409 (1883).

Beginning work on time is not a condition precedent, where it does not appear that the completion will also be late. Kenedy Town & Improvement Co. v. First Nat. Bank (Tex. Civ. App.) 136 S. W. 558 (1911).

May 1, 1913, the plaintiffs were not ready and able to perform. On the second day of May, however, they were ready and able to fulfill the terms of the sale. On the morning of that day they notified the attorney for the defendant of their ability and desire to act and were told it was too late, that the sale should have been completed on the first day of May, and the plaintiffs having failed in this respect, the defendants were therefore excused from performance.

Thereupon this bill in equity was brought to specifically enforce the contract. The facts being found by a master, a decree was entered in the superior court dismissing the bill.

In equity, under an agreement like the one before us, time is not considered of the essence of the contract unless it expressly so appears or is to be implied from the surrounding circumstances. Mansfield v. Wiles, 221 Mass. 75, 108 N. E. 901; Lennon v. Napper, 2 Sch. & L. 681, 684. See Law Quarterly Review, July, 1915, p. 253. The written instrument contained no express stipulation making the time stated of the essence of the contract, and there is nothing in the terms of the contract, in the nature of the property to be conveyed, or in the existing circumstances, which requires an inference that the parties intended May first, 1913, to be the necessary and essential time for carrying the sale into effect.

On the second day of May the plaintiffs' tenant had not surrendered the lease of a portion of the premises occupied by him, although it was agreed that the premises were to be free of all incumbrances. The tenant, however, had promised in writing to execute a release and surrender the premises whenever required, within thirty days. This was a sufficient compliance with the contract. Mansfield v. Wiles, supra; Richmond v. Gray, 3 Allen, 31; Dresel v. Jordan, 104 Mass. 407, 415.

It follows that the decree must be reversed and a decree entered for the plaintiff, the terms of which are to be settled by a judge of the superior court.

So ordered.[75]

LORD RANELAGH v. MELTON.

(In the High Court of Chancery, 1864. 2 Drew. & S. 278.)

This was a suit for specific performance.

By articles of agreement, bearing date the 22d day of December, 1857, the defendant, William Melton, agreed to lease certain plots

[75] In accord: Jaeger v. Shea, 130 Md. 1, 99 Atl. 954 (1917). If time was made expressly of the essence, specific performance will not be decreed when an installment of the price was tendered 20 days late, although relief is granted as against the specified penalty. Steedman v. Drinkle, [1916] 1 A. C. 275. If the condition has been waived, specific performance may be decreed. Kilmer v. B. C. Orchard Lands, [1913] A. C. 319. Where time has ceased to be of the essence by waiver, it may again be made so by notice. See note under "Waiver," p. 837.

of land in Richmond Road, Round Hill Park, Brighton, to Henry Banks and Joseph Vinall, for a term of ninety-nine years from June, 1856, subject to certain ground-rents; and the articles of agreement contained the following clause:

"In case, at any time within the space of seven years from the 23d day of June, 1856, the lessees shall be desirous of purchasing the fee simple and inheritance of all or any one of the said plots of ground, and of such their desire shall give three months notice to the lessor, and shall, at the expiration of such notice pay unto him the sum of £210 in respect of each plot mentioned in such notice, and all rent payable to and including the current quarter, then the lessor shall and will convey the freehold and inheritance of the plot or plots mentioned in such notice unto and to the use of the lessees, or as they shall appoint."

The articles of agreement provided that the terms lessor and lessee, as used therein, should apply to their assigns in the event of either party disposing of his interest in the premises.

The articles of agreement also provided that the lessees, in exercising their option to purchase, should not investigate the title of the lessor to the premises.

The interest of the lessees, Banks and Vinall, subsequently became vested in the present plaintiffs.

The plaintiffs being desirous of exercising their right, under the clause in the articles of agreement, of purchasing from the defendant the fee simple and inheritance in the said plots of land, on the 20th day of March, 1863, served on the defendant notice, as provided by the articles of agreement, of their desire so to do. It was admitted that this notice was regular in all respects. After the service of this notice, some communications took place between the parties, in the course of which the defendant expressed his wish to have the draft conveyances sent to him for perusal.

The period of three months from the date of the notice expired on the 20th of June, and the seven years from the date of the articles of agreement expired on the 24th of June, but nothing further took place till the 1st of July, when the plaintiff's solicitor sent the defendant draft conveyances for his perusal.

On the receipt of these draft conveyances the defendant wrote the plaintiff's solicitor that he did not consent to excuse the default to complete on or before the 20th or 24th day of June; and finally, on this ground, the defendant refused to complete the sale to the plaintiffs of the fee in the said plots of land. It appeared that the purchase-money had never been tendered.

Under these circumstances, the plaintiffs filed their bill to enforce specific performance, by the defendant, of the agreement to sell the fee simple to them.

The cause now came on upon motion for a decree.

The VICE-CHANCELLOR (Sir R. T. KINDERSLEY). I apprehend the rule of law applicable to cases like the present is perfectly clear. No

doubt, if an owner of land and an intending purchaser enter into a contract constituting between them the relation of vendor and purchaser, and there is a stipulation in the contract that the purchase-money shall be paid and the contract completed on a certain day, this Court in ordinary cases has established the principle that time is not of the essence of the contract, and that the circumstance of the day fixed for the payment of the money and completion of the purchase being past does not entitle either party to refuse to complete. On the other hand, it is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition on the performance of which the party performing is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case: if the agreement fixes a day for the payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost.

The question then is, whether any time is fixed in this agreement for the payment of the money. The language is, that if the lessees shall at the expiration of three months after the notice (which notice was duly given) pay the money, then the lessor shall convey the freehold and inheritance; and the matter resolves itself into a question of construction,—What is the meaning of the words "at the expiration of three months?"

The plaintiffs contend that these words mean, not at the time at which the three months expire, but at any time afterwards. If that be the true construction, the consequence would be, that not only a day or a week after, but a year or any number of years after the expiration of the three months, the plaintiffs would have a right to tender the money and demand a conveyance; and this is what the law will not permit. But besides that, if the lessees should think fit not to pay the money, could the owner file a bill to compel them to do so? I apprehend, clearly not; for there is nothing in the agreement to make it obligatory on the lessees to pay the money. It is impossible to put such a construction on the words. "At the expiration of three months" must mean, not at any time after such expiration, but on the day on which the three months expire.

This case is not open to the argument which might arise in ordinary cases between vendor and purchaser, that the investigation of the title would occupy some time, inasmuch as the agreement provides that the lessees shall accept the title; so that there was nothing to be done but the conveyance. Unfortunately for the plaintiffs, they have

allowed the time limited for the payment of the money to elapse, and therefore they are not entitled to a conveyance.

Bill dismissed, with costs.

WINDERS et al. v. KENAN et al.

(Supreme Court of North Carolina, 1913. 161 N. C. 628, 77 S. E. 687.)

Action by J. B. Winders and others against J. G. Kenan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action to compel specific performance, based upon the following instrument:

"This agreement, executed this 17th day of January, 1905, by and between Jas. G. Kenan and heirs of O. R. Kenan, of the county of Duplin and state of North Carolina, of the first part, and J. B. Winders and L. F. Hall of the second part, witnesseth: That said party of the first part for and in consideration of the sum of five hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby fully acknowledged, doth agree that upon the payment of ten thousand ($10,000.00) dollars, two thousand of which is to be paid the 1st day of April, 1905, and the remainder in four annual payments with interest at 6 per cent., to give, grant, sell and convey by proper deed with full warranty, and assure to the said party of the second part, his heirs and assigns, all the trees on the following described tract of land, * * *

"In witness whereof the said party of the first part hath hereunto set their hands and seal the day and year first written above.

"James G. Kenan. [Seal.]"
[and several others.]

The probate of this instrument was not complete until April 25, 1905, and it was registered on May 1, 1905. About the 1st of April, 1905, one of the plaintiffs and James G. Kenan, who represented the other makers of the instrument, met in Kenansville for the purpose of having a deed prepared, and a deed was prepared in accordance with said writing, and at that time the said plaintiff told the said Kenan that he would be ready to make the first payment when the deed was delivered. The probate of the deed was complete about April 10, 1905, and the plaintiffs were notified thereof during the month of April, and not later than April 27th.

The plaintiff offered evidence tending to prove that between March 6 and March 10, 1905, they told the said Kenan that they would take the timber, and for him to prepare a deed, and that the money was ready, and that the said Kenan said that he would have to have a little time, as the parties did not live close together, and that a few days would not make any difference as to the execution of the deed or as to the payment of the money; that on May 30, 1905, the plaintiff tendered

to the defendant the sum of $1,500, which the defendants refused to accept, and declared the contract at an end; that in the fall of 1905 or the spring of 1906 the plaintiffs tendered to the defendants two checks, one in the sum of $2,500 and the other in the sum of $9,220, which were refused; that on February 28, 1908, the plaintiffs tendered to the defendants $2,240, which was refused; that in March, 1909, the plaintiff tendered to the defendants the sum of $2,120, which was refused; that during the last of March or the 1st of April, 1909, the plaintiffs tendered to the defendants $9,500 and four years interest thereon, which was refused.

There was no other evidence upon the part of the plaintiffs of the tender of any part of the purchase money, but they did offer evidence that they were at all times ready, able, and willing to pay the purchase price, but they contended that the $500 first recited in said instrument was a part of the purchase price, and that the balance due was $9,500, instead of $10,000. They also offered evidence tending to prove that after the deed was written on April 1, 1905, material changes were made therein, so that it did not conform to said instrument, and that they declined to accept it on that ground. At the conclusion of the whole evidence, his honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

ALLEN, J.[76] In bilateral contracts there are reciprocal promises, so that there is something to be done or forborne on both sides, while in a unilateral contract there is a promise on one side only, the consideration on the other side being executed. 9 Cyc. 244. An option belongs to the latter class. It is a contract to give another the right to buy, and not a contract to sell, and it is because of the fact that the other party is not compelled to buy that it is spoken of as an offer. In Black v. Maddox, 104 Ga. 157, 30 S. E. 723, approved in Trogden v. Williams, 144 N. C. 199, 56 S. E. 868, 10 L. R. A. (N. S.) 867, it is defined to be "the obligation by which one binds himself to sell and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time."

If not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance (Paddock v. Davenport, 107 N. C. 710, 12 S. E. 464), but, if there is a valuable consideration to support it, the right continues during the period fixed in the option. Cummins v. Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986. In this case the court said: "The distinction between an option given without a consideration and an option given for a valuable consideration is that in the first case it is simply an offer to sell, and can be withdrawn at any time before acceptance upon notice to the vendee; but in the second, where a consideration is paid for the option,

[76] **Part of the statement of facts and the court's discussion of several cases are omitted.**

it cannot be withdrawn by the vendor before the expiration of the time specified in the option."

If no conditions are imposed upon the prospective purchaser, and it is a simple proposition giving the right to buy, upon notice of acceptance, it becomes a contract of sale and is obligatory on both parties, and it is then the duty of the seller to tender his deed and of the purchaser to pay according to its terms. Hardy v. Ward, 150 N. C. 393, 64 S. E. 171. The maker has, however, the right to impose conditions which must be performed precedent to the exercise of the right to buy, and among these is the payment of the agreed price. Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403; Trogden v. Williams, 144 N. C. 201, 56 S. E. 865, 10 L. R. A. (N. S.) 867. In the Trogden Case the language in the contract was: "If they shall, within the time hereinafter specified, elect to purchase said land, then and in that event they shall pay one-half cash and the balance in twelve months, to be secured by mortgage." And the court held that "payment of one half the purchase money and securing the other half constitute the method of electing to purchase," and quoted with approval the following excerpt from Weaver v. Burr, supra: "The period of 60 days from 7th June, 1883, mentioned in the option, within which plaintiff had the privilege of buying the land, * * * expired on the 6th day of August, 1883. During the whole of that period and during the whole of the 6th of August plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of and compliance with the terms thereof. They could not do so by any other manner than by actual payment or tender of the whole price of the land before the sixty days expired. Neither could they withhold the payment, or tender of payment, until a proper deed was executed or survey could be made and the excess number of acres ascertained." Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy, and it is generally held that time is of the essence of such a contract, and that the conditions imposed must be performed in order to convert the right to buy into a contract of sale.

The acceptance must be according to the terms of the contract, and if these require the payment of the purchase money or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy or that the party will take the property does not change the relations of the parties. Bateman v. Lumber Co., 154 N. C. 251, 70 S. E. 474, 34 L. R. A. (N. S.) 615; Clark v. Lumber Co., 158 N. C. 139, 73 S. E. 793; Kelsey v. Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; Pom. Spec. Per. § 387; Weaver v. Burr, supra; Trogden v. Williams, supra; Pollock v. Brookover, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 403;

Killough v. Lee, 2 Tex. Civ. App. 260, 21 S. W. 970; Stembridge v. Stembridge, 87 Ky. 94, 7 S. W. 611; Schields v. Horbach, 30 Neb. 540, 46 N. W. 629; Hollmann v. Conlon, 143 Mo. 379, 45 S. W. 275. * * * Applying these principles to the facts, we are of opinion that the plaintiffs are not entitled to specific performance.

The paper writing does not purport to be a contract to convey, is unilateral, and is what is designated as an option. * * * In the writing before us the makers, in consideration of $500 paid, agree upon the payment of $10,000, of which $2,000 was to be paid the 1st day of April, 1905, and the remainder in four annual installments at 6 per cent. interest, to give, grant, sell, and convey by proper deed, etc., which if we adopt a liberal and not a strict construction, can mean no more than that the $500 was paid for the right to buy, and that this right could not be exercised, nor were the makers under any obligation to convey until payment or tender of the purchase money.

If this is the correct interpretation of the writing, the notice given by the plaintiffs in March, 1905, that they would take the timber, did not change the relations of the parties and convert the writing into a contract to sell, because the writing imposed the further condition of payment of the purchase money. Nor can the conversation at the time the deed was written have this effect, as no money was presented or tendered, and it amounted to no more than an expression of readiness to make the first payment of $2,000 upon delivery of the deed. It may be conceded, as contended by the plaintiffs, for the purposes of this appeal, and not otherwise, that the conversation with one of the defendants in March, the delay in the execution of the writing sued on and in the execution of the deed work a waiver of the right to demand payment on the 1st day of April, 1905, but it appears from the record that the paper writing was complete on April 25, 1905, and was registered on May 1st thereafter, and the plaintiffs were notified on April 27, 1905, that the deed was ready for delivery. After notice of the execution of the writing and of the deed, there was no excuse for further delay, and it was then incumbent on the plaintiffs to pay or tender the sum of $2,000 at least promptly. They did not do this, but on the contrary, waited until May 30, 1905, before they offered to pay any amount, and then only the sum of $1,500, which was not in compliance with the writing upon which they sue in time or amount. The defendants refused to accept, and declared the contract at an end, as they had the right to do, and it could not be revived without their consent by subsequent offers to pay. In the view of the case we have adopted, the alteration of the deed after it was written is not material, as the correspondence shows that, while the defendants wished some modification of the option, they did not refuse to execute a deed in accordance with its terms until the plaintiffs had by delay lost their right to demand it. If, under the writing, the plaintiffs had been required to do no more than give notice of acceptance, they would have had the right to delay pay-

ment until a deed was tendered conforming to the writing, but they were required to pay before they were entitled to demand a deed of any kind, and had not placed themselves in position to criticize the one offered.

We have discussed the case in the light most favorable to the plaintiffs upon the assumption that they could have demanded a deed upon the payment of $2,000, but we do not so decide, as the writing says upon the payment of $10,000, of which $2,000 was to be paid on the 1st of April, 1905, and the remainder in four annual installments, the makers agree to sell and convey.

For the reasons given, we are of opinion there was no error in entering the judgment of nonsuit.

Affirmed.[77]

(e) Contracts of Service

POUSSARD v. SPIERS & POND.

(Queen's Bench Division of High Court of Justice, 1876. 1 Q. B. Div. 410.)

Declaration on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for £83.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

[77] It seems never to have been doubted that time is of the essence in accepting an ordinary offer. The same rule is followed in regard to the exercise of an irrevocable power created by an option contract. This is because the executed consideration was given for a power with a fixed life period. That power has been enjoyed just as agreed, and strict enforcement of the time limit causes no forfeiture whatever. So where a sale was to become absolute in absence of a notice to the contrary by a fixed time, the power to terminate the conditional duty ended on the exact day. Mackey Wall Plaster Co. v. United States Gypsum Co. (D. C.) 244 Fed. 275 (1917); Berg Co. v. Thomas & Son Co., 256 Pa. 584, 100 Atl. 951 (1917); International Filter Co. v. La Grange Ice & Fuel Co., 22 Ga. App. 167, 95 S. E. 736 (1918).

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And, 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which the jury said "Yes." Lastly, he left the question of damages, which the jury assessed at £83.

On these answers he reserved leave to the plaintiff to move to enter judgment for £83.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo. See per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in Jackson v. Union Marine Insurance Co., Law Rep. 10 C. P. at page 141.

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, shew a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shewn that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favour of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.

BETTINI v. GYE.

(Queen's Bench Division of High Court of Justice, 1876. 1 Q. B. Div. 183.)

Third count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows:

"Royal Italian Opera, Covent Garden, London.
"Year 1875.

"The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows:

"1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing-rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye.

"2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

"3. The salary of Mr. Bettini shall be £150 per month, to be paid monthly.

"4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sign anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

"5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters according to the ordinary usage of theatres.

"6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, etc.

"7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

"8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

"9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

"10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August. F. Gye.

"Milan, 14 Dec. 1874."

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from January 1st, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before March 28th, 1875, but he did arrive in London on

that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his said engagement for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so, wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

The judgment of the Court (BLACKBURN, QUAIN, and ARCHIBALD, JJ.) was delivered by

BLACKBURN, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in Graves v. Legg [9 Ex. at page 716] "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the Court must look at the general nature of such an engagement. By the seventh paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals." The engagement was to begin on March 30th, 1875. It is admitted on the record that the plaintiff did not arrive in London till March 28th, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfill this part of his contract, which may prevent his being liable in damages for not doing so, but whether

his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's, part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised, and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams's Notes to Saunders, p. 554, in the notes to Pordage v. Cole, and in the second volume, p. 742, notes to Peeters v. Opie.

We think the answer to this question depends on the true construction of the contract taken as a whole.

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the seventh paragraph of the agreement there had been added words to this effect, "And if Mr. Bettini is not there at the stipulated time Mr. Gye may refuse to proceed further with the agreement;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and, applying the rule stated by Parke, B., to be acknowledged,[78] see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before

[78] In Graves v. Legg, 9 Ex. at p. 716; 23 L. J. (Ex.) 228.

the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from March 30th to July 13th, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from January 1st to December 31st, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from January 1st to March 30th; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And as far as we can see, the failure to attend at rehearsals during the six days immediately before March 30th could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must therefore, we think, seek redress by a cross-action for damages.

Judgment for the plaintiff.

FARMER v. FIRST TRUST CO.

In re MILWAUKEE MOTOR CO.

(Circuit Court of Appeals of the United States, 1917. 246 Fed. 671, 158 C. C. A. 627, L. R. A. 1918C, 1027.)

In the matter of the Milwaukee Motor Company, bankrupt; First Trust Company, trustee. Appeal by A. J. Farmer from an order disallowing his claim. Affirmed.

Appellant Farmer, a mechanical engineer, was employed as superintendent of the bankrupt's gas engine shops at Milwaukee. After serving about two months in such capacity, a contract for a year's service, beginning August 1, 1912, was entered into, under which Farmer was to superintend and manage the shops, devoting his entire time thereto, and to receive for such service a salary of $6,500 and a bonus of $3 per engine if, with the equipment of the factory, and such further equipment as had theretofore been specified by Farmer, 3,000 engines were produced within the year at prescribed factory costs, to fill contracts therefor which were extant. Provision was made for

renewal of the contract for another year if Farmer "has made good his guaranty to make the said 3,000 engines now sold within this contract year, and within the above schedule cost of manufacture."

Under date of July 26th, the bankrupt had entered into a contract with the Imperial Automobile Company of Jackson, Mich., to supply it 2,200 motors, with option for 1,000 more, during the entire year; the contracted deliveries for 1912 being August 100, September 130, October 260, November 260, and December 300.

The work of installing the new equipment was being carried on, and the manufacture of the engines proceeded, but in the months indicated only 190 engines were completed for delivery, and some, if not all of these, proved unsatisfactory. Demands for overdue deliveries were being made, as well as complaints respecting engines delivered. In response to the complaints the bankrupt's vice president on December 18th went to Jackson, taking Farmer with him. The next day Farmer started back home by way of Chicago. The vice president urged him to be back to the shops as soon as possible, and Farmer said he would reach Milwaukee the same day, as he intended stopping at Chicago but a short time to buy his wife a Christmas present. Upon reaching Chicago he did not return to Milwaukee, but remained at Chicago until the 22d, indulging himself in diversion strictly personal. Coming to Milwaukee on the 22d, he did not go to the shop because of a severe cold he had contracted. On the 24th he was dismissed from his employment. Within six months thereafter the company became bankrupt. Farmer filed his claim for $13,062.45 for damage accruing to him by reason of his alleged unlawful dismissal.[79]

ALSCHULER, Circuit Judge (after stating the facts as above). It is maintained for appellant that one serving in a supervisory capacity is not so strictly accountable to the employer for his time as is a clerk or a workman, and that Farmer's absence of two or three days without permission was not such a breach of the contract as warranted its termination. The legal proposition, as generally stated, is sustained by the authorities cited from Wisconsin, the state where this contract was made, as well as elsewhere. Moody v. Streissguth Clothing Co., 96 Wis. 202, 71 N. W. 99; Schumaker v. Heinemann et al., 99 Wis. 251, 74 N. W. 785; Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645, 140 Am. St. Rep. 1052; Green v. Somers, 163 Wis. 96, 157 N. W. 529; Beach on Modern Law of Contracts, § 584.

But the applicability of such rule must depend on the facts of particular cases. Conditions may be readily imagined where in a well-organized, smoothly running, and successful business a day's or even a month's absence of a general superintendent, who has the business well in hand, might be wholly consistent with its continued uneventful and successful operation. Upon the other hand, the business may be in condition so critical that a single hour's willful absence of such an

[79] The statement of facts is condensed.

officer at such a time might well be regarded as rank disloyalty and gross insubordination. Nearly five months of the new contract period had passed. Instead of deliveries of 1,050 engines required during that time under a single contract, to say nothing of other outstanding contracts, but 190 all told had in fact been delivered, and these more or less defective. Purchasers were clamoring for deliveries and complaining of defects in those delivered; materials were delayed; there was more or less trouble in the shop; and things generally seemed to be going awry. Added to this, the new equipment was in process of installation; old machines were being moved and changed; and the shop was undergoing radical rearrangement and reconstruction. The responsible head was Farmer. He had various foremen under him, but he was the only mechanical engineer connected with the plant, and while in authority it was upon his designing, planning, and direction that success or failure depended. This high-priced man faced obstacles, to surmount which would manifestly require his fullest capacity and undivided attention. Surely this was not a situation wherein the man at the helm might needlessly and with impunity abandon his post that he may tread "the primrose path of dalliance."

It is urged that the evidence shows no harm to the business resulting from these days of absence of its mechanical head. The sentry sleeping at his post, is not less derelict in duty if, haply, disaster does not follow; nor is the responsible employé's disloyalty or insubordination measured by the extent of the resultant harm to the employer, nor minimized if none happens to follow.

It is insisted that even if, while at Chicago, appellant did transgress the canons of propriety and right living, this of itself would not warrant his dismissal. The authorities support the proposition that if the transgression does not injure the employer, nor unfit the transgressor for the employment, termination of a contract of employment for such cause alone would not be justified. Wood, Master & Servant, § 110; Child v. Boyd, etc., Co., 175 Mass. 493, 56 N. E. 608; Brownell v. Ehrich, 43 App. Div. 369, 60 N. Y. Supp. 112. But the dismissal here is not justified on the ground of the employé's personal transgression at Chicago. The fact of the transgression affords evidence that the absence from duty was not necessitated by any such causes as might excuse it, and emphasizes the conclusion that it was willful and deliberate, and under conditions which gave to the conduct strong color of disloyalty and insubordination.

Nor is it material that at the time of the dismissal the employer did not know of his conduct at Chicago, and did not assign it as a cause of dismissal. Even if the cause assigned for dismissal was not in itself sufficient, if it appears that sufficient cause therefor did in fact exist, the dismissal was justified. Wood, Master & Servant, § 121; Labatt's Master & Servant, § 189; Carpenter Steel Co. v. Norcross, 204 Fed. 537, 123 C. C. A. 63, Ann. Cas. 1916A, 1035; Thomas v. Beaver Dam Mfg. Co., 157 Wis. 427, 147 N. W. 364, Ann. Cas.

1916A, 1020; Loos v. Walter Brewing Co., 145 Wis. 1, 129 N. W. 645, 140 Am. St. Rep. 1052; Von Heyne v. Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524. But the employer did then know the desperate condition of things at home; did know that appellant's place was there, and his presence there much needed; did know appellant had been asked at Jackson to return at once to the shop, and had stated he would do so after a short stay at Chicago for buying a present; and did know that for several days he did not put in appearance at his place of duty. Without any excuse appearing for the absence, such as illness or other unavoidable cause might afford, the employer was warranted in attributing it to a willful disregard of the master's interests, and to insubordination, which, in our judgment, upon this record justified his dismissal.

The order of the District Court is therefore affirmed.[80]

(f) Certificate of Architect or Engineer

SECOND NAT. BANK OF CINCINNATI, OHIO, v. PAN-AMERICAN BRIDGE CO.

(Circuit Court of Appeals of the United States, 1910. 183 Fed. 391, 105 C. C. A. 611.)

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action at law by the Pan-American Bridge Company against the Second National Bank of Cincinnati, Ohio. Judgment for plaintiff, and defendant brings error. Reversed.

Knappen, Circuit Judge.[81] The defendant in error (plaintiff below, and hereafter called the plaintiff) recovered verdict and judgment against plaintiff in error (hereafter called the defendant) for $2,723.49, being the balance of the contract price for certain structural steel work furnished by plaintiff, under written contract with defendant, for the construction of the latter's bank building, together with the value of certain extras furnished. The questions presented on this review lie within a comparatively narrow compass. The facts material to their understanding are these:

The contract provides that plaintiff shall furnish and erect the work "agreeably to the drawings and plans prepared by" the architects for the owner, and that the work shall be performed "under the direction, and to the satisfaction of" the architects or the authorized

[80] See, also, Crabtree v. Bay State Felt Co., 227 Mass. 68, 116 N. E. 535 (1917), superintendent refused to appear before board of directors; held a question for the jury; Casavant v. Sherman, 213 Mass. 23, 99 N. E. 475 (1912).

[81] Part of the opinion is omitted.

representative of the owner; also that payments under the contract should be made "upon a certificate of the architect or other authorized representative of the owner," 15 per cent. being retained from the amount of each certificate and to be paid within 30 days after the final completion of the work "and the acceptance of the same by the architects of the owner, or its duly authorized agent." Payments were made from time to time by the defendant as the work progressed, aggregating full payment of the contract price except the sum of $2,062.89. Plaintiff furnished extras amounting to $660.60. It is for the sum of these two items that recovery was permitted. There is no dispute over the extras. The only dispute over the merits of the other item arises upon the claim of defendant that it should be allowed $2,370.84, as the expense of making certain changes in the work claimed to have been made necessary by plaintiff's failure to comply with the specifications in one respect only, which is this: The specifications provide that "the connection of beams and columns will be standard." They also provide that the contractor shall furnish to the architect, for his approval, triplicate copies of detail drawings, and that the work shall be executed "in strict accordance with such approved drawings," there being the further provision that "the architect, in approving these drawings, approves them in a general manner as being in or out of conformance with the general requirements of his drawings and specifications and does not relieve the contractor of responsibility for the correctness of the work shown by them."

The contractor made detail drawings of the connections of beams and columns, plainly showing 8 holes for each connection; that is to say, in splice-plates, angle irons, columns, and beams. These drawings were approved in writing by the architect. Construction in accordance therewith proceeded to at least the sixth story, without objection by the owner or the architect to the manner of these connections. Objection was then made that good workmanship and standard connection required 10 rivets instead of 8 for each connection. The record indicates that this objection was first made by the public building inspector. There is testimony tending to show that the architect, after construction had progressed to at least the height before stated, insisted that new 10-rivet connections be furnished in place of the 8-rivet connections. Upon plaintiff's refusal or failure to make the changes, they were made by defendant at a cost of $2,370.84. The architect was satisfied with and accepted the material and workmanship furnished by plaintiff with the single exception of the connections in question. He refused to finally accept plaintiff's work as a performance of the contract and to give a certificate of such performance, basing his refusal upon the failure of plaintiff to make the proper connections or to allow defendant for the cost of the changes made therein. The plaintiff's work has not been accepted by defendant, or by any one on its behalf, as a complete performance

of the contract, the defendant, however, being in the occupancy and use of the building. By its plea it offered to confess judgment for $352.69, as the difference between the plaintiff's claim and the amount paid by defendant for making the new connections.

Upon the trial there was a conflict of testimony as to whether 8-rivet connections were standard or whether 10-rivets were required. The defendant, both by objection to testimony and by motion for a directed verdict at the close of the testimony, insisted that plaintiff was precluded from recovery by the architect's refusal to accept performance of the contract and to give his certificate thereof, and that plaintiff could have relief against such refusal only in a court of equity. The court instructed the jury that if plaintiff's work and material conformed to the contract recovery could be had, notwithstanding the lack of acceptance or certificate by the architect, provided the jury should find that such certificate was withheld "unreasonably and unfairly" or (as expressed at another time) "capriciously or arbitrarily." An instruction requested by defendant at the close of the general charge that "it is not sufficient to show that the architect is unreasonable and unfair," was refused. No exception was taken to the charge of the court as given, exception being, however, reserved to the refusal to give the request just referred to as well as to the refusal to direct verdict for defendant.

In our opinion the exception to the refusal of defendant's request just mentioned sufficiently raises for review the correctness of the charge in the respect mentioned. Indeed, no question of such sufficiency is raised in plaintiff's brief.

We cannot accede to the proposition that resort to equity is necessary in order to avoid the effect of failure to obtain the architect's certificate. The contention most strongly urged seems to be that the plaintiff must, as condition precedent to recovery on the contract, procure the setting aside of the contract provisions requiring such certificate, although the suggestion is also made that the architect's action needs reforming. Neither of those contentions is, in our opinion, maintainable. The plaintiff does not attack the validity of the contract provision requiring the architect's certificate as a condition precedent to recovery. Nor is there any certificate of the architect standing in the way and requiring reformation. The plaintiff's complaint in this respect is not that the contract is wrong, nor that any certificate of the architect is wrong. Its grievance is that the architect has improperly refused, as alleged, to accept the work and to certify accordingly. * * *

The right of a party to a building contract to show in an action at law thereon that the certificate required by the contract as a condition precedent to action was fraudulently withheld has been at least impliedly recognized in numerous cases, several of which are cited in another branch of this opinion, and has never, so far as we have

seen, been denied. But in our opinion the trial judge erred in holding that the architect's certificate could be dispensed with if the jury were satisfied that it was "unreasonably and unfairly" withheld. It is true that this instruction finds apparent support in several decisions of state courts cited in plaintiff's brief. But the rule is well settled in the federal courts that under contract provisions such as those existing here the certificate of acceptance is a condition precedent to recovery upon the contract in the absence of fraud or of mistake so gross as to imply bad faith; in other words, that the withholding of the certificate must have been in bad faith.

Thus, in Kihlberg v. United States, 97 U. S. 402, 24 L. Ed. 1106, it was said: "It is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government."

In Sweeney v. United States, 109 U. S. 618, 620, 3 Sup. Ct. 344, 27 L. Ed. 1053, it was held that, as there was "neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections," the certificate was a condition precedent to payment. In Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549, 551, 553, 5 Sup. Ct. 1035, 1037, 29 L. Ed. 255, a charge was requested that the engineer's final estimate was conclusive unless it appeared that he was guilty of "fraud or intentional misconduct." A modification by adding the words "or gross mistake" was held "well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer." In Chicago Santa Fé R. R. Co. v. Price, 138 U. S. 185, 195, 11 Sup. Ct. 290, 292, 34 L. Ed. 917, it was held that the engineer's certificate was conclusive in the absence of fraud or of such gross error "as to imply bad faith." In United States v. Gleason, 175 U. S. 588, 602, 607-608, 20 Sup. Ct. 228, 236, 44 L. Ed. 284, an averment that the refusal of the engineer to extend the time for the completion of the contract "was wrongful and unjust, and a breach of the contract" was held "wholly insufficient on which to base an attempt to upset the judgment of the engineer."

To the same effect are several decisions of this court. In Mundy v. Louisville & N. R. Co., 67 Fed. 633, 637, 14 C. C. A. 583, 587, Judge Taft used this language: "The authorities leave no doubt that construction contracts, in which the contractor stipulates that the engineer or architect of the owner shall finally and conclusively decide, as between him and the owner, what amount of work has been done, and its character, and the amount to be paid therefor under the con-

tract, are legal, and should be enforced. In such cases, after the work has been done, the contractor can recover nothing in excess of the amount found due by the engineer, unless he can make it appear that the engineer's decision was fraudulently made, or was founded on palpable mistake."

In Boyce v. United States Fidelity & Guaranty Co., 111 Fed. 138, 142, 49 C. C. A. 276, 280, Judge Severens used this language: "And if the appointee, without fraud or manifest mistake, makes a determination upon any of the matters falling within the scope of the authority committed to him, the parties are bound by the decision."

In Memphis Trust Co. v. Brown-Ketchum Iron Works, 166 Fed. 398, 403, 93 C. C. A. 162, 167 (where many authorities upon the proposition we are considering are cited), it was said of an agreement in a building contract to submit differences to the arbitration of the architect that: "An award made by virtue of such contract provision, in the absence of fraud or of such gross mistake as would imply bad faith or a failure to exercise honest judgment, is binding upon both parties thereto, so far as it is confined to disputes actually subsisting and open to arbitration." See, also, American Bonding & Trust Co. v. Gibson County, 127 Fed. 671, 62 C. C. A. 397; s. c. 145 Fed. 871, 873, 76 C. C. A. 155, 7 Ann. Cas. 522; Choctaw & M. R. Co. v. Newton, 140 Fed. 225, 71 C. C. A. 655.

The jury could scarcely be expected to understand that the words "unreasonably and unfairly" meant "in bad faith," for the court charged that, "if their [the plaintiffs'] work and materials did conform to the plans and specifications made by the architect, then the refusal of the architects to accept such work and materials and to issue a certificate of acceptance is not fair and reasonable, and the plaintiffs may recover in excess of $352.69."

In other words, the actual conformity of the work and materials to the plans and specifications was made the test of the bad faith which the law requires for setting aside the action of the architect. It is strongly insisted that the bad faith of the architect is clearly shown by his refusal to accept the plaintiff's work on account of defects apparent in the detail drawings approved by the architect. While the record was such as to justify submitting to the jury the question whether the architect acted in bad faith in refusing the certificate, and while it is possible that the defendant and the architect as well, in requiring the substituted connections, were influenced by a fear of criticism upon the sufficiency of the building, we cannot say, as a matter of law, that the admitted facts lead only to a conclusion of bad faith on the architect's part.

The error referred to requires a reversal of the judgment. The plaintiff should be permitted to make any amendment of its pleadings which may be necessary to meet the views we have expressed.

The conclusion we have reached makes it unnecessary to consider

the propriety of the instruction that a "capricious and arbitrary" refusal to accept avoided the effect of the failure to obtain the certificate; and perhaps the record should not be construed as sufficiently raising that question. We content ourselves with the suggestion that, if the words referred to are to be used, it should be made clear that they involve either bad faith or a refusal or failure to exercise honest judgment.

Judgment reversed, and new trial ordered.[82]

[82] A contract making the decision of an architect or engineer final and conclusive will be enforced, in the absence of fraud or bad faith on his part or on that of the party maintaining the validity of his decision. In such cases his decision is usually a condition precedent to recovery. Shriner v. Craft, 166 Ala. 146, 51 South. 884, 28 L. R. A. (N. S.) 450, 139 Am. St. Rep. 19 (1910); Hatfield Special School Dist. v. Knight, 112 Ark. 83, 164 S. W. 1137 (1914); Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242 (1908); American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44 (1913); Empson Packing Co. v. Clawson, 43 Colo. 188, 95 Pac. 546 (1908); Chatfield Co. v. O'Neill, 89 Conn. 172, 93 Atl. 133 (1915); Beattie v. McMullen, 82 Conn. 484, 74 Atl. 767 (1909); Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35; Pope v. King, 108 Md. 37, 69 Atl. 417, 16 L. R. A. (N. S.) 489, 15 Ann. Cas. 970 (1908); Marsch v. Southern New England R. Corporation, 230 Mass. 483, 120 N. E. 120 (1918); Hathaway v. Stone, 215 Mass. 212, 102 N. E. 461 (1913); Loftus v. Jorjorian, 194 Mass. 165, 80 N. E. 235 (1907); Frolich v. Klein, 160 Mich. 142, 125 N. W. 14 (1910), fraud on owner; Landstra v. Bunn, 81 N. J. Law, 680, 80 Atl. 496 (1911); Hoskins v. Powder Land & Irr. Co., 90 Or. 217, 176 Pac. 124 (1918); Payne v. Roberts, 214 Pa. 568, 64 Atl. 86 (1906); Ilse v. Ætna Indemnity Co., 55 Wash. 487, 104 Pac. 787 (1909), fraud on owner; Forrest City Box Co. v. Sims, 208 Fed. 109, 125 C. C. A. 337 (1913), fraud of party; Eyre-Shoemaker v. Buffalo R. & P. R. Co., 193 Fed. 387, 113 C. C. A. 313 (1912); Cope v. Beaumont, 181 Fed. 756, 104 C. C. A. 292 (1910), to permit recovery on a showing that the refusal is unfair and unreasonable substitutes the jury's opinion of the work for that of the agreed arbiter; Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237 (1907); Sheffield & B. Coal, I. & R. Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164 (1894); Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917 (1891).

The decision is not final when not so agreed, and particularly when it is agreed that it shall not be. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572 (1907).

A statute declared null and void any provision of a contract making the finding or award of an engineer, architect, or other person final or conclusive or a condition precedent to a right of action; this statute was held unconstitutional in Adinolfi v. Hazlett, 242 Pa. 25, 88 Atl. 869, 48 L. R. A. (N. S.) 885 (1913).

The certificate of an architect is often made a condition precedent to the power of the owner to terminate the contract and the right to payment by the contractor of the expense of completion. Lenox Const. Co. v. Colonial Const. Co., 93 Conn. 234, 105 Atl. 467 (1919); Hoyt v. Pomeroy, 87 Conn. 41, 86 Atl. 755 (1913); Henry Smith & Sons v. Jewell, 104 Md. 269, 65 Atl. 6 (1906); Heidbrink v. Schaffner, 147 Mo. App. 632, 127 S. W. 418 (1910).

The English courts are strongly in accord with the principal case above. Clarke v. Watson, 18 C. B. N. S. 278 (1865); Tullis v. Jacson, [1892] 3 Ch. 441.

MARTINSBURG & P. R. CO. v. MARCH.

(Supreme Court of the United States, 1885. 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255.)

HARLAN, J.[83] This case is within the principles announced in Kihlberg v. U. S., 97 U. S. 398, 24 L. Ed. 1106 and Sweeney v. U. S., 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053. Kihlberg sued the United States upon a contract for the transportation of military, Indian, and government stores and supplies from points on the Kansas Pacific Railway to posts and stations in certain states and territories. The contract provided for payment for transportation "in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route." One of the issues in that case was as to the authority of that officer to fix, conclusively for the parties, the distances which should govern in the settlement of the contractor's accounts for transportation. There was neither allegation nor proof of fraud or bad faith upon the part of that officer in his discharge of the duty imposed upon him by the mutual assent of the parties. This court said: "In the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government." This principle was affirmed and applied in Sweeney's Case, in which he sought to recover from the United States the price of a wall built by him around a national cemetery. The contract provided that the wall should be received, and become the property of the United States, after an officer or civil engineer, to be designated by the government to inspect the work, should certify that it was in all respects such as the contractor agreed to construct. The officer designated for that purpose refused to so certify, on the ground that neither the material nor the workmanship was such as the contract required. As the officer exercised an honest judgment in making his inspections, and as there was on his part neither fraud, nor such gross mistake as implied bad faith, it was adjudged that the contractor had no cause of action on the contract against the United States.

Those decisions control the determination of the claim arising out of the contract here in suit, whereby the defendant in error, who was plaintiff below, covenanted and agreed that he would furnish all the material required,—which should be sound, durable, and of good quality, and approved by the company's chief engineer,—and perform all the labor necessary to construct and finish, in every respect, in the most substantial and workman-like manner, the grading and masonry of a certain section of the Martinsburg & Potomac Railroad.

[83] Part of the opinion is omitted.

The contract provides that, to prevent all disputes, the engineer of the company "shall, in all cases, determine" the quantity of the several kinds of work to be paid for under the contract, and the amount of compensation that the appellee should earn at the rates therein specified; that he "shall, in all cases," decide every question which can or may arise relative to the execution of the contract, and "his estimate shall be final and conclusive;" that in order to enable the contractor to prosecute the work advantageously, the engineer "shall make an estimate from time to time, not oftener than once per month, as the work progresses, of the work done," for which the company "will pay in current money within twenty per cent. of the amount of said estimate on presentation;" that, in calculating the quantity of masonry, walling and excavation, the most rigid geometrical rules should be applied, any custom to the contrary notwithstanding; and that "whenever this contract shall be wholly completed on the part of the said contractor, and the said engineer shall have certified the same, they [the company] will pay for said work" the prices in the contract named. These stipulations were emphasized by this additional provision in the agreement: "And it is further agreed that whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due."

The plaintiff, in his declaration, which is in assumpsit, sets out the written contract in full, and counts specially upon its various provisions. The other count is the ordinary one of indebitatus assumpsit. A general demurrer by the company to the whole declaration, and to each count, was overruled. This action of the court below cannot be upheld without disregarding the express conditions of the written agreement; for it does not appear from the declaration that the engineer ever certified in writing the complete performance of the contract by the plaintiff, together with an estimate of the work done, and the amount of compensation due him according to the prices established by the parties. Until after the expiration of 30 days from the receipt of such a certificate, the company did not, by the terms of the agreement come under a liability to pay the plaintiff the balance, if any, due to him under the contract. Nor does the declaration state any facts entitling him to sue the company, on the contract, in the absence of such a certificate by the engineer, whose determination was made by the parties final or conclusive. And upon the supposition that the engineer made such a certificate as that provided by the contract, there is no allegation that entitled the plaintiff to go behind it; for there is no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the

duty imposed upon him. The first count of the declaration was, therefore, defective for the want of proper averments showing plaintiff's right to sue on the contract, and the demurrer to that count should have been sustained.

As, for this reason, the case must be remanded for a new trial, it is proper to say that if the declaration had been good on demurrer, we should have been compelled to reverse the judgment for errors in the instructions given to the jury. Several instructions were asked by the defendant embodying the general proposition that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the evidence that, in respect thereto, he was guilty of fraud or intentional misconduct. These instructions were modified by the court by adding after the words "fraud or intentional misconduct" the words "or gross mistake." This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer. We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect of every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith. * * *

Reversed.

COPLEW v. DURAND et al.

(Supreme Court of California, 1908. 153 Cal. 278, 95 Pac. 38, 16 L. R. A. [N. S.] 791.)

Action by D. Coplew against A. W. Durand and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

HENSHAW, J. Plaintiff had entered into a contract with defendants to do the painting, polishing, enameling—in short the "finishing"—of the woodwork and floors of defendants' house. By the terms of the contract progress payments were to be made, 75 per cent. of the con-

tract price to be paid on completion, and 25 per cent. 36 days after final completion. The progress payments were made as in the contract provided, and this action is brought to recover the 25 per cent. final payment, which defendants refused to make.

The contract provided that the work was to be "strictly first-class and to be done to the entire satisfaction of the owner and the architect"; as to the payments, "that in each of said cases a certificate be obtained and signed by the said architect." Defendants' refusal to pay was based upon the declaration of the architect that the work was not first-class and was not done to his satisfaction. Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. This proposition is too well established to be questioned, and, indeed, is not questioned in this case. Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Loup v. California, etc., Co., 63 Cal. 97; Cox v. McLaughlin, 63 Cal. 196; Tally v. Parsons, 131 Cal. 516, 63 Pac. 833; Kihlberg v. U. S., 97 U. S. 398, 24 L. Ed. 1106; Wangler v. Swift, 90 N. Y. 38; 9 Cyc. 618.

To make his case, in the absence of such certificate, the contractor pleaded and the court found that the work was done to the entire satisfaction of the owner and the architect, and that the refusal to issue the completion certificate was wrongful and was due to plaintiff's refusal to do certain repair work which was not required of him by the contract. The evidence, while conflicting, established to the satisfaction of the trial court the following facts: Under the terms of the contract plaintiff was to be paid $2,165. The work consisted of the finishing of the woodwork of the doors and walls and the finishing of the hardwood floors. The hardwood floors were naturally the last woodwork to be put in place and the last to be finished by the contractor. The contractor proceeded with his work upon the doors and walls, receiving partial payments. In the early part of August he had completed all this work, and nothing remained for him to do under his contract but to finish the floors, which were not as yet ready for him. The architect asked the plaintiff what would be the value of the work which he had yet to do upon the floors, and plaintiff replied, "About $200." The architect then stated that he would allow him the full 75 per cent. of the contract price, deducting the value of the separate work yet to be done upon the floors, and did so; the architect himself testifying that he knew that he had paid precisely 75 per cent. of the entire contract price, excepting $200, the cost or the value of the work upon the floors. It is in evidence on behalf of the plaintiff that at the time of the completion of all this woodwork, excepting the floors, the architect and owner both expressed themselves satisfied with it. This condition of affairs obtained from August 8, 1904, when the last payment, amounting to 75 per cent. was made, until January 22, 1905, when plaintiff finally completed the work upon the floors. The delay was through no fault of

his. Meantime decorators had been called in, and in doing their work they had injured the work done by plaintiff. This is not disputed, and a separate contract was entered into by defendants with plaintiff to repair the damage so occasioned by the decorators. This work, in turn, he did to the apparent satisfaction of the defendants. At least he was paid in full therefor. It is not satisfactorily explained why at this time he should have been employed at a special price to do this repair work, if, as defendants' architect contends, he was at that time insisting that the original work was incomplete, unsatisfactory, and poor. The floors were done by plaintiff, as the court finds, in a satisfactory and workmanlike manner. Then, when in due course plaintiff demanded his final payment, the architect refused to give him a final certificate, stating that the woodwork had been damaged by water, panels and joists were cracked and would have to be replaced, and that he looked to the plaintiff to finish these damaged panels and joists, to which plaintiff replied that he could not be expected to do the work twice, when he was paid but once for it. In fact it was necessary to replace panels to the number of about 60, and those panels in turn had to be "finished."

Appellants, however, contend that, notwithstanding these progress payments which had been made, and notwithstanding the fact that the woodwork had been completed to the satisfaction of the architect and owners, and evidence of that completion given by the payment of the 75 per cent., still the owners and architect retained a right under the contract to exercise a later judgment, and were not legally required to pass final judgment until the contractor was ready to turn over to them his work as complete. Haynes v. Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413. In this connection it is pointed out that the very finding of the court, while to the effect that the work had been performed to the satisfaction of the architect and owner, declared also that it was not performed in a good and workmanlike manner, so that, whatever payments the owners and architect might choose to make during the progress, they still had the right to refuse the certificate for the final payment if at that time the work had not been performed to their satisfaction under the terms of the contract. This undoubtedly is true. Where, from the nature of the work, there might be latent defects, not discoverable at the time of completion, but becoming patent after the lapse of time, it might be important that the architect should not exercise final judgment until after the lapse of the 36 days; or where, as the architect contends in this case, the defects were apparent, and he frequently called the contractor's attention to them, and paid the 75 per cent. under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance. Under such circumstances it would unhesitatingly be held that there was reserved to the architect the right of final approval or rejection at the expiration of the time named. This was the position of the defendants in this case, and that position was sup-

ported by the testimony of the architect. But the difficulty which confronts appellants lies in the fact that the court did not accept their version. Its direct finding that the work was done to the satisfaction of the architect impliedly, but positively, negatives the contention that he was, during all of that time, insisting that the work was imperfect and incomplete.

The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with. Katz v. Bedford, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826; Nolan v. Whitney, 88 N. Y. 649; Phillips, etc., Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341.

For these reasons, the judgment and order appealed from are affirmed.[84]

NOLAN et al. v. WHITNEY.

(Court of Appeals of New York, 1882. 88 N. Y. 648.)

In July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the city of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2,700 was to be paid thirty days after the completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming

[84] Recovery allowed where certificate is withheld with fraudulent intent. Corse v. Linke, 147 Wis. 410, 133 N. W. 598 (1911); Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709 (1906), "if the architect inspected the work and accepted it * * * and then refused to deliver the certificate, he was guilty of bad faith"; Blome v. Wahl-Henius Institute of Fermentology, 150 Ill. App. 164 (1909), arbitrary refusal "without any reason or excuse existing or being given"; Thaler Bros. v. Greisser Const. Co., 229 Pa. 512, 79 Atl. 147, 33 L. R. A. (N. S.) 345 (1911); Howard County v. Pesha, 103 Neb. 296, 172 N. W. 55 (1919); Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668 (1888).

So, also, where it is withheld merely at the owner's request and not for errors or omissions that have been passed upon by the architect. American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 133 Pac. 280, Ann. Cas. 1916C, 44 (1913); Masek v. Chmelik, 169 Ill. App. 589 (1912); Foster v. McKeown, 192 Ill. 339, 61 N. E. 514 (1901); Caldwell & Drake v. Schmulbach (C. C.) 175 Fed. 429 (1909).

So, also, where it is withheld solely for a reason that is not within the architect's jurisdiction. Maurer v. School Dist. No. 1, 186 Mich. 223, 152 N. W. 999 (1915); Shine v. Hagemeister Realty Co., 169 Wis. 343, 172 N. W. 750 (1919).

that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate, which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

The Court say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith v. Brady, 17 N. Y. 189, 72 Am. Dec. 442; Thomas v. Fleury, 26 N. Y. 26; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Johnson v. DePeyster, 50 N. Y. 666; Phillip v. Gallant, 62 N. Y. 256; Bowery Nat. Bank v. The Mayor, 63 N. Y. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

EARL, J., reads for affirmance. All concur.

Judgment affirmed.[85]

[85] In accord: Kling v. Bucher, 32 Cal. App. 679, 163 Pac. 871 (1917), court found contract fully performed; Cornell & Co. v. Steele, 109 Va. 589, 64 S. E. 1038, 132 Am. St. Rep. 931 (1909), refusal of certificate grossly erroneous, but

HEBERT v. DEWEY.

(Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 403, 77 N. E. 822.)

Two actions. The first by Valerie Hebert, administratrix, against P. H. Dewey; the second by Dewey against Hebert. Rulings were adverse to Dewey, and he excepted. In second action, exceptions overruled; in first action, exceptions sustained.

KNOWLTON, C. J. The first of these actions was brought by the plaintiff's intestate to recover upon a contract in writing for building a house for the defendant, and also for extra work done in connection with the contract. * * * [86]

The first important exception relates to the rulings and refusals to rule in regard to certificates given to the plaintiff's intestate by the architect, upon which payments were made by the defendant under the contract. The contract provided for three payments to be made at different stages in the progress of the work, and a fourth after the completion of it. Then followed this proviso: "That in each case of the said payments, a certificate shall be obtained from and signed by said F. S. Newman, architect, to the effect that the work is done in strict accordance with the drawings and specifications, and that he considers the payment properly due; said certificate, however, in no way lessening the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials," etc.

The third certificate, in its substantive parts, is as follows: "This is to certify that under the terms of the contract dated," etc., "Mr. Joseph Hebert, contractor for building your house, is entitled to the third payment, amounting to $1,200." The first and second certificates were in the same form; but the architect refused to give the fourth and final certificate, and the plaintiff's intestate never obtained it. At the trial the evidence was conflicting upon all the questions in issue, and there was much dispute as to whether the plaintiff's intestate had performed the contract, or had done improper work and used improper materials in violation of it. The judge instructed the jury, in substance, that so far as the work and materials which had previously been supplied were known to the architect at the time of giving one of these certificates, the certificate would be conclusive upon the defendant as to the quality

not fraudulent; Johnson & Grommet Bros. v. Bunn & Monteiro, 114 Va. 222, 76 S. E. 310 (1912); Richmond College v. Scott-Nuckols Co., 124 Va. 333, 98 S. E. 1 (1919); Scully v. U. S. (D. C.) 197 Fed. 327 (1912), "it is not necessary that there should be actual fraud or intentional wrong; it is enough if there has been an arbitrary, unreasonable, or unjust refusal." See Audette v. L'Union St. Joseph, ante, p. 489.

[86] Part of the opinion is omitted. No question affecting the defendant's cross-action is of present interest.

and fitness of the work and materials, and it would not afterwards be open to the architect or the owner to question it. He treated each of these certificates as a final determination, in favor of the contractor, that the contract had been properly performed up to that time, in all parts of which the architect had knowledge. It is well settled that, in the absence of fraud, or such mistake as prevents him from exercising his judgment upon the case, the parties are bound by the certificate of an architect, made under the authority of a building contract like that now before us. His position is like that of an arbitrator, to determine the particular matter submitted to him. Palmer v. Clark, 106 Mass. 373, 389; Flint v. Gibson, 106 Mass. 391; Robbins v. Clark, 129 Mass. 145. National Contracting Co. v. Com., 183 Mass. 89, 66 N. E. 639; Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347; White v. Abbott, 188 Mass. 99, 74 N. E. 305.

The only question of difficulty in this part of the case arises from the peculiar language of the contract as to the effect of the certificates. They are referred to as "in no way lessening the total and final responsibility of the contractor." etc. This language furnishes ground for an argument that the certificates given prior to the completion of the work were intended to be merely intermediate or progress certificates, for the benefit of the builder, given to enable him to obtain payments on account, during the progress of the work. Such certificates are not conclusive as to the final payment, nor upon a claim for damages, nor on a quantum meruit. 1 Hudson, Building Contracts, 288; Tharsis Sulphur & Copper Co. v. McElroy, 3 App. Cas. 1040; Ford v. Railroad Co., 54 Iowa, 723, 7 N. W. 126. While the matter is not free from doubt, we are inclined to hold that these certificates were intended to be something more than progress certificates, and that they are to be held final in their determination of all matters which were then within the knowledge of the architect. In the first place, the contract makes no distinction in this particular between the certificates to be given before the work is completed and the final certificate. Then the special provision as to the effect is that they shall not relieve the contractor from liability for inferior work, "if it be afterwards discovered to have been done ill, * * * either in execution or materials," etc. Inasmuch as the general rule would make such certificates conclusive, we are of opinion that they should be held to leave the claims open only as to deficiencies that are afterwards discovered, and that this exception of the defendant should be overruled.[87]

The defendant contended that the plaintiff could not recover under the contract, because here intestate failed to obtain from the architect a certificate that the final payment was due. The question is whether a sufficient justification was shown for this failure. The instruction to the jury on this point was as follows: "If the defendant's architect

[87] Cf. Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572 (1907).

capriciously withheld the final certificate, and capriciously allowed the contractor to believe that nothing more remained to be done to entitle him to such certificate, the contractor is thereby relieved from his obligation to secure the certificate." This was in accordance with the plaintiff's request, except that the judge left out the word "fraudulently" which was used in the request with "capriciously." The law bearing upon this part of the case has not been definitely settled in this commonwealth. There is a class of cases arising under policies of insurance and other similar contracts, in which it is held that the procurement of the certificate, called for by the contract, is a condition precedent to the plaintiff's recovery. Johnson v. Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65; Audette v. L'Union St. Joseph, 178 Mass. 113, 59 N. E. 668, and cases there cited. The reason why it is not open to the plaintiff in these cases to show that he could not obtain the certificate, is because the nature of the contract and the purpose of the requirement of a certificate are such as to make the recovery conditional upon the presentation of the paper, for the purpose of affording the insurer an assurance against fraud, and giving him additional evidence that there is a legal liability. Johnson v. Phœnix Ins. Co., ubi supra. The promise is to pay only upon the existence of conditions shown by a particular kind of proof, which the parties prescribe as the only evidence that will be deemed sufficient to establish the fact. In such contracts the plaintiff takes upon himself the obligation to furnish the required proof, and assumes the risk of whatever difficulty there may be in procuring it. Whether a contract is of this kind is a question of construction, dependent upon the meaning of the parties, as ascertained from the writing. A provision for a certificate by an architect, in a building contract, stands differently. The architect is the agent of the owner, to perform an act for the convenience of both parties, in regard to a matter with which he is directly connected as an employé. It is assumed by the contracting parties and implied in the contract that he will do his duty, and will act in good faith in determining whether a certificate should be granted.

In cases under provisions like the one before us, it is everywhere held that the contractor may recover without a certificate, if the circumstances relieve him from the obligation to obtain one. What circumstances are sufficient for this purpose is the only question. If the owner wrongfully interferes to prevent the giving of a certificate, it is universally held that this will entitle the contractor to recover without it. Beharrell v. Quimby, 162 Mass. 571, 575, 39 N. E. 407; Whitten v. New England Live Stock Co., 165 Mass. 343, 345, 43 N. E. 121; Batterbury v. Vyse, 2 H. & C. 42; Whelen v. Boyd, 114 Pa. 228, 6 Atl. 384. Many of the authorities are to the effect that any wrongful refusal of the architect to give a certificate will entitle the contractor to proceed without one. In some of the cases it is said that if the architect unreasonably refuses to give a certificate it is enough. Nolan v. Whitney, 88 N. Y. 648; Flaherty v. Miner, 123 N.

Y. 382, 390, 25 N. E. 418; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608; United States v. Robeson, 9 Pet. 319, 327, 9 L. Ed. 142. In others it appeared that he refused "dishonestly and arbitrarily," or "willfully and fraudulently," or "capriciously." Bentley v. Davidson, 74 Wis. 420, 43 N. W. 139; Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668; Bradner v. Roffsell. 57 N. J. Law, 32, 29 Atl. 317; Id., 57 N. J. Law, 412, 31 Atl. 387; Badger v. Kerber, 61 Ill. 328. In Beharrell v. Quimby, 162 Mass. 571, 575, 39 N. E. 407, 409, there is an implication that if the architect "had fraudulently or capriciously withheld a final certificate," the plaintiff might have recovered without it.

In the present case there was evidence from which the jury might have found that after a complete performance of the contract the plaintiff's intestate applied to the architect for the final certificate, and he willfully and fraudulently refused to give it. It is plain that in making the contract it was understood between the parties that the architect would act in good faith in the performance of this part of his duty. In legal effect, the contract is as if their understanding in this particular had been written into it, as one of its terms. If, under such an agreement, after the full performance of the contract, the architect willfully and fraudulently refuses to act, or dies, or becomes disqualified, and there is no provision for such a case, the question arises whether the contractor is entitled to receive the contract price, the fact of performance being shown in some other way, or whether the entire contract falls to the ground, and the parties are left to enforce their rights under a quantum meruit. It is a general rule that if an implied condition that fails is of the essence of the contract, and enters largely into the consideration, in such a way that there can be no substantial performance under the changed conditions, the whole contract will fail, and the parties may have reasonable compensation for what they have done in reliance upon it. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654. But the provision in this case for the ascertainment of their rights, in reference to the construction of the building called for by the contract is of a different kind. It is a part of the machinery provided for the ascertainment and adjustment of their rights in reference to the matters to which the contract relates. It is provided to be used only upon an implied condition that it will be available for use. If, through the death or incapacity of the architect, or his willful refusal to act, it becomes impossible to adopt this method of determining the rights of the parties, other means may be adopted, on the ground that this no longer remains as an essential term of the agreement. In all substantial particulars the contract is complete without the provision for obtaining a final certificate, and, in the case supposed, it should be treated as if the provision were stricken from the contract. In Whitten v. New England Live Stock Insur-

ance Co., 165 Mass. 343, 345, 43 N. E. 121, this was held to be the effect of an interposition by a party to prevent that from happening, upon the happening of which he was to make a payment under a contract.

A provision like the one before us in this kind of contract, where the substance of the consideration on one side is valuable property in the form of labor and materials, is materially different from the provision in the policies of insurance to which we have referred. In these contracts for insurance a small sum is paid on one side to obtain indemnity from the possible consequences of a risk which is very likely to cause damage. The compensation is to be paid only for genuine losses, resulting from the risk insured against. Satisfactory proof of their character, as coming within the policy, is of the very essence of the contract. On that depends the obligation of the insurer to pay a very large sum for which only a small consideration is given. In view of the ease with which frauds may be practiced, the parties sometimes prescribe a method of establishing the validity of the claim, which they make essential to its recognition. They say, in effect, that the policy shall apply only to claims established in this way, and they thereby make the production of the prescribed certificate of the very essence of the contract. It is only to contracts which are construed as showing such a strict agreement that this rule is applied. Whether any of these insurance contracts should be held to require the production of a certificate as a condition precedent to recovery, if the person who is to give it is incapacitated from acting, or fraudulently refuses to act, is a question which we need not consider in this case. In regard to such questions the rights of the parties depend upon what is their meaning and intention as shown by their contracts as applied to the subject with which they are dealing. We do not intend to extend the doctrine of the insurance cases beyond the statements in our decisions.

In all the cases that we have cited under building contracts, it is held that there may be a recovery upon the contract, where the contractor's failure to obtain the architect's certificate showing performance of it is caused by the fraud or intentional misconduct of the architect. In United States v. Robeson, 9 Pet. 319, 327, 9 L. Ed. 142, a case where the contract entitled the plaintiff to payment on the certificate of a colonel, commanding a party, Mr. Justice McLean said in the opinion: "Had the defendant proved that application has been made to the commanding officer for the proper certificates, and that he refused to give them, it would have been proper to receive other evidence to establish the claim." In Whelen v. Boyd, 114 Pa. 228, 232, 6 Atl. 384, 386, the court said of the defendant, in reference to the refusal of a certificate: "The law is settled that he cannot take advantage of his own or his agent's wrong." In Baltimore & Ohio R. R. v. Polly, Woods & Co., 14 Grat. (Va.) 447, 464, this language is used, in reference to the same subject: "The principal cannot take ad-

vantage of the fraud of his agent, even though he did not actually participate in the perpetration of the fraud." Other cases, indicating that, where the plaintiff is excused from obtaining such a certificate, the recovery may be on the contract itself, are Herrick v. Belknap's Estate and the Vermont Central R. R., 27 Vt. 673, 681, and Batchelor v. Kirkbride (C. C.) 26 Fed. 899. We have found no case of this kind in which it is held, on a failure to obtain an architect's certificate after performance of a contract, that the contract lost its force, and that the parties were left to their rights upon a quantum meruit.

In a case like the present, we are of opinion that if an architect after the completion of a contract willfully, and without excuse, refuses to act at all, or if he acts dishonestly and in bad faith, and the contractor is thereby prevented from obtaining a certificate, the contractor may proceed with his suit without it. Such action or refusal to act would leave the provision for obtaining an architect's certificate of no effect upon the rights of either party. The judge followed the instruction quoted with other instructions which went too far in relieving the plaintiff from obligation to obtain the certificate. He said: "If the fact was that after Mr. Hebert had finished the contract so far as he thought it required him to do work and furnished material, and when he called upon Mr. Macauley or Mr. Newman to come there and see whether the thing was right, and if it was, to give him a certificate, and if not, tell him what work was to be done, and he would do it. Mr. Macauley went there and pointed out where things were necessary to be done, and then a certificate could be given, and Guyman or Mr. Hebert caused those things to be done, and the doing of those things was said to be all that was required, and they were done, and then Mr. Newman the [architect] refused to give the certificate, or to come to the premises to look them over and see whether in these respects the added matters were sufficiently done, and they were sufficiently done, then the architect's certificate would drop out of sight and not be required." The facts here stated would be evidence from which the jury might find that the plaintiff's intestate was excused from obtaining the certificate; but it cannot be said as matter of law that they would excuse him. The architect, in the meantime, might have discovered other things which justified him in refusing the certificate.

After telling the jury that certain conduct of Dewey would not be fraudulent in reference to the certificate, he added: "It would still have to be shown by the plaintiff that the certificate ought to have been given, and if it was shown that the work was done and the contract substantially performed, then the fact that the certificate was not given was not of any account." This last proposition was not correct in law. If the architect, acting in good faith, thought that the work was not properly done and the contract was not substantially performed, and refused the certificate for that reason, the mere fact that the certificate ought to have been given, and that the work was done, and

the contract was performed, would not entitle the plaintiff to recover without the certificate. The parties were bound by the decision of the architect made in good faith. The judge also gave the following instruction: "Under the law as I have instructed you I do not know as it would make any difference what was the conduct of Mr. Dewey, whether he tried improperly to get the architect to withhold the certificate, because if the work was properly done then the certificate ought to have been given. If the work was not properly done, and was so far improperly done as to render it no performance of the contract by Hebert, then the certificate would not avail. Perhaps it is only in the event that although the contract was not performed, still there were particulars in which it could be compensated for, and certain things could be done by Mr. Dewey to remedy it, in that event, but even in that event I don't see that the certificate would make any difference." Because these instructions give too little effect to the requirement that the contractor shall procure a certificate from the architect before he is entitled to payment, there must be a new trial. We deem it unnecessary to discuss other questions raised by the bill of exceptions.

In the second action the exceptions are overruled. In the first action the entry will be:

Exceptions sustained.

(g) Substantial Performance as Fulfillment of Condition

HANDY v. BLISS.

(Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 513, 90 N. E. 864.)

Action by Herman P. Handy against Nancy E. Bliss. Verdict for plaintiff, and defendant excepted. Exceptions sustained.

Knowlton, C. J.[88] This is an action to recover a balance due a contractor for the construction of a building. One of the counts was upon an account annexed, which opened to the plaintiff the right of recovery upon a quantum meruit for labor and materials. The defendant requested, among others, the following instructions:

"(1) That if the jury believe that pages 1 and 2 of the specifications, entitled 'General Conditions,' were a part of the contract, there could be no recovery on the ground of substantial performance.

"(2) If the jury shall be of the opinion that pages 1 and 2 of the specifications, entitled 'General Conditions,' were not a part of the original contract, then that where a payment is due only on the completion of the contract as here, the plaintiff must show substantial completion; that is, if the plaintiff knowingly omitted to do certain things required by the contract, and they are of such a nature that the work is

[88] Part of the opinion is omitted.

complete in all material respects, then the contractor may recover the contract price, less what it would necessarily cost to complete the work; but the performance, so far as it goes, must be in exact compliance with the terms of the contract; that to constitute substantial performance, a general adherence to the plans and specifications is not sufficient, the builder not being entitled to willfully or carelessly depart from minute details, or to leave his work incomplete in any material respect; that the builder is not entitled to make changes that are so substantial that an allowance out of the contract price will not give the owner substantially what he contracted for, or to omit work that cannot be done by the owner except at great expense or with great risk to the building.

"(3) That this doctrine of substantial performance does not apply where omissions by the builder were intentional, or where the contract is to be performed to the satisfaction of the owner."

The law relative to the matters mentioned in these requests has been considered in different cases, and it was discussed at length in Bowen v. Kimbell, 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302. To entitle the plaintiff to recover in a case of this kind there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximation to complete performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense or with great risk to the building. There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable. Notwithstanding such an omission, there might be a substantial performance of the contract.

There is no reason why the doctrine of substantial performance should not apply where the contract is to be performed to the satisfaction of the owner, according to the usual meaning of this expression as applied to contracts of this kind, namely, to his satisfaction, so far as he is acting reasonably in considering the work in connection with the contract. This doctrine does not apply where the builder intends not to perform the contract. But an intentional omission to do certain things called for by the contract, if he believes that they are not called for, and intends in good faith to do all that he has agreed to do, does not prevent the application of the doctrine. These requests for rulings were rightly refused.

Another request, numbered 3, relates to the requirements that the work should be done "to the entire satisfaction and approval of the

owner." The question is whether this language means that the owner must act reasonably in determining whether the work is satisfactory, or whether, if he acts in good faith, he may decline to be satisfied and refuse his approval upon a whimsical and unreasonable exercise of personal taste or prejudice. Sometimes it is difficult to determine which construction should be given to a contract of this kind. Cases in which the language has been given the former meaning are: Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Noyes v. Eastern Accident Ass'n, 190 Mass. 171, 76 N. E. 665; Lockwood Mfg. Co. v. Mason Regulator Co., 183 Mass. 25, 66 N. E. 420. See C. W. Hunt & Co. v. Boston Elev. Ry. Co., 199 Mass. 227, 85 N. E. 446; Cashman v. Proctor, 200 Mass. 272, 86 N. E. 284; Webber v. Cambridge Sav. Bank, 186 Mass. 314, 71 N. E. 567. Contracts which are given the latter meaning are found in Williams Mfg. Co. v. Standard Brass Co., 173 Mass. 356, 53 N. E. 862; White v. Randall, 153 Mass. 394, 26 N. E. 1071; Whittemore v. New York, New Haven & Hartford R. R., 191 Mass. 392, 77 N. E. 717.

Where the subject-matter of the contract seems to involve questions of personal taste or prejudice, and especially when in such a case no benefit will pass under the contract unless the work is accepted, there is more reason for giving such language the latter construction. But as was said in Hawkins v. Graham, ubi supra, "when the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part unless paid for, a just hesitation must be felt and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies of the interested party. In different cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant."

The erection of a building upon real estate ordinarily confers a benefit upon the owner, and he should not be permitted to escape payment for it on account of a personal idiosyncrasy. Indeed, under the law of Massachusetts, this question is usually of little practical application to contracts for buildings upon real estate; for if the contract is not performed by reason of the failure of the owner to be satisfied with that which ought to satisfy him, there can be a recovery upon a quantum meruit; and in most cases the deduction that would be made from the contract price, for the difference between the literal performance of the contract and that which would have been a complete performance if the owner had acted reasonably and accepted the work, would be little if anything. This request for an instruction was rightly refused. * * *

Exceptions sustained.[89]

[89] In the case of a construction contract not expressly creating a condition precedent, the plaintiff can recover the contract price on a showing that he has substantially performed as he agreed. The defendant will have a counter-

MANITOWOC STEAM BOILER WORKS v. MANITOWOC GLUE CO.

(Supreme Court of Wisconsin, 1903. 120 Wis. 1, 97 N. W. 515.)

Action by the Manitowoc Steam Boiler Works against the Manitowoc Glue Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.[90]

Action to recover the contract price and enforce a lien for supplying a steam boiler to the defendant. The evidence disclosed that the defendant operated a glue factory, requiring a large amount of steam, not only for power, but also for heating and drying; that it had an old tubular boiler, which had been manufactured by the plaintiff, and with which and its use the plaintiff was entirely familiar; that in such situation the parties negotiated for a new boiler, the defendant stating to the plaintiff that the old boiler was inadequate—that it had a commercial rating of about 80 horse power, and that one was needed of about 100 horse power. The plaintiff's manager counseled one still larger, namely, to rate about 125 horse power, as compared with the old one, 80 horse power. The agreement finally reached was that the new one should be substantially of 50 per cent. more capacity than the old, but was to be of the Scotch type, instead of the tubular type. Plaintiff constructed a boiler of the Scotch type, put it in place in a building and upon brick foundation constructed by the defendant for that purpose. After it was connected up, it was found disappointing in capacity, and not up to the old boiler, but was used, in connection with the old one, to furnish the steam necessary for the factory, while efforts were made both by plaintiff and defendant to make it work more efficiently. These efforts being still unsatisfactory, the defendant complained of the boiler as not satisfying the contract, and, as the defendant's manager testifies, desired to have it taken away. The plaintiff's manager testifies that thereupon he proposed to have a test made, and, if it did not satisfy the contract, he would either take it out and put in a new one, or enlarge it so as to make it of the necessary capacity. That test was made, the plaintiff contending that it showed the boiler to satisfy the contract, the defendant contending that it did not, but meanwhile using the boiler to supply in part the steam needed to keep its factory running. * * * Thereupon the court made findings that the plaintiff had substantially performed its contract, except

claim for defects. Dyer v. Lintz, 76 N. J. Law, 204, 68 Atl. 908 (1908); Peterson v. Pusey, 237 Ill. 204, 86 N. E. 692 (1908); Edmunds v. Welling, 57 Or. 103, 110 Pac. 533 (1910); Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, 90 Atl. 624 (1914); Pressy v. McCornack, 235 Pa. 443, 84 Atl. 427 (1912); Stratmeyer v. Hoyt (Iowa) 174 N. W. 243 (1919); City of St. Charles v. Stookey, 154 Fed. 772, 85 C. C. A. 494 (1907); Omaha Water Co. v. Omaha, 156 Fed. 922, 85 C. C. A. 54 (1907); Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, 148 C. C. A. 257 (1916), seller supplied only 99⅞ per cent. of material agreed.

[90] Parts of the report are omitted.

that, instead of a boiler 50 per cent. greater than the old one, it had supplied one of about 20 per cent. less capacity; that defendant had accepted the boiler; and that the reasonable value thereof was the original contract price of $2,035, for which, less the payments, judgment was rendered, from which the defendant brings this appeal.

DODGE, J. (after stating the facts). The result of this action, whereby the defendant is required to pay the full contract price for a boiler of only about one-half the capacity or value of that for which it agreed to pay, is somewhat startling, especially in view of the consideration, understood by both parties, that its only reason for buying a new boiler at all was that the operation of the factory required more steam than the old one could supply. Before reaching such a result, a court should pause to re-examine the rules of law or processes of reasoning upon which it is based. If the law warrants it, the force or value of a contract seems to have vanished. The contractor receives the same compensation for nonperformance as for performance. The general rule of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its terms. Moritz v. Larsen, 70 Wis. 569, 36 N. W. 331; Cohn v. Plumer, 88 Wis. 622, 60 N. W. 1000; Widman v. Gay, 104 Wis. 277, 80 N. W. 450. This general rule has, with considerable hesitation, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship:

First, in favor of laborers who contract to perform personal services, and without fault of either party fail of complete performance (Diefenback v. Stark, 56 Wis. 462, 466, 14 N. W. 621, 43 Am. Rep. 719; Walsh v. Fisher, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865; Hildebrand v. Amer. F. A. Co., 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826); secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment (Malbon v. Birney, 11 Wis. 107; Fuller, etc., Co. v. Shurts, 95 Wis. 606, 70 N. W. 683; Williams v. Thrall, 101 Wis. 337, 76 N. W. 599; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327; Pritzlaff Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564; Taft v. Montague, 14 Mass. 282, 7 Am. Dec. 215; Smith v. School Dist., 20 Conn. 312; Bozarth v. Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, having full opportunity to reject without loss or injury, decides to accept and retain the thing furnished.

This third phase is hardly an exception, for such voluntary accept-

ance may well be deemed the making of a new contract to take and pay reasonably for the article which does not satisfy the original contract. Fuller, etc., Co., v. Shurts, supra; Williams v. Thrall, supra. In case of either of these exceptions, great caution is due in order that the innocent purchaser shall not suffer. If loss must fall anywhere, it should rest on him who breaks the contract. As said in Allen v. McKibbin, 5 Mich. 449, 455, and quoted approvingly in Walsh v. Fisher, supra, "the party in default can never gain by his default, and the other party can never be permitted to lose by it:" Bishop v. Price, 24 Wis. 480. The question, therefore, in such cases, is never what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed? The recovery is quantum valebat from the innocent purchaser's point of view.

Proceeding to ascertain how far these principles are applicable to the situation at bar, we are confronted by the fact that substantial performance of the express contract is wholly wanting. The finding is that the boiler furnished was about 82 per cent. of the capacity of the old one, instead of 150 per cent., and that the increase of capacity was the vital and essential part of the contract. This is in no sense substantial performance. The boiler does not serve at all the purpose which the larger one would have served, and for which it was purchased. Defendant can obtain that for which it contracted, and for which it agreed to pay $2,035, and which is necessary to the purpose which induced the contract, in only one of two ways: either it can remove this boiler from its premises at large expense, if plaintiff does not remove it, and purchase and put in place another of the required size; or it can retain it, and put in another of substantially equal capacity as auxiliary to it, and at a cost equal to or greater than the original contract price, and probably necessitating reconstruction of his boiler house. One in such predicament cannot be said to have received in substance that for which he contracted. Malbon v. Birney, supra; Fuller, etc., Co. v. Shurts, supra. Neither do we discover either finding or proof that defendant had accepted the boiler, had decided to keep it, and use it so far as it will go toward supplying the needed steam. True, the trial court argues that it would be inequitable to allow defendant to keep the boiler and pay nothing for it, but does not find that it has elected to do so. The only finding is that it is not shown by a preponderance of the evidence that defendant rejected the boiler, or demanded its removal, though he did protest that it did not satisfy the contract. The evidence is that defendant never in words ordered plaintiff to remove the boiler, but from the testimony of the same witness (plaintiff's manager) it appears that defendant, at the time of protesting the insufficiency, did convey to defendant its wish and expectation that it be removed. That witness testified that upon such protest he agreed that he would remove the boiler if on test it did not come up to contract requirement. The test was made, the capaci-

ty ascertained, but the plaintiff's contention thereafter was that the contract was other than it is now found to have been, and for that reason did not remove it. This testimony fully confirms that of defendant's manager that he desired to have the boiler removed, and negatives any inference that it remained on defendant's premises pursuant to an election on its part to keep it. * * * Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. * * *

The result is that at the close of the trial there was no evidence to support a recovery on the contract, and the court should have rendered judgment dismissing the complaint. Neither was there evidence to support a cause of action quantum meruit, to accord with which amendment by the court is authorized by section 2830, Rev. St. 1898. True, the court might conceive that acts subsequent to those disclosed by the proofs might take place, and might constitute acceptance; but could that justify an entire change of issues? The real controversy had been as to the capacity of the boiler contracted for. That issue being decided against it, different courses were open both to plaintiff and defendant. The former might decide to take it away and replace it by one up to the contract requirement, as it had promised to do; or perhaps it might enlarge this particular boiler, as suggested by the evidence; or it might take it away entirely, and stand its liability for damages for entire breach of the contract. The defendant might consent to any of these steps, or it might resist them in such a way as to effectively work an acceptance so as to be liable quantum meruit. Indeed, so far as the record discloses, these options are still open to the parties, if not foreclosed by the judgment appealed from. * * *

Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.[91]

[91] In the following cases the court gave judgment for the defendant, for the reason that the plaintiff's performance was not substantial performance: Herdal v. Sheehy, 173 Cal. 163, 159 Pac. 422 (1916), building erected partly on an adjoining street; Tice v. Moore, 82 Conn. 244, 73 Atl. 133, 17 Ann. Cas. 113 (1909), plaintiff abandoned performance; Nance v. Patterson Bldg. Co., 140 Ky. 564, 131 S. W. 484, 140 Am. St. Rep. 398 (1910); Steel Storage & Elevator Const. Co. v. Stock, 225 N. Y. 173, 121 N. E. 786 (1919), an elevator whose capacity is 3,300 bushels per hour does not substantially fulfill a contract requiring a capacity of 4,000 bushels; Asbestolith Mfg. Co. v. Kerley (Sup.) 129 N. Y. Supp. 512 (1911); Howard v. Albright, 129 App. Div. 763, 114 N. Y. Supp. 194 (1909); Richardson v. Investment Co., 66 Or. 353, 133 Pac. 773 (1913); Moha v. Hudson Boxing Club, 164 Wis. 425, 160 N. W. 266 (1916), boxer struck foul blow in second round of ten-round contest; Manthey v. Stock, 133 Wis. 107, 113 N. W. 443 (1907), paint blistered and put on over old paint.

GILLESPIE TOOL CO. v. WILSON et al.

(Supreme Court of Pennsylvania, 1888. 123 Pa. 19, 16 Atl. 36.)

Action by the Gillespie Tool Company against R. J. Wilson and George E. Tener, copartners under the style of Wilson & Tener, to recover for boring a gas-well. The contract of the plaintiff company was to put down and case a gas-well for the defendants, 2,000 feet deep,—to be 8 inches in diameter for 400 feet, to shut off fresh water, and below that, to the bottom, to be 5⅝ inches in diameter. If salt water was found below 400 feet, the 5⅝-inch casing to be drawn, and the hole reamed out to 8 inches in diameter, to shut off salt water. then 5⅝-inch hole to the bottom. The well was put down the 2,000 feet, but the diameter was not as specified in the contract. It was an 8-inch hole to the depth of 940 feet; from that to 1,820 a 5⅝-inch hole; and from that to the bottom a 4¼-inch hole. At the depth of 1,729 feet, a salt rock was struck, nearly 100 feet in thickness. To shut off this salt water and finish the well 5⅝ inches in diameter, the casing from 940 to 1,820 feet would have to be drawn, and the hole reamed out to 8 inches in diameter. Instead of doing that, the plaintiff inserted casing inside the 5⅝-inch casing, and this shut off the salt water, but in consequence thereof could make the well below only 4½ inches in diameter.

The court below granted a nonsuit, and the plaintiff took out a writ of error, making the following assignments of error: "(1) The court below erred in entering judgment of compulsory nonsuit. (2) The court below erred in refusing plaintiff's motion to take off nonsuit. (3) The court below erred in rejecting plaintiff's offer of testimony of J. M. Guffy and others, which, with the objection thereto and ruling of the court thereon, were as follows: 'By Plaintiff's Counsel: We propose to ask Mr. Guffy, and other witnesses of similar practical experience in the same line, the following question: A test well is to be drilled for oil or gas in undeveloped territory to a depth of 2,000 feet. An 8-inch hole is drilled 940 feet deep, passing through the water-veins usually found in the developed territory, and it is cased to that depth. From that point it is drilled 5⅝ inches in diameter, until it has reached a depth of 1,729 feet from the surface, when salt-water veins, such as are unusual in previously developed territory, are struck, and continue to be struck until the well has been drilled to a depth of 1,822 feet from the surface. It is then cased with 4¼-inch casing from the surface down to the depth of 1,822 feet, where the salt-water veins have all been passed. Assuming these facts, state whether or not substantially the same results would be reached in testing territory for oil or gas as if the hole had been drilled 5⅝ inches in diameter below the depth of 1,822 feet. (Objected to as incompetent and irrelevant, and, further, that the question assumes facts not shown to exist in this case.) By the Court: The offer is to prove substantially that it is

as good as if it had been bored out the required distance. The question is not whether it will answer as well, but whether it is a substantial fulfillment of the contract. Objection sustained. Exception and bill sealed.' (4) The court below erred in rejecting plaintiff's further offer of testimony of same witnesses, as follows: 'Assuming the facts above stated, [as in third assignment of error,] state whether or not it would be good operating in the drilling of a test well to drill the remaining portion of the 2,000 feet with a 4-inch bit or auger. (Objected to as before. Objection sustained, and bill sealed.)' (5) The court below erred in rejecting plaintiff's further offer of testimony of same witnesses, as follows: 'Assuming the above facts [as in third assignment of error] to be true, state whether or not, in case of obtaining gas, the same could be practically used as well from a 4¼-inch hole as from a 5⅝-inch hole. (Objected to as incompetent and irrelevant. Objection sustained.)'"

STERRETT, J. Plaintiff company neither proved nor offered to prove such facts as would have warranted the jury in finding substantial performance of the contract embodied in the written propositions submitted to and accepted by the defendants. In several particulars the work contracted for was not done according to the plain terms of the contract. Nearly one-half of the well was not reamed out, as required, to an 8-inch diameter, so as to admit 5⅝-inch casing in the clear. About 180 feet of the lower section of the well, also, was bored 4 or 4½ inches instead of 5⅝ inches in diameter. In neither of these particulars, nor in any other respect, was there any serious difficulty in the way of completing the work in strict accordance with the terms of the agreement. To have done so would have involved nothing more than additional time and increased expense. The fact was patent, as well as proved by undisputed evidence, that a 4½-inch well would not discharge as much gas as one 5⅝ inches in diameter. It is no answer to say that, for the purpose of testing the territory, a 4½-inch well was as good as a 5⅝-inch well, nor that reaming out the well to the width and depth required by the terms of the contract would have subjected defendants to additional expense without any corresponding benefit. That was their own affair. They contracted for the boring of a well of specified depth, dimensions, etc., and they had a right to insist on at least a substantial performance of the contract according to its terms. That was not done, and the court was clearly right in refusing to submit the case to the jury on evidence that would not have warranted them in finding substantial performance of the contract. The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to pre-

sent a case in which there has been no willful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury. The offers specified in the third, fourth, and fifth assignments were rightly rejected. The proposed evidence was irrelevant and incompetent. There is nothing in the second that requires a reversal of the judgment.

Judgment affirmed.[92]

JACOB & YOUNGS v. KENT.

(Court of Appeals of New York, 1921. 230 N. Y. 239, 129 N. E. 889.)

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of $77,000, and now sues to recover a balance of $3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "all wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture."

The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were indeed,

[92] In accord: Connell v. Higgins, 170 Cal. 541, 150 Pac. 769 (1915); Peterson v. Pusey, 237 Ill. 204, 86 N. E. 692 (1908); Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410 (1911); Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017 (1892); Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238 (1900); Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52 (1890); Cornish Curtis & Greene Co. v. Antrim Co-op. Dairy Ass'n, 82 Minn. 215, 84 N. W. 724 (1901).

the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture. Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; Woodward v. Fuller, 80 N. Y. 312; Glacius v. Black, 67 N. Y. 563, 566; Bowen v. Kimbell, 203 Mass. 364, 370, 89 N. E. 542, 133 Am. St. Rep. 302. The distiriction is akin to that between dependent and independent promises, or between promises and conditions. Anson on Contracts (Corbin's Ed.) § 367; 2 Williston on Contracts, § 842. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Rosenthal Paper Co. v. Nat. Folding Box & Paper Co., 226 N. Y. 313, 123 N. E. 766; Bogardus v. N. Y. Life Ins. Co., 101 N. Y. 328, 4 N. E. 522. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. 2 Williston on Contracts, §§ 841, 842; Eastern Forge Co. v. Corbin, 182 Mass. 590, 592, 66 N. E. 419; Robinson v. Mollett, L. R., 7 Eng. & Ir. App. 802, 814; Miller v. Benjamin, 142 N. Y. 613, 37 N. E. 631. Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a "skyscraper." There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiæ without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development

of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. Dakin & Co. v. Lee, 1916, 1 K. B. 566, 579. Where the line is to be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case, precise boundaries are impossible." 2 Williston on Contracts, § 841. The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. Crouch v. Gutmann, 134 N. Y. 45, 51, 31 N. E. 271, 30 Am. St. Rep. 608. There is no general license to install whatever, in the builder's judgment, may be regarded as "just as good." Easthampton L. & C. Co., Ltd., v. Worthington, 186 N. Y. 407, 412, 79 N. E. 323. The question is one of degree, to be answered, if there is doubt, by the triers of the facts (Crouch v. Gutmann; Woodward v. Fuller, supra), and, if the inferences are certain, by the judges of the law (Easthampton L. & C. Co., Ltd., v. Worthington, supra). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. Schultze v. Goodstein, 180 N. Y. 248, 251, 73 N. E. 21; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 490, 56 N. E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong. Spence v. Ham, supra.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of

fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. Spence v. Ham, supra. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable." Handy v. Bliss, 204 Mass. 513, 519, 90 N. E. 864, 134 Am. St. Rep. 673. Cf. Foeller v. Heintz, 137 Wis. 169, 178, 118 N. W. 543, 24 L. R. A. (N. S.) 321; Oberlies v. Bullinger, 132 N. Y. 598, 601, 30 N. E. 999; 2 Williston on Contracts, § 805, p. 1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.[93]

ROWE v. GERRY et al.

(Supreme Court of New York, Appellate Division, 1906. 112 App. Div. 358, 98 N. Y. Supp. 380.)

Action by Edward Rowe against Isabel H. Gerry and others. From a judgment for plaintiff, defendant Gerry appeals. Affirmed.

PER CURIAM. This case has been here twice on appeal from judgments for the plaintiff. 86 App. Div. 349, 83 N. Y. Supp. 740; 109 App. Div. 153, 95 N. Y. Supp. 857. The complaint was to recover the final balance due on a building contract; i. e., it was for performance of the contract. The first judgment was reversed for the reason that per-

[93] The dissenting opinion of McLaughlin, J., is omitted. Concurring with Cardozo, J., were Hiscock, C. J., and Hogan and Crane, JJ.; with McLaughlin, J., in his dissent were Pound and Andrews, JJ.

formance was not shown by the plaintiff, but nonperformance, and excuse therefor, whereas a recovery could be had under the complaint only for performance. The second judgment was affirmed, because substantial performance, which is performance, was shown and found by the trial court. A reargument was ordered.

The learned counsel for the appellant understands that the second judgment should have been reversed, because it was for substantial performance, which he understands from our two former opinions to be not performance, but nonperformance. We do not wish to leave any such impression as that. There is a wide difference. Substantial performance is performance, and entitles the plaintiff to recover under a complaint for performance; and especially is that so under building contracts, where some of the infinite details may be easily overlooked. Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Spence v. Ham, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238. It may well even happen that the plaintiff may not know of existing omissions when he draws his complaint for performance. When such omissions are proved by the defendant, the plaintiff may recover on his complaint for performance, if they be unsubstantial, and not willful, but the cost of supplying them has to be deducted.

The judgment is affirmed.[94]

[94] Where the issue is the duty of the defendant to pay the agreed price, the performance by the plaintiff is quite immaterial except so far as such performance is a condition precedent to the duty. If the only condition is substantial (not full) performance, it is sufficient to allege this; but it is also proper to allege full performance for this means full performance of conditions precedent. Omaha Water Co. v. Omaha, 156 Fed. 922, 926, 85 C. C. A. 54 (1907).

In Smith v. Mathews Const. Co., 179 Cal. 797, 179 Pac. 205, 207 (1919), the court said: "Appellants insist that the deviations from the strict letter of the contract (such, for example, as the failure in each room to carry the "scratch coat" clear to the floor at that part of the wall subsequently concealed by the baseboard) were intentional, willful violations of the agreement necessarily involving bad faith, and that the doctrine of substantial performance has no application. They also assert that such doctrine may only be invoked by pleading and where, as here, plaintiff alleged full performance and the court found that there were any deviations, however slight, from strict performance on the part of the lien claimant, the judgment must be against him. In support of the point last stated, appellants cite such cases as Herdal v. Sheehy, 173 Cal. 163, 159 Pac. 422 (1916), and Daley v. Russ, 86 Cal. 114, 24 Pac. 867 (1890), which hold, in effect, that where one seeks to recover for the value of work done or material furnished in the partial performance of a contract, full performance of which has been prevented by the other party to the agreement, he must plead the excuse for failure of full performance. Undoubtedly, if the omissions on the part of the plaintiff were material and substantial failures to complete his contract, the pleading was not sufficient to support a cause of action based upon the quantum meruit. But the court held that there was a substantial performance of the contract, and the real question is whether or not that ruling was justified. It is not true, as appellants contend, that any conscious deviation from the absolute terms of the agreement causes a failure of performance."

(h) CONDITION OF PERSONAL SATISFACTION

GIBSON v. CRANAGE.

(Supreme Court of Michigan, 1878. 39 Mich. 49, 33 Am. Rep. 351.)

MARSTON, J. Plaintiff in error brought assumpsit to recover the contract price for the making and execution of the portrait of the deceased daughter of defendant. It appeared from the testimony of the plaintiff that he at a certain time called upon the defendant and solicited the privilege of making an enlarged picture of his deceased daughter. He says: "I was to make an enlarged picture that he would like, a large one from a small one, and one that he would like and recognize as a good picture of his little girl, and he was to pay me."

The defendant testifies that the plaintiff was to take the small photograph and send it away to be finished, "and when returned if it was not perfectly satisfactory to me in every particular, I need not take it or pay for it. I still objected and he urged me to do so. There was no risk about it; if it was not perfectly satisfactory to me I need not take it or pay for it."

There was little if any dispute as to what the agreement was. After the picture was finished it was shown to defendant who was dissatisfied with it and refused to accept it. Plaintiff endeavored to ascertain what the objections were, but says he was unable to ascertain clearly, and he then sent the picture away to the artist to have it changed.

On the next day he received a letter from the defendant reciting the original agreement, stating that the picture shown him the previous day was not satisfactory and that he declined to take it or any other similar picture, and countermanded the order. A farther correspondence was had, but it was not very material and did not change the aspect of the case. When the picture was afterwards received by the plaintiff from the artist, he went to see the defendant and to have him examine it. This defendant declined to do, or to look at it, and did not until during the trial, when he examined and found the same objections still existing.

We do not consider it necessary to examine the charge in detail, as we are satisfied it was as favorable to plaintiff as the agreement would warrant.

The contract (if it can be considered such) was an express one. The plaintiff agreed that the picture when finished should be satisfactory to the defendant, and his own evidence showed that the contract in this important particular had not been performed. It may be that the picture was an excellent one and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide this question. Where parties thus deliberately enter into an agreement

which violates no rule of public policy, and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it.

Artists or third parties might consider a portrait an excellent one, and yet it prove very unsatisfactory to the person who had ordered it and who might be unable to point out with clearness the defects or objections. And if the person giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, and this is agreed to, he may insist upon his right as given him by the contract. McCarren v. McNulty, 7 Gray (Mass.) 141; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463.

The judgment must be affirmed with costs.[95]

KENDALL v. WEST.

(Supreme Court of Illinois, 1902. 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317.)

Action by Ezra Kendall against William H. West. From a judgment of the appellate court (98 Ill. App. 116) affirming a judgment for defendant, plaintiff appeals. Affirmed.

HAND, J. This is an action of assumpsit brought in the circuit court of Cook county by the appellant against the appellee to recover damages in the sum of $10,000 for the breach of a contract in writing whereby the appellee, a theatrical manager, engaged the appellant, a specialist in monologue, to perform for appellee at such places and theaters in the United States and Canada as appellee might require, for the theatrical season of 1898 and 1899; the season to begin on or about August 15, 1898, and continue for not less than 30 weeks. Appellant

[95] In accord: Pennington v. Howland, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774 (1898), portrait; Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446 (1876), bust; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463 (1873), suit of clothes; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157 (1893), personal services; Crawford v. Mail & Express Pub. Co., 163 N. Y. 404, 57 N. E. 616 (1900), newspaper contributor; Bowen v. Buckner (Mo. App.) 183 S. W. 704 (1916), portrait; Clausen v. Vonnoh, 55 Misc. Rep. 220, 105 N. Y. Supp. 102 (1907), portrait; Schwartz v. Cohn (Sup.) 129 N. Y. Supp. 464 (1911), suit; Haehnel v. Trostler, 54 Misc. Rep. 262, 104 N. Y. Supp. 533 (1907), woman's coat; Aymar v. Bloomingdale (Sup.) 157 N. Y. Supp. 837 (1916), dental work.

Where a contract is to be performed to the satisfaction of some third person, more or less disinterested, the cases dealing with certificates of architects and engineers are applicable. In such cases the courts are much more likely (though not quite certain) to hold that personal satisfaction is a condition. See Butler v. Tucker, 24 Wend. (N. Y.) 447 (1840); Webb & Co. v. Board Trustees of Morganton Graded School Dist., 143 N. C. 299, 55 S. E. 719 (1906), contract to buy bonds "when legally issued to the satisfaction of our attorney"; Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207 (1892), condition of perfecting title to land to the satisfaction of an attorney; Giles v. Union Land Co. (Tex. Civ. App.) 196 S. W. 312 (1917); Grafton v. Eastern Co. R. Co., 8 Exch. 699 (1853), coke to be supplied "to the satisfaction of the railway company's inspecting officer."

agreed to "render satisfactory services," and appellee agreed to pay for "satisfactory services" the sum of $250 per week. Appellant entered upon his engagement on August 15, and continued until November 5, 1898, when the contract was terminated by appellee. Appellant was paid for his services in full up to and including November 5th. The case was tried by the court and a jury. At the close of all the evidence the court peremptorily instructed the jury to find for the defendant, and a motion for a new trial having been overruled, and judgment rendered on the verdict, the appellant perfected an appeal to the appellate court for the First district, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

The question presented for decision is, did the circuit court err in taking the case from the jury? There was no conflict in the evidence, and, the facts being admitted, it was the duty of the court to direct the jury as to whether or not such facts, in law, amounted to a legal justification for the discharge of the appellant. The company managed by appellee was a minstrel company. The appellant was requested by appellee a number of times to shorten the time of his performance, and to try his part in black face, with both of which requests he positively declined to comply. Wood, in his work on Master and Servant (section 119), says: "Refusing to obey the reasonable orders of the master is a good ground for discharge from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the lawful and reasonable commands of his master." The appellee was the proprietor of the company, and had the right to direct its management; and, if appellant refused to comply with his reasonable request, the appellee had the right to discharge him. We do not think the court erred in holding, as a matter of law, that the request made of appellant to shorten the time of his performance, and to try his part in black face, under the circumstances shown by the undisputed testimony, was not unreasonable, arbitrary, or capricious, and that he was bound to comply therewith, and, upon a refusal so to do, that the appellee had the right to discharge him and terminate the contract. The contract of employment provided that appellant should render "satisfactory services," for which he was to receive the sum of $250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed "satisfactory services." The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest, and judgment of appellee. It was the appellee who was to be satisfied, and, if dissatisfied, he had the right to discharge the appellant at any time for any reason, of which he was the sole judge. Goodrich v. Van Nortwick, 43 Ill. 445; Crawford v. Publishing Co., 163 N. Y. 404, 57 N. E. 616. In the Goodrich Case the plaintiff purchased and paid for a fanning mill, with the agreement that, if it did not suit him and answer his purpose, he might return

it within 30 days. It was held that the mill must answer both requirements, and, if it did not suit the purchaser, he had the right to return it and recover back the purchase price, and that he was the sole judge of whether or not he was suited. In the Crawford Case the plaintiff made a contract to write for the defendant's newspaper for two years, provided his services should be satisfactory to the publisher; and it was held that the defendant had the right to discharge the plaintiff at any time if his services were unsatisfactory, of which fact the defendant was the sole judge.

We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed. Judgment affirmed.[96]

BRIDGEFORD & CO. v. MEAGHER.

(Court of Appeals of Kentucky, 1911. 144 Ky. 479, 139 S. W. 750.)

Action by Louis L. Meagher against Bridgeford & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

CARROLL, J. On December 21, 1908, the following contract was entered into between the appellant, Bridgeford & Co., and the appellee, Meagher: "This is to certify that the undersigned, Bridgeford & Co. will guarantee Louis L. Meagher a steady position as foreman of our molding shop, the same position he now holds, for a term of three years or as long as he performs his duties in a successful or satisfactory manner, provided Bridgeford & Co. are in existence, at a salary of not less than twenty-two and $^{50}/_{100}$ dollars ($22.50) per week, payable weekly, said Louis L. Meagher to give his entire time and attention to the services of Bridgeford & Co. This contract to take effect January 1st, 1909." At the time this contract was entered into, Bridgeford & Co. were and had been for many years engaged in the manufacture of stoves and structural iron work, and the appellee, a molder by trade, had been working for them for some nine years, and for about three years preceding the contract held the position of foreman of the molding shop. On January 1, 1909, he commenced work under the contract and continued until the 22d of November, 1909, when he was discharged.

In January, 1910, he instituted this action against appellant to recover damages for its breach of the contract in discharging him. He averred in his petition: That during the time he worked for it under the contract "he gave his entire time and attention to the services of defendant as required by said contract, and performed his duties in a successful and satisfactory manner as said employé, and that defendant has been in existence ever since the making of said contract, and still is in existence. That plaintiff has at all times been, and still is, ready,

[96] In accord: Schmand v. Jandorf, 175 Mich. 88, 140 N. W. 996, 44 L. R. A. (N. S.) 680, Ann. Cas. 1915A, 746 (1913), services as skilled candy maker for one year "to the satisfaction of" Jandorf.

willing, and able to perform his part of said contract, and did so perform it until his wrongful discharge as aforesaid, and since his said discharge has at all times been ready, willing, and able to perform his part of said contract, and has tendered and offered to do so, but defendant, in violation of its contract, has refused and still refuses to permit him to do so. Plaintiff says that by reason of said breach of contract he was thrown out of employment and lost the opportunity to earn the salary promised in said contract for the remainder of the term, to wit, from November 22, 1909, to January 1, 1912, and that he has been unable to obtain other employment, although he has diligently endeavored to do so; that by reason of said breach of contract plaintiff has been damaged in the sum of $2,460." In its answer appellant, after denying in a general way the averments of the petition, set up in one paragraph that it did not undertake in the writing sued on to give appellee a position for three years, and in another paragraph it averred that it discharged him because he failed to perform his work in a satisfactory or successful manner. Upon a trial before a jury a verdict was returned in favor of appellee for $2,000, and from the judgment entered upon this verdict it prosecutes this appeal.

The first error assigned by counsel is the failure of the lower court to sustain a demurrer to the petition. [The reason given was that the contract was void for want of mutuality; but the court held that both made conditional promises for a three-year period and that neither had the privilege of terminating performance.] * * *

Another ground for reversal relied on is alleged error of the court in giving to the jury the following instructions:

No. 1. [This instruction was to the effect that the discharge was wrongful in case the jury believed that the plaintiff had performed his work "in a good, efficient, and workmanlike manner."]

"No. 2. If you find for the plaintiff, you will award to him such sum in damages as you believe from the evidence was the amount lost by him by reason of being discharged from the service of the defendant, and that means, gentlemen, you will find for him, the plaintiff, in the event you find for him at all, the full amount of his contract wages from the time he was discharged until the period of employment terminated, by its date, to wit, January 1, 1912, which would amount to $2,460, from which you will deduct such sum as you believe from the evidence the plaintiff has earned, and such sum, if any, as you may believe from the evidence the plaintiff could by the exercise of diligent efforts to secure employment have earned, and such sum as you believe from the evidence the plaintiff will earn or by the exercise of reasonable diligence to obtain employment can earn up to the termination of the period of time covered by the contract, to wit, January 1, 1912. Your verdict for the plaintiff, if you find for the plaintiff, not to exceed the sum of $2,260. If you find for the defendant, you will say so by your verdict, and no more."

The objection urged to instruction No. 1 relates to the construction

placed by the court upon the words, "in a successful or satisfactory manner." It will be observed that the trial court instructed the jury that these words meant that appellee was "to perform his work as foreman in a good, efficient, and workmanlike manner," and, if he did so, it had no right to dismiss him; while it is the contention of counsel for appellant that under the contract it was the sole judge as to whether appellee performed his work in a successful or satisfactory manner, and it had the right to determine in good faith this question for itself, and to discharge appellee without reference to whether the service rendered by him was efficient and workmanlike or not. There is a line of cases holding that, where the master reserves the right to discharge the servant if his services are not "satisfactory," he may do so without any other cause or reason than the mere fact that he is not satisfied with him or his service. Other cases hold that under such a contract the master in discharging the servant before the term ends must in good faith be dissatisfied, and that, if he is in good faith dissatisfied with the services of the employé, he may discharge him before the contract term has expired, although, in fact, no valid ground for the discharge exists. In the note to Corgan v. George F. Lee Coal Company, 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, reported in 11 Ann. Cas. 841, the authorities upon this question are collected, and a number of cases cited holding in the language of the editor of the note that: "Under a contract of employment for a definite term, provided the duties of the employment are satisfactorily performed, the services must be performed by the employé to the satisfaction of the employer, and the employer has the absolute right whenever he becomes in good faith dissatisfied with the services of the employé to discharge him."

But in nearly all of the cases where the right of the employer to discharge the employé if his services are not satisfactory is recognized the contracts of employment expressly and unconditionally conferred upon the employer this power, and there was no language in the contracts limiting this arbitrary authority or manifesting a purpose to protect the employé during the term, if he was capable and trustworthy, and performed his duties in an efficient and workmanlike manner.[97] And, if this contract read that appellant reserved the right to discharge appellee whenever his services were not satisfactory to it, or when he did not give satisfaction, there could be found ample authority to support the proposition that appellant might have discharged appellee before the expiration of the term if it was not in good faith satisfied with the manner in which he performed his duties, although he may have discharged them in an efficient or workmanlike manner. Wood on Master & Servant (2d Ed.) § 109; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157. But this rule, although well established and supported by the great weight of authority, ought not to

[97] Observe the use of the terms "right," "power," and "authority."

be extended to embrace contracts that do not fall strictly within its scope.

And, as this contract may by its terms be taken out of the class to which other contracts giving to the employer the right to discharge without cause belong, we are not disposed to hold it applicable. When it was entered into, appellee was holding the same position guaranteed to him by the contract. He had informed the appellant that, as it was about to convert its establishment into a nonunion plant, he could not remain in its employment unless some satisfactory arrangement was made by which he would be insured permanent employment. Following this declaration of appellee, and as an inducement for him to remain in its employment, it prepared the contract in question. It will be observed that this contract stipulates that it is to continue in force "for the term of three years or as long as he performs his duties in a successful or satisfactory manner, provided Bridgeford & Co. are in existence," showing that it was intended by appellant to retain appellee in its service for as long as three years if he performed his duties in a successful or satisfactory manner, and it remained in business. Unless this was the intention of the parties, there was no reason for inserting in the contract that it should terminate before the expiration of three years if Bridgeford & Co. went out of existence. If it had the right to discharge appellee at any time his services were not satisfactory, it had the right to do so whether it went out of existence or not; and it is manifest that the words, "provided Bridgeford & Co. are in existence," were inserted in the contract to protect it from loss in the event it went out of existence before the expiration of three years, and while appellee was performing his services in a successful, or efficient and workmanlike manner.

The situation of the parties at the time it was entered into may also be looked to in arriving at their intention as expressed in the contract, and, when the conditions surrounding them are considered, it is manifest that it was not contemplated by either that one might arbitrarily and without good cause terminate the contract. Appellee wanted his position secured for a definite term, and appellant desired his services for a certain period, and with these mutual purposes in view the contract was entered into. To allow appellant to terminate at its pleasure a contract made under these circumstances would do violence to the intention of the parties when it was executed, and to the language employed to express their engagement. Having this view as to the proper construction of the contract, we think the trial court correctly instructed the jury.

The objection urged to instruction No. 2 is that it permitted the jury to award appellee damages which might accrue after the time of the trial which took place in November, 1910, more than 13 months before January 1, 1912, at which date the three years expired.[98]

[98] The part of the opinion subsequent hereto should be studied again later in connection with Schell v. Plumb and following cases, post, p. 784.

It is the settled law in this state, and has been so ruled by virtually all the courts, that in actions like this there can be only one recovery, and that one must include all past as well as future damage that has been or may be sustained by reason of the breach of contract on the part of the employer. The action to recover this damage may be brought as soon as the contract is broken, or at any time before the expiration of the term for which the employment was made, or the employé may, if he so elects, wait until the end of the term; but, whenever he brings the suit, he must in that suit recover all of his damage past and future growing out of the breach of the contract.

It is also the general rule that the measure of damage is the difference between the contract price and any sum earned by, or that by the exercise of reasonable diligence could have been earned by, the employé after his discharge. To illustrate: If under the contract the employé was to receive $100 a month, and immediately after his discharge he obtained employment that paid him $50 a month, the measure of his damage, assuming that he had a right to recover, would be $50 a month, and this would be all that he could recover, although he was not actually employed at $50 a month, provided it appeared that he could by the exercise of reasonable diligence have procured employment that would have paid him this sum. So that, if the trial should take place after the expiration of the contract, there would not be much difficulty in determining by the application of this rule the amount of damage to which the injured employé was entitled; but, if the trial is had before the contract expires, it is apparent that the sum he would earn or that he might earn by the exercise of reasonable diligence between the date of the trial and the expiration of the contract is necessarily involved in great uncertainty, and this has induced some courts to reject the right to recover any damages after the date of the trial if it takes place before the expiration of the contract. McMullan v. Dickinson, 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.

But the great weight of authority supports the rule prevailing in this state, that the action may be brought before the expiration of the term; and, if it is, damages may be recovered in this action for loss that will be sustained for the whole of the term, although the trial may be had before the term expires. In Pierce v. Tenn., etc., Coal Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, the Supreme Court of the United States, in considering this question said: "The defendant committed an absolute breach of the contract at a time when the plaintiff was entitled to require performance. The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service, or to resort to successive actions for damages from time to time, or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this ac-

tion once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future as well as in the past if the contract had been kept. In so doing he would simply recover the value of the contract to him at the time of a breach, including all the damages past or future resulting from the total breach of the contract. The difficulty and uncertainty of estimating damages that the plaintiff may suffer in the future is no greater in this action of contract than they would have been if he had sued the defendant in an action of tort to recover damages for personal injuries sustained in its service, instead of settling and releasing those damages by the contract now sued on." The same rule was announced in John C. Lewis Co. v. Scott, 95 Ky. 484, 26 S. W. 192, 16 Ky. Law Rep. 49, 44 Am. St. Rep. 251; Forked Deer Pants Co. v. Shipley, 80 S. W. 476, 25 Ky. Law Rep. 2299; Keedy v. Long, 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759; Hamilton v. Love, 152 Ind. 641, 53 N. E. 181, 54 N. E. 437, 71 Am. St. Rep. 384; Smith v. Cashie, etc., Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Howay v. Going, etc., Co., 24 Wash. 88, 64 Pac. 135, 6 L. R. A. (N. S.) 49, 85 Am. St. Rep. 942.

It is further argued that the averments of the petition are not sufficient to authorize any recovery after the time of the trial. In support of this, attention is called to Lewis & Co. v. Scott, supra, in which the court said: "If it was to be a part of her damages that she remained out of employment after seeking it, it was incumbent on her to allege the fact, and, if because she brought her suit before the expiration of the contemplated term of service she could not fix the damage or loss with certainty, this was a burden she voluntarily assumed by bringing the suit when she did. She must lay the basis as best she may upon which the jury may assess her damages. It would be an approximation, but is permissible, and is the most that could be required of her, and the best she could do unless she waited until the year was out." As the plaintiff under the rule prevailing in this state in actions like this is required to aver and prove that he was unable to obtain other employment, if such be the case, it is manifest that it would be practically impossible for the plaintiff to truthfully aver or state that he could not obtain employment after the trial, as he could not with any degree of certainty declare in advance whether he could obtain employment or not, or what compensation he would derive from employment if he succeeded in obtaining it, and therefore it is argued that no damages should be allowed after the trial.

Viewing the matter from a logical standpoint, there is much force in this contention; but, as practically all the authorities agree that only one action can be brought and this may be brought and tried before the end of the term, it follows that, if this practice is to be adhered to, the damages subsequent to the trial must be estimated as best they can, for, when the law points out the method by which an injured person may obtain redress, it should not impose conditions

that would deny him the right to secure the redress to which it has said he was entitled; and so all that the plaintiff in cases like this should be required to do is to state in his petition, as did the appellee, that he had been unable to obtain other employment, although he had diligently endeavored to do so, and to show by evidence what he earned and what efforts he made to get employment up to the trial, leaving it to the jury to determine from the evidence what employment the plaintiff may obtain and how much he can earn between the time of the trial and the termination of the contract. Of course, in arriving at what should be allowed for damages after the trial, the jury can only be guided by the evidence of conditions that existed before and at the time of the trial and from these determine the amount to be awarded. It would not be fair to the plaintiff to assume in the absence of evidence to that effect that he will not be damaged subsequent to the trial or to assume that he can and will obtain employment through which he can earn more than the contract price, and if there is uncertainty or doubt about this part of the recovery, the person who incurred the responsibility by committing the breach of the contract should bear the burden of any injustice that may result, And so we are of the opinion that the petition was sufficient, and that the instruction conformed to the law as it is administered in this class of cases.

Another ground for reversal is that the evidence does not support the verdict, and that the recovery is excessive. We have carefully read the record, and our conclusion without going into details is that appellee at all times performed his duties in a good, efficient, and workmanlike manner, and that his discharge was not justified by any failure upon his part to discharge in such a manner his part of the contract. Probably the assessment was slightly more than it should have been, but we are not prepared to say that it was so excessive as to justify us in interfering with the finding of the jury. We have noticed all the material grounds for reversal pointed out by counsel, and upon the whole case find no reversible error.

Wherefore the judgment is affirmed.

GERISCH v. HEROLD.

(Court of Errors and Appeals of New Jersey, 1912. 82 N. J. Law, 605, 83 Atl. 892, Ann. Cas. 1913D, 627.)

Action by John C. Gerisch against Rudolph Herold. Judgment for plaintiff (81 N. J. Law, 171, 79 Atl. 1028), and defendant brings error. Reversed, and venire de novo awarded.

The plaintiff agreed to erect and finish a house in a good workmanlike and substantial manner under the direction of Joseph Turck, architect, to be testified by a writing or certificate under the hand of Turck, and also to find and provide good, proper, and sufficient materials for

completing and finishing all the work. The defendant agreed to pay for the same in four payments, the last of which, $3,000, was to be made when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative. The contract also provided in the ordinary form that, should any dispute arise respecting the true construction or meaning of the drawings or specifications, it should be decided by Joseph Turck, and his decision should be final and conclusive. This suit is for the last payment. One plea averred that the plaintiff did not complete all the work to the satisfaction of the owner or his representative. The replication to the plea averred that the owner fraudulently withheld his satisfaction, and on this issue was joined. This issue was not submitted to the jury, and the defendant did not request its submission. He relied upon a motion to nonsuit for failure of the plaintiff to prove that the work was done to the satisfaction of the owner or his representative. The architect had certified that the plaintiff was entitled to the payment of $3,000 by the terms of the contract.

SWAYZE, J. (after stating the facts as above). Contracts requiring the work to be satisfactory to the employer are valid. Gwynne v. Hitchner, 66 N. J. Law, 97, 48 Atl. 571. This decision has been approved in this court in a suit involving the same contract. Gwynne v. Hitchner, 66 N. J. Law, 97, 48 Atl. 571. A distinction is sometimes made between cases where the fancy, taste, sensibility, or judgment of the promisor are involved, and cases where only operative fitness or mechanical utility is involved. 9 Cyc. 618, ff. Gwynne v. Hitchner was a case of the former class, and, although the case of a building contract is somewhat different, we see no reason to doubt that the mere taste or fancy of the owner may be an important element in a dwelling house at least. The Supreme Court has applied the rule to that situation, and we do not question the soundness of its decision. Welch v. Hubschmitt Co., 61 N. J. Law, 57, 38 Atl. 824. In the present case the parties made a clear distinction between the workmanship and the materials. The character of the former was to be testified to by Turck's certificate. The only provision as to the latter is that they should be good, proper, and sufficient for completing the work. The workmanship might well be left to the judgment of another while the owner to gratify his own taste might well desire to retain control of the latter himself.

No doubt it is true, as Justice Holmes said in Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff either wholly or in great part unless paid for, a just hesitation must be felt, and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies of the interested party." The court in that case seized upon the words, "or the work demonstrated," as offering an alternative to the owner's acknowledg-

ment. In a later case the same court drew a distinction between cases in which the decision of a particular person is referred to, and a case where machinery was guaranteed to work in a satisfactory manner, and held that the latter case involved a "result to be passed upon in a reasonable way in accordance with a standard stated in words." Lockwood Mfg. Co. v. Mason Regulator Co., 183 Mass. 25, 66 N. E. 420. The present case is one where the decision of a particular person (the owner or his representative) is referred to, a class of cases in which the Massachusetts courts recognize that the dissatisfaction of the promisor need not be a reasonable dissatisfaction to bar recovery by the promisee. The decision of the New York Court of Appeals seems to be to the contrary. Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398. The case is entitled to less weight for the reason that the learned judge failed to distinguish between a case where the owner withheld satisfaction unreasonably and one where he withheld it in bad faith. All the cases recognize that the owner must act in good faith. The reasoning of Chief Justice Beasley in Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316, 2 L. R. A. 544, 14 Am. St. Rep. 668, applies with greater force to such a case as the present, where it is the owner himself who is to be satisfied. Of course, he cannot avail himself of his own fraud to escape liability on his contract.

The motion to nonsuit would have been properly denied if there was evidence of bad faith on the part of the owner. We are not called upon to decide whether the jury in a proper case might be permitted to infer fraud from the fact that the owner was not satisfied with the architect's certificate. The case was not tried on that theory. If it had been, the defendants should have been allowed to ask the question of the plaintiff that was excluded—whether Turck did not tell him at the time he received the certificate that he (Turck) had been discharged as architect. Not only was the case not tried on the theory that the owner acted in bad faith, but no inference of bad faith could be drawn from his refusal to be satisfied by the architect's certificate, since by the terms of the contract that certificate covered only the execution of the contract in a good workmanlike and substantial manner, and the plaintiff specifically contracted to furnish good, proper, and sufficient materials to complete the work, with no provision authorizing or requiring the architect to certify whether he had in fact done so or not. The distinction is pointed out by Justice Fort in Newark v. New Jersey Asphalt Co., 68 N. J. Law, 458, 463, 53 Atl. 294. The contract, it is true, made the architect's decision final as to some things, but it was only as to the true construction or meaning of the drawings or specifications. The learned trial judge fell into error in thinking that the architect's certificate covered, not only these points, but also the question whether the payment was due. His charge as to the finality of the architect's certificate would have been correct if he had limited

it to the points to which the parties limited it by their contract. They contracted that the final payment should be due when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative provided that in case of each payment a certificate should be obtained and signed by Turck. Thus they made for the final payment a double condition (1) a certificate by the architect; (2) satisfaction of the owner or his representative.

The case differs from Welch v. Hubschmitt Co. because in that case satisfaction of the owner and architect was required; here only that of the owner or his representative. The question remains whether Turck was the representative of the owner. Our reason for thinking he was not is threefold. (1) It was unnecessary to require his certificate for the final payment if the payment was to be made upon his being satisfied. By requiring satisfaction of the owner or his representative in one clause and a certificate from Turck in a proviso immediately following, the parties seem to have had two different persons in view. (2) Turck had already been designated as the architect, and the word "architect" would have been more natural in this clause than the word "representative" if he had been meant. (3) He was made by the contract the judge between the parties as to the most important portions of the contract, which were likely to lead to controversy between builder and owner. To have made him the representative of the owner would have deprived him of the judicial position in which the parties meant him to stand, and thereby have deprived his certificate of that conclusive character against the builder which was given to it by the express terms of the contract.

We think for these reasons that there was error, and that the judgment must be reversed that a venire de novo may be awarded.[99]

[99] In accord: Adams Radiator & Boiler Works v. Schnader, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep. 893 (1893), steam heating apparatus—"We guarantee this apparatus to give entire satisfaction in its operation, and, should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense"; Hawken v. Daley, 85 Conn. 16, 81 Atl. 1053 (1911), building contract; Barnett v. Beggs, 208 Fed. 255, 125 C. C. A. 455 (1913), house plans to be drawn by architect; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207 (1885), elevator to be installed warranted to be satisfactory; Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410 (1911), building contract; Jones v. Lanier, 198 Ala. 363, 73 South. 535 (1916), coal to be supplied.

This is the general rule where merchandise is bought with the privilege of return: Campbell Printing Press Co. v. Thorp (C. C.) 36 Fed. 414, 1 L. R. A. 645 (1888), printing press; Wood, Reap. & M. M. Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57 (1883), harvesting machine; Goodrich v. Van Nortwick, 43 Ill. 445 (1867), fanning mill; Aiken v. Hyde, 99 Mass. 183 (1868), gas generator; Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257 (1886), exhaust fans.

The same is true of all "option" contracts, a power being intentionally created that is to be exercised according to the will and desire of the holder. Thus vendors often promise to repurchase if the buyer becomes dissatisfied. Parker v. Beach, 176 Cal. 172, 167 Pac. 871 (1917); Hills v. Hopp, 287 Ill. 375, 122 N. E. 510 (1919). And see Anvil Min. Co. v. Humble, 153 U. S. 540,

WILLIAMS MFG. CO. v. STANDARD BRASS CO.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 356, 53 N. E. 862.)

Action by the Williams Manufacturing Company against the Standard Brass Company. There was a judgment in favor of plaintiff, and defendant brings exceptions. Sustained.

HOLMES, J. This is an action upon a contract under which the plaintiff constructed an equipment for melting brass for the defendant. The contract was in writing. By one clause of it the plaintiff agrees "to place the above-named outfit in operation for sixty days' trial for the approval of the second party, and if the results obtained after the trial are in accordance with the specifications above, and satisfactory to the second party, the second party further agrees to pay for the above-named equipment the sum of $550." Upon the findings of the jury, it must be taken that the work was done in accordance with the specifications of the contract, and in such a way as to be satisfactory to a reasonable man. The defendant, however, was not satisfied, and stopped the experiment before the 60 days had elapsed.

The questions raised by the exceptions are whether the defendant's liability was conditioned upon actual satisfaction, even if the dissatisfaction was unreasonable, so long as it really was felt, and, perhaps, whether the defendant was bound to let the experiments continue for 60 days. We are of opinion that the defendant did not lose its right to insist upon its fundamental defense by the course of the trial. We are of opinion, also, with some slight hesitation on my part, that the defendant's liability was conditioned as above suggested, and that bona fide, even if unreasonable, dissatisfaction of the defendant is an answer to the plaintiff's claim. The plaintiff undertakes to put in the work "for the approval of the" defendant, and the defendant undertakes to pay only if the results are in accordance with the specifications "and satisfactory" to it. The exceptions state the substance of the evidence, but it does not appear to be material, except so far as it shows that putting in the proposed equipment involved a considerable change in the defendant's business, and that it seems to have been regarded as more or less of an experiment, which facts confirm and give a reason for the interpretation which we adopt. Furthermore, the contract does not provide a test alternative to satisfaction, as was the case in Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422, where the money was to be paid after acknowledgment of satisfaction by the defendant "or the work demonstrated." It almost follows from our interpretation that, as soon as the defendant was convinced that the

14 Sup. Ct. 876, 38 L. Ed. 814 (1894), option to terminate an agreed system of mining at will.

See, also, Goldberg v. Feldman, 108 Md. 330, 70 Atl. 245 (1908), promise to buy land if the deed contained a satisfactory covenant against the sale of liquors.

work was unsatisfactory, it had a right to stop it. The provision for 60 days' trial was an undertaking of the plaintiff for the defendant's advantage, to insure it whatever knowledge it wanted in order to decide.

We have assumed without discussion that the defendant was bound to good faith in deciding and in expressing its decision, and that such an arrangement limited its absolute freedom to do as it chose sufficiently to be entitled to the name of a contract.

Exceptions sustained.

DUPLEX SAFETY BOILER CO. v. GARDEN.

(Court of Appeals of New York, 1886. 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709.)

DANFORTH, J. The plaintiff sued to recover $700, the agreed price, as it alleged, for materials furnished and work done for the defendants, at their request, upon certain boilers belonging to them. The defense set up was that the work was done under a written contract for the alteration of the boilers, and to be paid for only when the defendants "were satisfied that the boilers, as changed, were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff:

"You may alter our boilers, changing all the old sections for your new pattern, changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you seven hundred dollars as soon as we are satisfied that the boilers, as changed, are a success, and will not leak under a pressure of 100 pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury has found, completed the required work in all particulars by the tenth of May 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellant is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers, as repaired, were a success, and that this question was for the defendants alone to determine;" thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must, of course, accord with the terms of the contract; but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that

for services rendered remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In Folliard v. Wallace, 2 Johns, 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded." This decision was followed in City of Brooklyn v. Brooklyn City R. R., 47 N. Y. 475, 7 Am. Rep. 469, and Miesell v. Insurance Co., 76 N. Y. 115.

In the case before us, the work required to be done was specified, and was completed. The defendant made it available, and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for, according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agree—whether it shall be accepted. Such instances are cited by the appellant. One who makes a suit of clothes, (Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463,) or undertakes to fill a particular place as agent, (Tyler v. Ames, 6 Lans. 280,) mould a bust, (Zaleski v. Clark, 44 Conn. 218, 26 Am. Rep. 446,) or paint a portrait, (Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351; Hoffman v. Gallaher, 6 Daly, 42,) may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.

The judgment appealed from should be affirmed.[1]

[1] This is the rule very generally applied in the case of contracts for work and materials where personal satisfaction is not made a condition in express words and sometimes in the very teeth of an express provision creating such a condition. Cashman v. Proctor, 200 Mass. 272, 86 N. E. 284 (1908); Handy v. Bliss, 204 Mass. 513, 90 N. E. 864, 134 Am. St. Rep. 673 (1910); Sloan v. Hayden, 110 Mass. 141 (1872); Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422 (1889); Doll v. Noble, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398 (1889); Hummel v. Stern, 21 App. Div. 544, 48 N. Y. Supp. 528 (1900), affirmed 164 N. Y. 603, 58 N. E. 1088 (1900); Folliard v. Wallace, 2 Johns. (N. Y.) 395 (1807), condition of satisfaction with title to land; Lockwood Mfg. Co. v. Mason Regulator Co., 183 Mass. 25, 66 N. E. 420 (1903); Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248 (1897); Erikson v. Ward, 266 Ill. 259, 107 N. E. 593, Ann. Cas. 1916B, 497 (1915); Waite v. C. E.

FECHTELER et al. v. WHITTEMORE et al.

(Supreme Judicial Court of Massachusetts, 1910. 205 Mass. 6, 91 N. E. 155.)

Action by Frank Fechteler and others against John Q. A. Whittemore and others. Judgment for plaintiffs, and defendants excepted. Exceptions overruled.

Contract on an account annexed to recover $800 for transfer signs made and shipped to defendants. The signs could be used in substitution for printed letters in signs for advertising and were sent to defendants to be used on shoeblacking stands. The order was dated March 29, 1904, and specified that plaintiffs might ship to defendants a certain number of signs, a sample lot of 25 to be sent first, and if, "after a thorough trial," they were not found "to work satisfactorily," the order was to be canceled. August 19, 1904, a sample lot was sent to defendants, and on August 23d defendants wrote a letter saying that the signs were satisfactory. On August 24th more signs were shipped, and on April 1, 1905, the final lot, making up the order, was shipped. From August 23, 1904 to April 20, 1905, there was correspondence between the parties. At the trial the plaintiffs, who had not been paid for the signs, contended that defendants had had ample time in which to test the signs, while the defendants contended that they had a right to determine whether the goods were satisfactory, and that they had not had sufficient time. There was a verdict for plaintiffs, and defendants excepted.

MORTON, J.[2] The contract was partly in writing and partly in parol, and it was rightly left to the jury to determine what the contract was and whether it had been performed by the plaintiffs. The jury were also rightly instructed that the defendants were not bound to accept and pay for the goods until they had had a reasonable opportunity to test and examine them, nor unless they were satisfactory to them, if they acted in good faith and did what they ought reasonably to have

Shoemaker & Co., 50 Mont. 264, 146 Pac. 736 (1915); Gould v. McCormick, 75 Wash. 61, 134 Pac. 676, 47 L. R. A. (N. S.) 765, Ann. Cas. 1915A, 710 (1913); Stevens v. Lakewood Utilities Co., 189 Mich. 203, 155 N. W. 402 (1915), to pay balance "if ice is in good shape and satisfactory to us"; Bruner v. Hegyi (Cal. App.) 183 Pac. 369 (1919), tile work in building; Miller v. Phillips, 39 R. I. 416, 98 Atl. 59 (1916), house painting; Geo. W. Lord Co. v. Industrial Dyeing & Finishing Works, 252 Pa. 421, 97 Atl. 573 (1916), water to be purified: Braunstein v. Accidental D. Ins. Co., 1 B. & S. 782 (1861), proof of loss to be "satisfactory to the directors."

In McCartney v. Badovinac, 62 Colo. 76, 160 Pac. 190, L. R. A. 1917A, 1146 (1916), M.'s wife was charged with theft of a diamond. He hired B., a detective, to determine the facts, promising to pay $500 to B. "in the event that he shall determine the above questions to the satisfaction of said M." B. clearly proved the wife guilty, and she confessed and fled the state. This was not to M.'s satisfaction. B. got judgment.

Observe the difference between a promise of A. to satisfy B. and a promise of B. to pay if A. satisfies him, between a legal duty in A. and a condition precedent to a legal duty in B.

[2] Part of the opinion is omitted.

done to decide whether the goods were or were not satisfactory. In other words, the substance of the instructions in regard to the question of satisfactoriness was that the defendants were not bound to accept and pay for the goods unless they were satisfactory, and that they were entitled to sufficient time "whether * * * three, or four, or six months, or a year," to determine whether they were satisfactory, and that it was for the jury to say, taking all of the circumstances into account, whether the defendants had had a reasonable time to test and examine the goods, and, if that were so, then whether as reasonable men acting in good faith towards the plaintiffs the goods should have been accepted as satisfactory, and if they should have been, then the defendants were liable; otherwise not. This was correct and afforded the defendants no just ground for complaint. C. W. Hunt Co. v. Boston Elevated Ry., 199 Mass. 220, 85 N. E. 446; Cashman v. Proctor, 200 Mass. 272, 86 N. E. 284; Noyes v. Eastern Accident Association, 190 Mass. 171, 182, 76 N. E. 665; Lockwood Manuf. Co. v. Mason Regulator Co., 183 Mass. 25, 66 N. E. 420; Lovett v. Farnham, 169 Mass. 1, 5, 47 N. E. 246; Page v. Cook, 164 Mass. 116, 41 N. E. 115, 28 L. R. A. 759, 49 Am. St. Rep. 449; Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. The contract related to an article of merchandise to be used for purely business purposes and assumed that it would be satisfactory if after a proper trial it ought to be, and that the defendants would thereupon accept and pay for it. It was not intended to be left to the whim or caprice or even altogether to the good faith of the defendants to say whether the goods were satisfactory. Under the circumstances the term "satisfactorily" must be held to mean "satisfactorily to a reasonable man," and the jury were so instructed. * * *

Exceptions overruled.

WILLIAMS v. HIRSHORN.

(Supreme Court of New Jersey, 1918. 91 N. J. Law, 419, 103 Atl. 23.)

Action by Lewis Williams against Jacob Hirshorn. Judgment for plaintiff, and defendant appeals. Affirmed.

TRENCHARD, J. The plaintiff below sued to recover the balance alleged to be due on his contract with the defendant wherein the plaintiff agreed to make the walls of the defendant's cellars waterproof, and the latter agreed to pay $50 upon completion, "the balance ($50) to be paid after a rain and a satisfactory test has been made."

We are of the opinion that the judgment for the plaintiff rendered by the trial judge, sitting without a jury, must be affirmed. We think the motion to nonsuit was properly denied, and that a jury question was presented at the end of the case. It was admitted that the work was done by the plaintiff, and that the balance sued for had not been paid. It was also admitted that after the work was finished there had

been "a rain." The controversy turned upon the question: Had "a satisfactory test" been made?

When by the terms of a contract work is to be paid for after "a satisfactory test has been made," it must be satisfactory to the one who is to pay for it, if, as here, the contract is silent as to the person to whom the work shall be satisfactory. Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; Campbell Printing Press Co. v. Thorp (C. C.) 36 Fed. 414, 1 L. R. A. 645. The trial judge found that, if there had not been a "satisfactory test," there could not be one, and that was so through no fault of the plaintiff. The defendant always expressed himself as dissatisfied, giving as a reason that after a heavy rainfall there was considerable water in the cellars. It is true that there was, but the trial judge found that it came in the cellar windows, with which the plaintiff's contract had nothing to do, and over which he had no control, and there was abundant evidence to support that finding. Indeed, the proven statements and conduct of the defendant indicated that he himself thought that the water came in the windows, but the evidence tends to show that he never corrected that trouble.

Now, the rule of law is that, where a promisor agrees to pay for work or goods provided he is satisfied with them, he must act honestly and in good faith. To escape liability his dissatisfaction must be actual, and not feigned; real, and not merely pretended. It is only the actual existence, not the mere expression, of dissatisfaction that can have this effect. He must, if a test is necessary to determine fitness, give that test or permit it to be made. Where good faith is in issue, and the evidence is conflicting, a jury question is presented. Gwynn v. Hitchner, 67 N. J. Law, 654, 52 Atl. 997; Gerisch v. Herold, 82 N. J. Law, 605, 83 Atl. 892, Ann. Cas. 1913D, 627. See, also, cases collected in 9 Cyc. 624.

Whether in the case at bar the defendant acted in good faith in expressing his dissatisfaction with plaintiff's work upon the walls, when the testimony tended to show that the water came through the windows, for which the defendant and not the plaintiff was responsible, was at least a jury question.

The judgment below will be affirmed, with costs.[3]

[3] In accord: Silsby Mfg. Co. v. Town of Chico, 24 Fed. 893 (1885); Hartford Sorghum Mfg. Co. v. Brush, 43 Vt. 528 (1871); Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860 (1904).

(i) CONDITION OF NOTICE

ANONYMOUS.

(Y. B. 18 Edw. IV, f. 18, pl. 23.)

In debt on obligation, etc., the defendant showed that the condition was this, that if he should account before an auditor to be named by the plaintiff as he should be required by the said plaintiff concerning certain receipts from his manor of Dale, and should pay to him all arrears which should be found by the said auditor to be due, that then the obligation should be void, etc., otherwise, etc. And alleged in fact that the said plaintiff appointed such a one, etc., before whom he made account, and that he had always been ready and willing to pay the arrears found by the auditor, etc., if the said auditor had given him notice; and now the question was whether or not the defendant should find out the fact for himself at his peril.

CHOKE. Suppose I am bound to Catesby in an obligation on this condition, that if I pay the damages which shall be recovered against the said Catesby in an action of trespass brought against him by Genney, then, etc. In this case it is no defense for me to say that Catesby did not give me notice as to the amount of the verdict against him, but I must find out that fact for myself at my peril, and so here.

BRIAN ad idem. And where an arbitrament is had, the party must find out what the award is at his peril and without notice; quod Vavisour and Catesby concesserunt,[4] and said that the very case put by my Lord BRIAN had been so determined in the King's Bench in the time of the present king. For this case of arbitrament see 8 Edw. 4.

Thereupon STARKEY imparled.

HOLMES v. TWIST.

(In the King's Bench, 1615. Hob. 51.)

Thomas Holmes brought an assumpsit against John Twist, and declared that he was possessed of a heap of wood containing ten tuns, and that Twist in consideration that Holmes would sell and deliver him one tun of the said wood, he would pay him for it within six months, after the rate that he should sell the rest, and shewed that he sold and delivered unto Twist the tun of wood, and after sold unto one Collins the residue after the rate of 23 pounds a tun, and the defendant paid him not the 23 pounds according to the promise, and thereupon judgment was given for the plaintiff in the King's Bench, and now upon writ of error in the Exchequer Chamber, the judgment was reversed, because the plaintiff had not alledged that he had given no-

[4] In accord: Y. B. 1 Hen. VII, 5, 8.

tice to the defendant of the sale and price of the rest, being a thing of his private knowledge, and not like the case of bond to perform the award. And some Judges of the King's Bench allowed of the judgment.[5]

POWLE v. HAGGER.

(In the King's Bench, 1616. Cro. Jac. 492.)

Error of a judgment in the Common Pleas, in an assumpsit; where the defendant assumed, in consideration of divers sums paid to him, that if Cooper affirmed at his return beyond sea that he received of the plaintiff twenty pounds, that the defendant would pay the twenty pounds: and alleged in fact that Cooper returned from beyond sea, and on such a day, year, and place, affirmed that he received of the plaintiff twenty pounds, and that the defendant licet requisitus such a day, year, and place, had not paid. The defendant pleaded non assumpsit; and it was found against him, and adjudged for the plaintiff.

The error was assigned, for that it is not shewn before whom he affirmed, nor that the defendant had notice given to him of this affirmation; for without notice given him he could not take cognizance thereof, nor is he bound to pay it.

Sed non allocatur; for the defendant is to take notice of this af-

[5] In accord: Gable v. Morse, 1 Bulst. 44 (1610), promise to pay a sum to plaintiff on latter's return to London; Henning's Case, Cro. Jac. 432 (1617); Tanner v. Lawrence, Aleyn, 24 (1648), promise to pay 2s. for every piece of cloth that plaintiff might buy; Makin v. Watkinson, L. R. 6 Exch. 25 (1870), promise to repair premises occupied by plaintiff; notice of disrepair necessary.

In Vyse v. Wakefield, 6 M. & W. 442 (1840), the defendant having sold a certain life annuity to the plaintiff for a large sum, agreed that the plaintiff might insure the defendant's life in any one of a large number of insurance companies in England and promised further that he would never do anything that would invalidate the policy so taken out. The plaintiff took out a policy on the defendant's life in a certain company, and later the defendant invalidated it by going to Canada. To a declaration for damages for breach of defendant's promise the defendant demurred on the ground that there was no averment that the plaintiff had given notice to the defendant of the fact that a policy had been issued or of the fact that it was conditional on the defendant's not going across the ocean. The demurrer was sustained, and PARKE, B., thus classified the cases: (1) "Where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite;" here notice must be given. (2) "No notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself." (3) "There is an intermediate class of cases" where the act to be done by the plaintiff is not wholly indefinite as to time or place; "where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given."

In Costantino v. Lodjiodice, 93 Conn. 203, 105 Atl. 465 (1919), the court said that the requirement of notice as a condition precedent "must be found in the contract, or must arise as a matter of common fairness and equity from the circumstances of the case." Notice is not necessary where the parties have substantially equivalent sources of information.

firmation as well as the plaintiff; for the plaintiff is not bound to give him notice thereof; for the act being to be done by a stranger, and not by the plaintiff, the cognizance thereof lies as well in the notice of the defendant as in the plaintiff's, and therefore the plaintiff need not to give him any notice: whereupon the judgment was affirmed.[6]

BROOKBANK v. TAYLOR.

(In the Exchequer Chamber, 1624. Cro. Jac. 685.)

Assumpsit. Whereas the plaintiff, at the defendant's request, 20 April, 19 Jac. 1. demised to one John Jennings his house in London for a year a prædicto 20 Aprilis, 19 Jac. 1, rendering fifty shillings quarterly; that the defendant promised, if the said Jennings did not pay the rent, that he would pay it; and alledgeth in fact, quod virtute dimissionis he entered the aforesaid 20 April, 19 Jac. 1. and was possessed, and had not paid the rent; and that the defendant, licet requisitus, had not paid it. The defendant pleaded non assumpsit; and found against him; and the jury find damages occasione assumptionis prædict. to five pounds; and judgment thereupon; and error thereupon in the Exchequer-Chamber. * * *

The second error assigned was, because it is not alledged, that notice was given that the other had not paid.[7] Sed non allocatur; for he at his peril ought to take cognizance of the non-payment and pay the rent, otherwise the promise is broken. * * *

Wherefore the judgment was affirmed.[8]

MELLES & CO. v. HOLME.

(In the King's Bench Division, 1918. 119 Law T. [N. S.] 191.)

SALTER, J. This is an action for damages for breach of covenant to repair. The facts are that the defendants on the 24th June 1915 demised to the plaintiffs certain rooms in a house of the defendants by a lease dated the 24th June 1915. Other portions of the house were let to other persons. In particular, rooms above those demised to the

[6] In accord: Fletcher v. Pynsett, Cro. Jac. 102 (1605), to pay money to plaintiff on his marriage to X.; Beresford v. Goodrouse, 1 Rolle Abr. 462, pl. 3, 4 (1616), same; Jackson v. Thornell, 1 Rolle Abr. 464, pl. 20 (1628), to pay sum to be named by X.; Normanvile v. Pope, Cro. Jac. 137, 150 (1605); Cutler v. Southern, 1 Wms. Saunders, 116 (1667), to keep plaintiff harmless from suits by X.; King v. Atkins, 1 Sid. 442 (1670), same; Clerke v. Child, Freeman, 254 (1678), to convey more land if a tract should measure under 40 acres.

[7] Parts not relating to this error are omitted.

[8] In accord: Haverleigh v. Leighton, Jenkins' Centuries, 311 (1610); Somersall v. Barneby, Cro. Jac. 287 (1611). See Ames' Cases on Suretyship, 225, and note citing many cases pro and contra.

plaintiffs were let to persons who carried on a boot manufacturing business. The lease to the plaintiffs contains a covenant by the lessors that they will keep the outside walls and roof of the demised premises in good and tenantable condition. The roof—including in the expression the gutters and rain-water pipes—appears to have been kept in perfectly good repair. The landlords employed a person to inspect every three months, and he appears to have done his duty; but by some means one of the rain-water pipes became choked within a few feet of the top. There was evidence to the effect that ashes from the chimneys fell upon the roof, and that, because of this, the landlords took care to see to the gutters; but it also appeared from the evidence that refuse from the rooms where the boot manufacture was carried on was wont to accumulate on the roof. In the result, the rain lying in the gutters came through the roof and down the walls to the rooms occupied by the plaintiffs. It is material to observe that their lease expressly provided that they should use the rooms only for exhibition or storage of certain perishable wares.

In an action for damages for breach of covenant a learned County Court judge has found for the defendants. He held that there was no want of care on the part of the landlords, and that, in the absence of notice of want of repair, and assuming that it was a breach of covenant to allow the pipes to become stopped up, the action could not be maintained. In my view that judgment cannot be supported. The matter turns upon the covenant to which I have referred. I do not think it is necessary to consider any implied term. No implied term could be wider—even if it were as wide—as the express term which is to be found in the lease. It has been contended, however, that the plaintiffs cannot enforce the performance of this covenant—even if it was broken—because they gave no notice of want of repair. The rule that in some cases there must be read into a landlord's covenant to repair an implied condition that notice of a defect shall be given to him depends in the first instance in Makin v. Watkinson, 23 L. T. Rep. 592; L. R. 6 Ex. 25, and the principle of the rule is there enunciated. It is that where the circumstances are that the landlord does not and could not know of the existence of the defect unless the tenant informs him, or where he has no right to enter upon the premises, then in such circumstances it is reasonable and in accordance with common sense to imply that he shall have notice of want of repair. (See per Collins, M. R., in Tredway v. Machin, 91 L. T. Rep. 310, 311.) There must be a strong reason to justify our reading into a covenant words which are not there. Here, having regard to the plain intention of the parties, there is no such reason. The roof was in the possession and under the control of the landlords. It was not in the possession of nor was it under the control of the tenant, and the landlords were in a better position than he was to know of the condition.

The question remains—On the facts was there a breach? I am of

opinion that the covenant must be read as applying to the roof, in so far as it covered these premises, which were in fact a set of rooms. As it was the expressed intention that the obligation of the defendants under the covenant included the scouring of the gutter and the keeping of the passage of the down-flow pipe at all times free, as they failed to so that they were guilty of a breach of covenant, and the judgment should have been for the plaintiffs for the amount of the damages found by the judge.

ROCHE, J. I agree.

Appeal allowed.[9]

MASON v. HARVEY.

(In the Court of Exchequer, 1853. 8 Exch. 819, 155 Eng. Rep. 1585.)

Assumpsit on a policy of insurance effected by the plaintiff, a pawnbroker, with the Norwich Union Fire Insurance Society. The declaration stated the insurance to be (inter alia) £150 on the shop of the plaintiff and £1000 on pledges received under the 39 & 40 Geo. III, c. 99; also that there was indorsed on the policy the following (among other) conditions: "Eighth: Whenever any fire shall happen, the party insured shall give immediate notice thereof to one of the secretaries or agents of the society, and within three calendar months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars and amount of the loss sustained, estimated with reference to the state in which the property destroyed or damaged was immediately before the fire happened; and such accounts shall, if required by the directors, be supported by the oral testimony, and by the depositions or affirmations in writing of the claimant, and of his or her servants, and by the production of his or her books and vouchers." The declaration alleged that, whilst the property continued so insured, the "said shop and divers pledges received under the 39 & 40 Geo. III, c. 99, and then being in the said shop, were damaged and destroyed by fire," &c. Breach, that the loss which so happened has not been made good to the plaintiff.

Plea, that the plaintiff did not, within the period of three calendar months after the said shop and pledges were so damaged and destroyed by fire, deliver to any secretary or agent of the said society, under his hand, any such accounts as are in and by the eighth condition mentioned and required, exhibiting the full particulars and amount of the loss sustained by the plaintiff as alleged, estimated with reference to the state in which the property damaged and destroyed was immediately before the fire happened by which the property was so damaged and destroyed.

Demurrer and joinder.

[9] In accord: Hayden v. Bradley, 6 Gray (Mass.) 425, 66 Am. Dec. 421 (1856). Cf. Hugall v. McLean, 53 L. T. 94 (1885.)

Pollock, C. B. By the contract of the parties, the delivery of the particulars of loss is made a condition precedent to the right of the assured to recover. It has been argued that such a construction would be most unjust, since the plaintiff might be prevented from recovering at all by the accidental omission of some article. But the condition is not to be construed with such strictness. Its meaning is, that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss. Such a condition is, in substance, most reasonable; otherwise a party might lie by for four or five years after the loss, and then send in a claim when the Company perhaps had no means of investigating it. The plaintiff may have liberty to amend by withdrawing the demurrer, otherwise judgment for the defendant.

Alderson, B., Platt, B., and Martin, B., concurred.

Amendment accordingly.[10]

(j) Conditions in Aleatory Contracts

MARTINDALE v. FISHER.

(In the Court of King's Bench, 1745. 1 Wils. 88.)

This is a special action upon the case, wherein the plaintiff sets forth in his declaration that an horse-race was agreed to be run between an horse of the plaintiff and one of Sir Marmaduke Wyvill's, and that in consideration that the plaintiff had agreed to deliver to the defendant three yards and one-eighth of cloth, the defendant agreed to pay to the plaintiff £5 12s. 6d. in case Sir Marmaduke Wyvill's horse should beat the plaintiff's horse, but if the plaintiff's horse beat Sir M. W.'s, then defendant to pay nothing for the cloth; and avers, that Sir M. W.'s horse won the race. Upon the general issue there was a verdict for the plaintiff. It was now moved in arrest of judgment, and the exception taken to the declaration by Serjeant Bootle was, that it is not averred in the declaration that the cloth was delivered to the defendant. But to this it was answered by Mr. Ford, and resolved by the Court, that this was an action founded on mutual promises, and that here was only promise for promise, and therefore it was not necessary for the plaintiff to make an averment in his declaration

[10] See Reed v. Loyal Protective Ass'n, 154 Mich. 161, 117 N. W. 600 (1908), post, p. 870; Everson v. General Accident Fire & Life Assur. Corp., Limited, of Perth, Scotland, 202 Mass. 169, 88 N. E. 658 (1909), left to the jury to say whether notice within four days was "with reasonable promptness; In re Coleman's Depositories, [1907] 2 K. B. 798, held that notice of the accident was not a condition even though the policy declared it to be "of the essence", because the insurer had not yet delivered the policy and the insured had no notice that notice was required.

of the delivery of the cloth: and the Court said, the case of Nichols and Raynbred, Hob. 88, is in point.

DENNISON, J., said, that where a plaintiff declares, that in consideration he the said plaintiff would deliver to the defendant a piece of cloth to the defendant, that the defendant should pay such a sum of money for it, in that case an averment of the delivery of the cloth is necessary; but if the plaintiff states an agreement, and then lays it that in consideration of such a promise or agreement, &c. there is no need of an averment. So N. B. the difference. And the postea was ordered to be delivered to the plaintiff. Vide Hob. 106. Yelv. 136. 7 Lev. 293. Hard. 103.[11]

CHRISTIE v. BORELLY.

(In the Court of Common Pleas, 1860. 29 L. J. Com. Pl. 153.)

The first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange, of £100 and £62, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on January 23d, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guaranteed to the plaintiff the repayment of the sum of £300 towards the payment of Scotch whiskies, as follows: Six puncheons, 5hhds., 4 qr. casks, Auchtertool, 2 puncheons, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his, the defendant's, part of the said agreement; and that the said two bills of exchange of £100 and £62 were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; and that he, the plaintiff, delivered to the said Mr. B. Fisse, the said Scotch whisky, in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse,

[11] For other cases of aleatory contracts, see Henderson v. Stone, 1 Mart. N. S. (La.) 639 (1823), horse race; Moore v. Johnston, 8 La. Ann. 488 (1852), same; Seward v. Mitchell, 1 Cold. (Tenn.) 87 (1860); ante, p. 296; Ptacek v. Pisa, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537 (1907), promise to support X. for life in return for being made beneficiary of an insurance policy; after supporting X. for five years, plaintiff sent him to the poorhouse; he now fails to recover even quantum meruit. In Losecco v. Gregory, 108 La. 648, 32 South. 985 (1902), plaintiff contracted to buy all the oranges that defendant's grove might produce in 1899 and 1900, for $8,000 payable half in advance, "purchaser assumes all risks." An unprecedented freeze killed every orange tree on the place. Buyer sued to recover $4,000 paid in advance. The court allowed three arguments and decided in three different ways by variable majorities; the final decision being that the contract was aleatory and that the plaintiff must pay the balance of the price to the defendant, for which he had counterclaimed.

although requested to pay the said amount of £300 toward the payment of the said Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of £300 or any part thereof, and the same still remained wholly due and unpaid; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of £300, or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (inter alia), secondly, to the said first count, that, although the said debt and sum of £300, in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew; yet the said two bills of exchange of £100 and £62, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on the issue taken on the second plea, the Court, in Michaelmas Term last, on the application of Edward James, granted a rule nisi to enter judgment for the plaintiff on such issue non obstante veredicto, on the ground that the said second plea was no answer to the action.

Erle, C. J.[12] I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have judgment entered for him non obstante veredicto. The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of £300 toward the payment of certain whisky being paid for when due; and the plaintiff guarantees that two bills of exchange of £100 and £62 shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side; on the one side they would be £300, and on the other only £162; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condition precedent to performance of the other. The question is, to my mind, one entirely of fact—namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only

[12] The concurring opinion of Willes, J., is omitted.

a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise was not a condition precedent, and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

WILLIAMS, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterward ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

Rule absolute.[18]

[18] "In every purely bilateral contract not under seal the mutual promises are necessarily, in legal contemplation, the full equivalent of each other; for otherwise the promise on one side would be in part a mere gift, and therefore would be invalid for want of consideration. In bilateral contracts under seal there is not the same legal necessity that the mutual covenants should be the full equivalent of each other, yet a case will rarely occur in which they must not be so regarded in fact. For all practical purposes, therefore, it may be said that mutual covenants and promises are always, in legal contemplation, the full equivalent of each other, and are given and received in payment for each other. And what is thus true of mutual covenants and promises is also necessarily true of the performance of them, provided the performance on each side is equally certain; but if the performance on one side is conditional, while on the other side it is unconditional, the inference is that the conditional performance makes up in quantity what it loses in certainty; and therefore, though the covenants or promises are equal, the performances are unequal. In other words, whenever the performances of mutual covenants or prȯmises are unequal in certainty, they will also be unequal in amount, and hence there will be no foundation for making one dependent upon the other by implication. This seems to have been the true ground for the decision in Martindale v. Fisher, 1 Wilson, 88 (1745). This principle is especially applicable to all that class of contracts known to writers on the civil law as aleatory or hazardous contracts, e. g. contracts of insurance, of indemnity, of suretyship or guaranty, of warranty in sales of personal property, and covenants for title in sales of real estate. In most cases all of these contracts are unilateral, and then of course no question of dependency can arise; but even when the are bilateral, it seems that the covenants or promises are never dependent by implication. The consequence will generally be the same if the performance on each side is conditional, for the court can seldom say that each condition creates the same degree of uncertainty. Therefore mutual promises of guaranty are not dependent by implication, unless at least the debts guaranteed are of the same amount. Christie v. Borelly, 29 L. J. C. P. 153 (1860)." Langdell's Summary of Contract Law, § 107.

SMITH v. COMPTON et al.

(Supreme Court of California, 1856. 6 Cal. 24.)

The plaintiff brought his action on a tripartite agreement (not under seal) dated Nov. 22, 1853, between Wm. A. Richardson of the first part, Chas. S. Compton and D. Davidson (the defendants) of the second part, and Wm. Smith (the plaintiff) of the third part; which recites that Smith had recovered a judgment for $3,913, besides costs, the whole bearing interest, against Richardson, under which he had levied on property of Richardson in Marin County; and contains the following agreements: Richardson agrees that the interest shall be compounded, and bear interest with the principal. Compton and Davidson agree that the property levied on shall not be removed, and shall remain subject to the levy, and also guarantee the payment of the judgment and costs. Smith agrees to suspend all proceedings under the judgment for four months, and to assign the judgment, on a week's notice, to Compton and Davidson, on their paying him the amount due at any time previous to the expiration of the four months. A payment of $300 on account of the judgment in Smith v. Richardson, was admitted. The performance by plaintiff of his portion of the contract is put in special issue by the pleadings.

On the trial of the cause, the defendants (plaintiff) introduced the contract in evidence, and then rested his case. The defendants then moved for a non-suit, upon the ground, among others, that the plaintiff had not proved a compliance with his agreement to suspend proceedings.

The motion for a non-suit was overruled, and the plaintiff (defendants) then introduced testimony to the effect that the levy was made on Richardson's property under plaintiff's judgment, on Nov. 10, 1853, and a portion of the property sold under the orders of plaintiff, March 6, 1854, the remainder being claimed by other parties and found to be their property by a sheriff's jury. The plaintiff then proved that the defendants assented to the sale being made prior to the expiration of the four months, and actively assisted therein, and the jury so found under the instructions of the Court. The Court instructed the jury if they found for the plaintiff, to give a verdict for the amount of the judgment against Richardson, less the amount paid, with simple interest at three per cent.

The jury found a verdict for plaintiff for $3,912.55. Judgment accordingly. Defendants moved for a new trial, which was denied by the Court, and defendants appealed.

Mr. Justice TERRY delivered the opinion of the Court. Mr. Justice HEYDENFELDT concurred.

The promise on the part of plaintiff to stay proceedings under his judgment against Richardson, was a condition precedent to the guar-

anty sued on, and performance on his part should have been alleged and proven, to entitle him to recover against defendants.

This was not done in the opening, and defendant was entitled to a judgment of non-suit.[14]

The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and by so doing, waived the objection. See Ringgold v. Haven, 1 Cal. 108.

From the whole record, the right of plaintiff to recover clearly appears; and we will not disturb a judgment, when it is evident that a new trial must be attended with the same result.

The judgment is affirmed with costs.[15]

NATIONAL SURETY CO. v. WINSTON et al.

(Supreme Court of New York, Appellate Division, 1914. 161 App. Div. 594, 146 N. Y. Supp. 825.)

Action by the National Surety Company against James O. Winston and Thomas S. Winston, partners as Winston & Co., and another. From a judgment for plaintiff, defendants appeal. Affirmed.

[14] Contra: United & Globe Rubber Mfg. Co. v. Conard, 80 N. J. Law, 286, 78 Atl. 203, Ann. Cas. 1912A, 412 (1910).

[15] Where the defendant became surety for another's debt, and in return the creditor promised to assign certain securities to the surety, it is held that the creditor can maintain no action on the surety's promise unless he has assigned the security as agreed. Griggs v. Moors, 168 Mass. 354, 47 N. E. 128 (1897). The same is true where the creditor has promised to do other acts for the surety's protection. Watts v. Shuttleworth, 5 H. & N. 235, 7 H. & N. 355 (1861); Walker v. Goldsmith, 7 Or. 161 (1879); Rolt v. Cozens, 18 C. B. 673 (1856), perhaps distinguishable as a unilateral contract; Jones v. Keer, 30 Ga. 93 (1860); Capps v. Smith, 3 Scam. (Ill.) 177 (1841) express condition; Jeffries v. Lamb, 73 Ind. 202 (1880); Campbell v. Gates, 17 Ind. 126 (1861); Fay & Co. v. James Jenks Co., 93 Mich. 130, 53 N. W. 163 (1892); Bookstaver v. Jayne, 60 N. Y. 146 (1875).

Where an insurance policy has been issued in return for a promissory note for the premium, it is held that the duty of the insurer to pay the amount of the policy is not conditional upon the payment of the note when due. Mutual Life Ins. Co. of New York v. Allen, 212 Ill. 134, 72 N. E. 200 (1904); Bradley v. Federal Life Ins. Co., 178 Ill. App. 524 (1913); Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543, 46 Am. Rep. 792 (1883); Arkansas Ins. Co. v. Cox, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808 (1908); Lawrence v. Penn Mut. L. Ins. Co. of Newark, N. J., 113 La. 87, 36 So. 898, 1 Ann. Cas. 965 (1904); Langbehn v. American Ins. Co. of Newark, N. J., 41 S. D. 581, 171 N. W. 820 (1919). But payment of the premium note is usually made a condition precedent by express provision in the policy. Marshall v. Farmers' & Bankers' Life Ins. Co., 98 Kan. 502, 159 Pac. 17 (1916); Mutual Aid Union v. Wadley, 125 Ark. 449, 188 S. W. 1168 (1916); Carey v. Amicable Life Ins. Co. (Ga. App.) 100 S. E. 225 (1919); Hinkson v. Kansas City Life Ins. Co., 93 Or. 473, 183 Pac. 24 (1919); Bigelow v. State Mutual Life Assur. Ass'n, 123 Mass. 113 (1876).

In New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451 (1852), post, p. 739, an insurer got judgment on a premium note, even though it had repudiated its own promises.

Scott, J. Defendants were awarded a contract to construct a portion of the new aqueduct for the city of New York. They gave the city an undertaking of the Empire State Surety Company in the sum of $80,000, and at the same time executed an agreement to indemnify the Surety Company and to pay it an annual premium of $1,200, payable in advance on the 20th day of September, afterwards changed to the 20th day of February, in each year. The Empire State Surety Company became insolvent and is now in process of liquidation.

On September 18, 1912, the Empire State Insurance Company reinsured all of its risks with plaintiff and assigned to it all of its good will, agreements of insurance and reinsurance, indemnity agreements, and the like; plaintiff agreeing on its part to assume and fulfill all the outstanding contracts of the Empire State Surety Company. Neither the city of New York nor defendants were parties to this agreement, nor so far as appears have consented to it; but, on the other hand, it does not appear that the city has called on defendants to substitute other security. This action is for the premium which fell due February 20, 1912, which defendants refused to pay.

The appellant argues that by becoming insolvent the Empire State Company necessarily broke its contract with the city of New York to insure defendant's faithful performance of its contract, and consequently that the contract of indemnity failed of consideration to support it. This argument is supported by a line of cases holding that an insurer or casualty company upon becoming insolvent or reinsuring its policies, breaks its contract with its policy holders, and that they are not required to go on paying premiums or to accept the substitution of the reinsuring company.

The analogy is not perfect, however. Defendants are not, in the usual sense, policy holders of the Empire State Company. That company does not insure defendants. Its agreement with them is that it will insure the city of New York against any default on the part of defendants. If the city is content to accept the substituted surety, as it appears to be, defendants get all that they contracted for. So long as the city is satisfied, it can make no difference to defendants who the city accepts as surety. If it accepts any one, the defendants have received consideration for their indemnity agreement.

The Empire State Company still exists and is still liable upon its bond, and for all that appears its bond is perfectly good, notwithstanding its insolvency. It has simply superadded to its own responsibility that of plaintiff, and it, or its assignee, are entitled to enforce the indemnity agreement.

Judgment appealed from is affirmed, with costs. All concur.[16]

[16] The failure of the contractor to pay the premiums does not release the surety from his duty to his promisee (the creditor or owner). Massachusetts Bonding & Insurance Co. v. State (Ind. App.) 127 N. E. 223 (1920). Cf. Merritt v. Haas, 113 Minn. 219, 129 N. W. 379 (1911).

(k) CHARTER PARTIES—LEASES

SHADFORTH v. HIGGIN.

(At Nisi Prius, 1813. 3 Camp., 385.)

Assumpsit upon the following agreement signed by the plaintiff and defendant:

"James Shadforth, part owner of the ship Fanny of 300 tons, coppered and armed, agrees to dispatch said vessel immediately in ballast direct to Jamaica, and on her arrival at Rio Nova Bay, Salt Gut, and St. Ann's, receive a full and complete cargo of produce, consisting of sugar, rum, coffee, and pimento. In return Messrs. Higgin & Co. agree to provide a cargo to the above shipping places, to be taken on board in the usual manner, in time for July convoy, provided she arrives out and ready by the 25th of June, and the freight to be at the current rate as given to other vessels loading at the same time and same ports."

The declaration alleged, that the defendants did immediately dispatch the vessel in ballast to Jamaica, and that on her arrival at Rio Nova Bay she was afterwards, to wit, on the 3rd of July, and from thence for a long space of time, to wit, for the space of three months from thence next ensuing, ready to receive at Rio Nova Bay, Salt Gut, and St. Ann's aforesaid, a full and complete cargo of produce, according to the form and effect of the said agreement; yet that the defendant did not nor would provide a cargo for the said vessel at the above shipping places, or any or either of them, according to the form and effect of the said agreement, whereby the said ship was obliged to return from Jamaica without any cargo being loaded on board thereof.

The ship in point of fact did not reach Jamaica till the 3rd of July; and the question was, whether under these circumstances the defendant was answerable for having failed to furnish her with a full cargo.

Garrow, S. G., for the plaintiff, contended, that the defendant was bound to furnish a full cargo for the ship at all events. Provided she arrived out and was ready by the 25th June, this was to be done in time to enable her to sail with the July convoy. The condition of her arriving by 25th June only applied to the time of her departure on the homeward voyage. If by any accident her arrival was delayed beyond the day specified, she was still entitled to a cargo in a reasonable time, as if the proviso and the mention of the July convoy had not been introduced into the agreement. It could hardly be meant, that where the owner was absolutely bound to dispatch his ship to Jamaica, if she arrived a day later than was expected, the freighter might send her home empty.

Lord ELLENBOROUGH. I think the arrival of the ship on the 25th June was a condition precedent. The freighter might know that if

she arrived by that day he could easily provide a cargo for her; but that afterwards it might be impossible. He might have had goods of his own, which it was essentially necessary should be shipped by that day, and which he was therefore compelled to load on board another vessel. It would be a great hardship if he were bound to provide a freight for a vessel which arrives at a season of the year when there is no produce ready for shipping in the island. If the freighter is liable, although the ship does not arrive till a week after the day agreed upon, where is the line to be drawn? I think the fair interpretation of the instrument is, that unless the ship arrived by the 25th June, the defendant's liability was to be at an end.

The plaintiff likewise failed in establishing another agreement declared upon for the loading of the ship, and submitted to be nonsuited.

OLLIVE v. BOOKER.

(In the Court of Exchequer, 1847. 1 Exch. 416.)

Assumpsit, for breach of a charterparty agreement set out verbatim in the eighth plea below. The plaintiff alleged performance by himself, and a breach by the defendant in that the latter refused to ship a cargo of goods as agreed, although the plaintiff was ready to receive the cargo, as the defendant knew.

Eighth plea, as to the first count: The defendant says, that the said charterparty made between the plaintiff and the defendant was and is made in the words and figures following, that is to say: "London, 24th December, 1844. Charterparty. It is this day mutually agreed between Messrs. Ollive, Nephew & Co., original charterers of the good ship or vessel called The Dove, A 1, of the measurement of 149 tons, or thereabouts, now at sea, having sailed three weeks ago, and Messrs. Booker & Co., merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Marseilles, (after having delivered her cargo at Genoa, for ship's account,) or so near thereunto as she may safely get, and there load from the factors of the said charterers a full cargo of linseed or other goods, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, shall therewith proceed to one safe port in the United Kingdom, calling at Cork or Falmouth for orders, which are to be given in due course of post, or so near thereunto as she may get, and deliver the same on being paid freight at and after the rate of 5s. 6d. per imperial quarter for linseed, or other goods in full proportion, according to the London printed rates delivered: the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, dur-

ing the said voyage, always excepted. The freight to be paid on unloading and right delivery of the cargo, one-third in cash, and the remainder by an approved bill on London, at three months' date. Thirty working days are to be allowed, Sundays excepted, the said merchant (if the ship is not sooner dispatched) for loading the said ship at Marseilles, and unloading at the return port; mats and bulk heads to be found by the charterers, and dunnage by the ship, and ——— days on demurrage, over and above the said laying days, at £4 per day; the penalty for the non-performance of this agreement, £400; the vessel to be consigned to the freighter's agents at Marseilles; cash for usual disbursements at Marseilles, free of interest and commission, but the insurance bills of lading to be signed for more or less freight, without prejudice to the charterparty. Per proc. Booker & Co.; Thomas Booker, jun.; Ed. Ollive, Nephew, & Co.; John Aitkin, witness to the signature of Messrs. Booker & Co., and of Messrs. Ed. Ollive & Co. The commission on this charterparty is at £5 per cent., due ship lost or not lost. The vessel to be addressed to Alexander Howden or his agents, at the port of discharge." And the defendant avers, that upon the making of the said charterparty, time was an essential and material part of the contract, and that the probable situation of the vessel, with reference to the date of her sailing, was also a material and essential part of the contract, to wit, with reference to the object of the said voyage, and the distance of the said port of Marseilles, and the nature of the said intended cargo, and the time of year at which the said charterparty was made. And the defendant further says, that, in point of fact, at the time of the making of the said charterparty, the said vessel had not sailed three weeks before, but on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which the plaintiff, at the time of the making of the said charterparty, knew, and whereof the defendant had no notice or knowledge, wherefore the defendant wholly declined to accept or employ the said vessel under the said charterparty, to wit, immediately upon learning and knowing that the said vessel had not sailed, as in the said charterparty set forth, to wit, upon the 1st of February, 1845, and wholly neglected and refused to load any cargo on board her, to wit, upon the day and year last aforesaid, as he lawfully might for the cause aforesaid. Verification.

Replication, de injuriâ.

At the trial, at the sittings after last Hilary Term, before the Lord Chief Baron, a verdict was found for the plaintiff upon all the issues, except those raised by the 8th, 9th, and 11th pleas, and upon these issues the defendant had a verdict,—leave being reserved to the plaintiff to move to enter a verdict upon them also.

Crowder having obtained a rule nisi accordingly, and also for judgment non obstante veredicto upon the eighth plea.

Watson and Greenwood now shewed cause.—The plaintiff is not entitled to judgment non obstante veredicto upon the eighth plea. The

statement in the charterparty, that the vessel was then at sea, and had sailed three weeks, is an essential and most material part of the contract, and was not a mere collateral agreement, for the breach of which an action should have been brought to recover any consequential damages. The defendant was not bound to complete his part of the engagement, as this condition was not performed by the plaintiff. The time at which a vessel sails is a most important matter in contracts of affreightment. This is a term which forms the basis of the contract. * * *

The term of the vessel's sailing is as much a condition of the charterparty as that she was staunch and strong. (They were then stopped by the Court.)

Crowder and Bovill in support of the rule. This plea affords no answer to the action. The statement in the charterparty, upon which the plea is founded, is a mere representation, and not a condition. The plaintiff might be liable for the breach of it in a cross action. * * *

PARKE, B.[17] I am of opinion that the rule for judgment non obstante veredicto on the eighth plea ought to be discharged. It seems to me that the averment in the plea, that at the time of entering into the charterparty the plaintiff knew that the vessel had sailed a materially and unreasonably later time than that which was stipulated for, is an immaterial averment, and might be struck out. The main question, however, in the construction of this plea, is, whether the allegation in the charterparty, of the vessel being "now at sea, having sailed three weeks ago," is a warranty or a representation. In the construction of agreements, as in the case of contracts under seal, we should endeavour to discover the intention of the parties. Here it is stated that the vessel was now at sea, having sailed three weeks; and if time is of the essence of the contract, no doubt it is a warranty and not a representation. Such, also, is the case in policies of insurance. It appears to me that it is a warranty, and not a representation, that the vessel had sailed three weeks. It is, therefore, a condition precedent. The rule depends upon each particular contract, and here time was of the essence of the contract, as much so as the statement that she was a sound vessel. This being a condition precedent, and not performed, the defendant was not bound to load the vessel. If he had loaded her, the breach of the condition would have been waived, and he would have been liable for the full freight.[18] I entirely agree with the reasoning of Tindal, C. J., in the case of Glaholm v. Hays, which I think applies to the present case. There the stipulation was held to be a condition precedent. The defendant was entitled to say that he was not bound to load the vessel, as the condition had not been performed,

[17] The facts have been restated in part, the arguments abridged, and the concurring opinions of Alderson and Rolfe, BB., omitted.

[18] In accord: Pust v. Dowie, 32 L. J. Q. B. 179 (1864); Graves v. Legg, 9 Ex. 717 (1854), semble.

and that the case was the same as if the vessel had not proved to be A 1, as she was warranted to be. I think, therefore, that the plea affords a good answer, and that the rule for judgment non obstante veredicto ought to be discharged.

Rule discharged.[19]

ANONYMOUS.

(In the Common Pleas, 1590. 4 Leon. 50, Case No. CXXX.)

A lease for years is made by deed indented rendering rent, and the lessor covenants that the lessee paying his rent shall enjoy the land demised for the whole term; the lessee did not pay the rent, and afterwards is ejected by a title paramount: by WALMESLY and WINDHAM, Justices, that the covenant is conditional, and that the lessee should not have advantage of it, if he did not perform the condition, which is created by this word (paying). PERIAM, Justice, was strongly to the contrary, viz. that the word (paying) did not create a condition.[20]

[19] In accord: Behn v. Burness, 32 L. J. Q. B. 204, 3 B. & S. 751 (1863), ship represented to be "now in the port of Amsterdam," when she was not; Cranston v. Marshall, 5 Ex. 395 (1850); Croockewit v. Fletcher, 1 H. & N. 893 (1857); Glaholm v. Hays, 2 M. & G. 268 (1841), "the vessel to sail from England on or before the 4th day of Feb." Other cases where time was of the essence and delay fatal are Freeman v. Taylor, 8 Bing. 124 (1831); Oliver v. Fielden, 4 Ex. 135 (1849) "to be launched and ready to receive cargo in May"; Tully v. Howling (C. A.) 2 Q. B. D. 182 (1877).

In the following cases the nonperformance by one was held not to go to the essence of the charter party. Storer v. Gordon, 3 M. & S. 308 (1814); Fothergill v. Walton, 8 Taunton, 576 (1818); Clipsham v. Vertue, 5 Q. B. 265 (1843); Tarrabochia v. Hickie, 1 H. & N. 183 (1856); Seeger v. Duthie, 29 L. J. C. P. 253, 30 L. J. C. P. 65 (1860); McAndrew v. Chapple, L. R. 1 C. P. 643 (1866), a slight deviation or delay.

In Rae v. Hackett, 12 M. & W. 724 (1844), where the defendant had agreed to sail his ship to some safe port near Cape Town, it was held that the naming of the port was a condition precedent to his duty to sail.

Delivery at Destination.—In charter parties delivery of the goods at destination is normally a condition precedent to the duty to pay freight, and the condition is not dispensed with by the fact that it is prevented by disaster, war, blockade, pirates, prohibition of trade, or other force majeure. The Isabella Jackson, 4 C. Rob. 77 (1801), leakiness, due to bad weather; The Appam (D. C.) 243 Fed. 230 (1917), capture by enemy; The St. Helena, [1916] 2 A. C. 625, outbreak of war made delivery in enemy port illegal; Scott v. Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431 (1807), blockade at port of destination; Hunter v. Prinsep, 10 East, 378 (1808), cargo sold at intermediate port, after wreck; The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406 (1905), ship abandoned by peril of the sea and later brought into port by salvors.

If the delivery at destination is prevented by the cargo owner, the shipowner is entitled to full freight. Jordan v. Warren Ins. Co., 1 Story, 353, Fed. Cas. No. 7524 (1840).

A temporary blockade is not impossibility, and a ship thus delayed is not bound at once to abandon the voyage and lose freight. Palmer v. Lorillard, 16 Johns. (N. Y.) 348 (1819).

[20] Where a lessee covenants to repair the premises, "the same being first put into tenantable repair by the lessor," it has been held that the tenant's duty is conditional upon repair by the lessor. Neale v. Ratcliff, 15 Q. B. 916

POWELL v. MERRILL.

(Supreme Court of Vermont, 1918. 92 Vt. 124, 103 Atl. 259.)

Action by Max L. Powell against James A. Merrill. Judgment was adverse to plaintiff and he brings exceptions. Affirmed.

POWERS, J.[21] The plaintiff, by a writing under seal, rented to the defendant a building in Burlington. The lease provided for a monthly rent, authorized the lessee to sublet with the lessor's consent, required the tenant to pay the water rates, and stipulated for a right of re-entry for breach of its covenants. At some time during the term, the defendant, with the plaintiff's permission, sublet a part of the premises to the American Woolen Company, who occupied such part, undisturbed by the plaintiff, until December 1, 1913, when they paid to the defendant the October and November rent and vacated the premises. The defendant continued to occupy that part of the premises not so sublet until November 15, 1913, on which day the plaintiff brought a suit against him, seeking to recover therein rent in arrear under the lease and certain other items of indebtedness. He placed the writ in the hands of an officer for service, and by his direction the latter went to the premises and attached certain personal property of the defendant there found, and having ejected therefrom one Joseph Agel, who was in the part occupied by the defendant by the latter's permission, placed a padlock on the door and locked the defendant out. He did not interfere with the part occupied by the woolen company. Since that time, the defendant has not been in possession of any part of the premises, or had anything to do with them, except to receive the rent as above stated. One-half of the rent so received he turned over to the plaintiff. What became of the suit referred to, we do not know. Whether or not it ever came to trial, and, if so, who finally prevailed, is not shown by this record.

The suit before us is an action for rent on the premises from November 1, 1913, to March 1, 1914, on which day the plaintiff gave the defendant a written release from further liability. The defendant filed several pleas, but the transcript shows that the case was tried below without regard to them. Judgment was rendered for the plaintiff to recover rent from November 1 to November 15, 1913, only, and the plaintiff excepted.

The defendant contends that the acts of the officer, done by direction of the plaintiff, amounted to an eviction of him from a substantial part of the premises, and that as a result, his obligation to pay rent was entirely suspended. But an eviction may be rightful or wrongful. 1 R. & L. Dict. 467. The term is commonly used in the books as denot-

(1850); Slater v. Stone, Cro. Jac. 645 (1622). Contra: Bragg v. Nightingale, 1 Rolle, Abr. 416, pl. 15 (1649).

[21] Part of the opinion is omitted.

ing a wrongful ouster of the tenant by the landlord, and is so used in this opinion. It is established beyond controversy that an eviction by act of the landlord, in order to have the effect contended for by the defendant, must result from a wrongful act of the landlord. "Eviction, properly so called," says Mr. Justice Crowder in the much-cited case of Upton v. Townend, 84 E. C. L. 70, "is a wrongful act of the landlord, which operates the expulsion or amotion of the tenant from the land."

The rule invoked by the defendant is thus stated by Lord Hale in Hodgkins v. Robson, 1 Ventr. 276: "If the lessor enters into part by wrong, this shall suspend the whole rent; for in such case, he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." To the same effect are the American authorities: Shumway v. Collins, 6 Gray (Mass.) 232; Mirick v. Hoppin, 118 Mass. 582; Skally v. Shute, 132 Mass. 367; Galleher v. O'Grady, 78 N. H. 343, 100 Atl. 549. So unless the acts of the landlord are wrongful, although they permanently deprive the tenant of the use of the demised premises, no eviction is committed (note to 38 Am. St. Rep. at page 487), and a rightful re-entry does not evict (Wright v. Everett, 87 Iowa, 697, 55 N. W. 4).

So the first question for determination is, Was this plaintiff's re-entry—for that is what it amounted to—rightful or wrongful? The common-law rules regulating the rights of landlord and tenant are highly technical and strictly adhered to. Forfeitures are not favored by the law, and stipulations therefor are construed strictly. The mere breach of a covenant contained in the lease does not in the absence of special stipulation, work a forfeiture of the term or give the landlord a right of re-entry. But the lease before us contains a provision that, if the lessee should "at any time for the space of one month refuse or neglect to fulfill the conditions of this lease, then the said Powell shall have the right to enter into and upon the premises to take possession thereof and order out the said Merrill." The plaintiff invokes this clause and insists upon three grounds as justifying his re-entry thereunder, default in payment of rent, subletting to Agel without consent, and nonpayment of water rates.

As we have seen, without the clause referred to, the plaintiff had no right to re-enter. Under the clause his rights are stricti juris, and no more than the covenant gives him. Unless one or more of the covenants were at that time broken, and, in view of the term of grace specified, had remained broken for one month, no right of re-entry existed on November 15, 1913.

The findings do not directly show that there was any rent then overdue. The nearest that they came to it is that (as we shall see) at some time or other the defendant agreed or offered to pay what rent was due. The findings also fail to show that any part of the premises were sublet to Agel. They show he was there by permission of the defendant,

but nothing more. Nor do the findings show that these defaults, if such they were, or either of them had existed for one month before that date. It is found that the defendant failed to pay certain water rates, but whether this failure was a month before the re-entry is not shown. So the plaintiff fails to show by the record that his right to enter and oust the defendant had accrued when he sent the officer to the premises with the writ.

The plaintiff insists that he only intended to make an attachment and not evict the defendant when he sent the officer there, and he complains because he was not allowed to show this. It is true that in speaking of this kind of an eviction it is frequently said that the character of the landlord's act depends on his intention. And so it does; but the landlord will be presumed to intend the natural consequences of his acts (16 R. C. L. 688), and where, as here, his acts necessarily result in depriving the tenant of the beneficial enjoyment of the premises or a substantial part of them, the intent to oust the tenant will be conclusively presumed (Id.; Skally v. Shute, 132 Mass. 367; Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716).

The rule contended for by the defendant that an eviction from a part of the premises suspends the rent in its entirety is established by the great weight of authority not only in England but in this country. Mirick v. Hoppin, 118 Mass. 582; Fifth Ave. Bldg. Co. v. Kernochan, 221 N. Y. 370, 117 N. E. 579; Kuschinsky v. Flanigan, 170 Mich. 245, 136 N. W. 362, 41 L. R. A. (N. S.) 430, and note, Ann. Cas. 1914A, 1228. * * *

Affirmed.[22]

[22] What would have been the court's decision as to the rent had the eviction been rightful?

In Tracy v. Albany Exchange Co., 7 N. Y. 472, 57 Am. Dec. 538 (1852), an action for damages for breach of a covenant to renew a lease, the court said: "As to the objection made by the defendant that there was rent in arrear, and therefore the plaintiff was not entitled to a further lease, the covenant being independent, the liability of the defendant for the breach of the covenant in question remained. The payment of the rent was not a condition precedent to the right of the plaintiff to a renewal of the lease under the covenant, and he might bring his action for a breach of it, although he was guilty of a default in the payment of his rent or performance of his covenant. Dawson v. Dyer, 5 Barn. & Ad. 584 (1833)."

In Friar v. Grey, 5 Ex. 584 (1850), it was provided in a lease that the tenant should have the power of terminating the lease after eight years by giving 18 months notice, "all arrears of rent being paid." The failure to pay rent went to only part of the consideration, but Manisty (of counsel) argued that the principle applicable to mutual covenants (see Boone v. Eyre, ante, p. 533) is not applicable in the case of "a power dependent on a condition." The court held that payment of the rent was a condition precedent to the power.

In Edge v. Boileau, 16 Q. B. D. 117 (1885), the action was by the tenant for breach of a covenant for quiet enjoyment, "to the effect that the lessee paying the rent when due, and observing the covenants on his part to be observed, should peaceably and quietly hold and enjoy." Judgment was given for the tenant, in spite of the fact that rent was in arrears and that he had not repaired as agreed. It was held by Pollock, B., Manisty, J., concurring,

GASTON v. GORDON.

(Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 265, 94 N. E. 307.)

Action by William A. Gaston, trustee, against Isaac Gordon. Verdict was directed for plaintiff, and defendant excepted. Exceptions overruled.

RUGG, J. This is an action of contract to recover rent reserved in a written lease. The facts are not in controversy. The defendant, hoping to secure a license to sell intoxicating liquors upon the demised premises, executed with the plaintiff under date of November 15, 1907, a lease for a term of three years from February 1, 1908, which contained a covenant that he would "use the said premises solely for the following purposes: For the retail liquor business," and would not "use said premises or any part thereof for any purpose other than those stated in this lease, nor for any purpose * * * which shall be unlawful * * * or contrary to any law, ordinance or by-law." In the latter part of 1907 an application for a license for the sale of intoxicating liquors on the premises was made by the defendant to the licensing board, and it was refused. Thereupon the defendant gave notice to the plaintiff, did not enter occupation under the lease, and refused to pay rent. * * * [28]

2. The defendant contends that it is an implied condition of the entire lease that the lessee shall be able to procure a license, and if he fails he shall not be bound. The lease is plain that the premises can be used for nothing else than the liquor business, except with the assent in writing of the lessor. It follows that without a license the lessee can make no use of them, except by consent of the lessor. Stewart v. Winters, 4 Sandf. Ch. (N. Y.) 587; Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119; Maddox v. White, 4 Md. 72. 59 Am. Dec. 67; Wertheimer v. Circuit Judge, 83 Mich. 56–62, 47 N. W. 47. There is nothing about the lease to raise the inference that the parties intended it to be subject to an implied condition that the defendant should procure a license. On the contrary, there is much to lead to the opposite conclusion. It is elaborate in all its details. It expresses the rights of the parties in the event of damage to or destruction of the property by fire or unavoidable casualty or its taking by eminent domain, and for the possible termination of the lease under these circumstances. There is also a stipulation as to its termination in the event of bankruptcy, insolvency or assignment for benefit of

that the covenants were mutual and independent. See, to the same effect, Leavitt v. Fletcher, 10 Allen (Mass.) 119 (1865), where the lessee's promise to pay rent was said to be independent of the lessor's promise to keep in repair, and the lessee was held entitled to damages for breach of the duty to repair, even though he had been ejected for failure to pay rent.

[28] The court here denied the contention of the defendant that the lease was void because it required the performance of an illegal act. It did not require the defendant to sell liquor.

creditors by the lessee, and by notice in writing at any time after January 31, 1910. The lease seems to be a studied effort to put into written phrase every consideration which was a part of their agreement. It was apparently an intelligent attempt to express their contract in such a way and with such fullness that nothing could be left uncertain. It must have been within the thought and contemplation of the parties that the lessee would be obliged to get a license not only once but each year of the term of the lease in order to make the required use of the premises. The lease binds the heirs, the assigns and legal representatives of both the lessor and the lessee. Yet it is plain that if a license had been granted to the lessee, it is such a personal privilege that had he died before its expiration, it would have been extinguished, and the liquor business could not have been carried on except under a new license. But by the express terms of the lease rent would still have been due. The inference is unavoidable that if it had been their intention to make this whole instrument dependent upon the granting of a license to the lessee, a clause to that end would not have been omitted.

The lessee has bound himself in unmistakable language to pay the rent without any qualification dependent upon his failure to obtain the necessary authority from public officers. Although this mischance renders it impossible for him to make the valuable use of the property which was contemplated, that was a contingency which ought to have been foreseen, and some anticipatory provision of partial or entire exoneration from liability inserted in the lease if such was the intention of the parties. There appears to be no more reason to imply such condition in this lease than to say that the burning of a building ends a lease of land and buildings. Yet nothing is better settled in the law of landlord and tenant than that in the absence of special stipulation, there is no abatement of rent in case a building upon leased premises is ruined by fire. Fowler v. Bott, 6 Mass. 63; Davis v. Alden, 2 Gray, 309; Roberts v. Lynn Ice Co., 187 Mass. 402–407, 73 N. E. 523. The reason for this rule is that an express and unqualified obligation voluntarily incurred ought to be enforced. Casualties not provided for in such a contract must be presumed to have been omitted intelligently and intentionally. The fact that by reason of the refusal of the public board to act favorably to the defendant, for which the landlord is in no wise responsible, the value of the estate to the tenant has been greatly diminished will not excuse him from performing what is required of him. Pratt v. Grafton Electric Co., 182 Mass. 180, 65 N. E. 63; Houston I. & B. Co. v. Keenan, 99 Tex. 79, 88 S. W. 197; Goodrum Tobacco Co. v. Potts-Thompson Liquor Co., 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498.

3. The testimony of conversation occurring before the execution of the lease between the plaintiff's agent and the defendant, so far as not wholly immaterial, was properly excluded, under the familiar rule that when parties have put their contract in writing in unambiguous

terms, previous or contemporaneous conversations or agreements respecting the same subject are inadmissible to vary its terms. The writing is conclusively presumed to express the contract. Com. Trust Co. v. Coveney, 200 Mass. 379, 86 N. E. 895; Buttrick Publishing Co. v. Fisher, 203 Mass. 122-132, 89 N. E. 189, 133 Am. St. Rep. 283; Perry v. J. L. Mott Iron Works, 207 Mass. 501, 93 N. E. 798; Jennings v. Puffer, 203 Mass. 534, 89 N. E. 1036.

4. The execution and delivery of the lease being admitted, there was no question of fact to be submitted to the jury. This is not a case where different inferences might have been drawn from undisputed facts. The only correct conclusion possible as matter of law was that the plaintiff was entitled to recover. Hence the verdict was rightly directed.

Exceptions overruled.

SECTION 3.—CONDITIONS SUBSEQUENT—PLEADING AND BURDEN OF PROOF OF CONDITIONS

CHAMBERS v. ATLAS INS. CO.

(Supreme Court of Errors of Connecticut, 1883. 51 Conn. 17, 50 Am. Rep. 1.)

PARDEE, J. The plaintiffs took from the defendant a policy of insurance against loss by fire, to be in force from January 1st to December 31st, 1881. On September 1st of that year the property covered by it was injured by fire. The plaintiffs instituted this suit for the recovery of damages. The defendant demurred and had judgment; the plaintiffs appeal.

The policy contains the following provisions:—"Payment of losses shall be due in sixty days after the proofs required by this company shall have been received at this office, and the loss shall have been satisfactorily ascertained and proved as required by the foregoing provisions of this policy. It is furthermore hereby expressly provided that no suit or action of any kind against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against this company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. * * * This policy is made and accepted upon the above express conditions; no part thereof can be waived except in writing signed by the secretary."

Proof of loss was made on September 14th, 1881. This suit was instituted on November 11th, 1882. It is the claim of the plaintiffs that they may institute their suit within the twelve months next after the expiration of sixty days from proof of loss, that is, next after November 14th, 1881. It is the claim of the defendant that they must institute it within the twelve months next after the fire.

This limitation is lawful and reasonable. In words in common use and of plain meaning an event is referred to as a starting point; that is, the destruction of, or injury to, the plaintiffs' property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure or subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of a suit.

The contract keeps the day upon which a fire shall occur entirely distinct from the day upon which the right to sue for indemnity accrues; each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended; and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement.

There is no error in the judgment complained of.

In this opinion the other judges concurred.[24]

NORTHWESTERN NAT. LIFE INS. CO. v. WARD.

(Supreme Court of Oklahoma, 1916. 56 Okl. 188, 155 Pac. 524.)

Action by Rebecker Ward against the Northwestern National Life Insurance Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

[24] A similar case is Semmes v. Hartford Ins. Co., 13 Wall. 158, 20 L. Ed. 490 (1871), where it was further held that the breaking out of the Civil War, making the bringing of a suit within the 12 months almost impossible, nullified the condition altogether. Observe that the condition subsequent, terminating the insurer's duty to pay, was the *not* bringing of the suit in 12 months. This was rendered inevitable, not impossible, by the war. The same was held in Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350 (1892), where land was conveyed on condition to revert to the grantor when no longer used as a cemetery, and later the Legislature forbade its use for that purpose.

In Colony State Bank v. Watson, 104 Kan. 3, 177 Pac. 544 (1919), a fidelity bond provided "that no claim should be payable that shall be filed with the company after the period of six months from the expiration of the service." Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 665, 64 Am. St. Rep. 180 (1897), held that the six months period begins with the making proof of loss and not with the occurrence of the loss itself. Conflicting cases are cited pro and con.

WILSON, C.[25] Defendant in error, as plaintiff, commenced this action against the plaintiff in error, as defendant, to recover on a certain life insurance policy written on the life of Coleman A. Ward, her husband. Plaintiff's petition was filed on March 16, 1909, and alleged that the insured, Coleman A. Ward, died on the 1st day of August, 1907, that being more than one year before the commencement of the action. One of the provisions of the policy sued on is that: "No suit at law or action in equity shall be brought to recover on this policy after one year from the actual date of the death of the insured, and if such suit be brought after such period of one year the lapse of time shall be a conclusive bar thereto, any statute or law to the contrary notwithstanding."

The defendant filed its answer to plaintiff's petition, in which it set out the above-quoted provision of the policy, alleged the same to have been a condition precedent to liability thereon, and pleaded the fact that the action was commenced more than one year after the actual death of the insured as one of its defenses. Upon defendant's answer being filed the plaintiff filed her reply thereto, in the second paragraph of which she admitted the clause referred to, and that the action was not commenced within the year, but alleged that during the year following the death of the insured, and up to within three months of the date of the filing of her suit, she and the defendant were attempting to negotiate a settlement; that the defendant, during said time, made different propositions of settlement and compromise, and by its long course of conduct and many assurances of settlement induced the plaintiff to believe that the matter would be settled and adjusted without litigation; that but for such conduct and assurances of settlement by the defendant the plaintiff would have instituted suit on the policy within the time limit of one year, and that by such conduct the defendant was estopped from availing itself of such provision of the policy, and wholly waived the same. Upon the reply being filed the defendant moved the court to strike therefrom all the allegations having reference to such waiver, for the reason that they were inconsistent with the allegations of plaintiff's petition and constituted a departure therefrom. This motion was overruled by the court, which action was excepted to at the time and constitutes one of the alleged errors assigned by the defendant in its petition in error and urged in its brief. * * *

Therefore, in consideration of the foregoing, the first question which arises for our decision is: Do the allegations of the second paragraph of plaintiff's reply constitute a departure from the allegations of her petition? A departure in pleading is defined in the seventh volume of the Standard Encyclopedia of Procedure, page 117, as: "The abandonment of one ground of action or defense asserted in one pleading and the substitution of some other ground or defense in a subsequent pleading."

[25] Part of the opinion is omitted.

Under the established practice of this state a departure in pleading by alleging in a reply facts materially inconsistent with the facts alleged in the petition will not be permitted when the objection is properly taken advantage of by a motion to strike the objectionable matter from the reply. St. Paul Fire & Marine Insurance Co. v. Mountain Park Stock Farm Co., 23 Okl. 79, 99 Pac. 647; Merchants' & Planters' Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996.

A reply filed in an action to recover on an insurance policy which admits the nonperformance of a condition precedent and sets up facts to show that the performance of such condition precedent had been waived, when the petition in the action had affirmatively alleged that such conditions precedent had been performed, is a departure from the cause of action alleged in the petition (St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., supra; Merchants' & Planters' Ins. Co. v. Marsh, supra), but a like manner of pleading does not constitute a departure when the conditions involved are what is known as "conditions subsequent" or promissory warranties. Western Reciprocal Underwriters' Exchange v. Coon, 38 Okl. 453, 134 Pac. 22.

A condition precedent of a contract is one which calls for the performance of some act or the happening of some event after the contract is entered into and upon the performance or happening of which its obligations are made to depend. R. C. L. title, Contracts, § 290, p. 904.[26]

A condition subsequent of a contract is one which follows the performance of the contract and operates to defeat or annul it upon the subsequent failure of either party to comply with the condition. R. C. L. title, Contracts, § 291, p. 906.

The stipulation or condition of the policy sued on in this case that an action could not be brought to recover on the policy after one year from the actual date of the death of the insured was one which, in its very nature, could not prevent the accrual of a right to recover on the policy, and consequently was not a condition precedent of the policy, but was a limitation on the beneficiary's right to sue at law or in equity after her right to do so had accrued, and was in the nature of a condition subsequent, although not strictly so, which did not defeat or annul the policy, but placed a time limitation on the right to enforce payment of any amount to come due on the same, in the absence of a waiver or estoppel.

The clause in question, which prohibited suit on the policy being brought after a year from the date of the death of the insured, was not averred in the petition or set out in the exhibit thereto, and it was not necessary for the plaintiff to do so to state a cause of action, for

[26] Conditions precedent and subsequent are distinguished in Adams v. Guyandotte Val. Ry. Co., 64 W. Va. 181, 61 S. E. 341 (1908).

while it was a part of the contract, it was a provision which in no way affected the liability, but related only to the enforcement. It was one wholly for the benefit of the insurer, and could be waived, and, if not waived and suit was brought to recover on the policy after the expiration of the time limit, that fact could have been and was pleaded in defense of the action, and the plaintiff's plea of facts, by way of reply, which tended to establish a waiver or an estoppel, was a proper plea and did not constitute a departure. Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

It is next urged that the waiver contended for by the plaintiff was not sufficient to bind the defendant and to constitute an excuse for noncompliance with that provision of the policy which limited the time within which suit could be commenced thereon to one year after the death. That was a harsh provision, inserted in the policy for the benefit of the insurance company and was one which unquestionably could be waived and it only remains to be determined whether the evidence offered was competent and sufficient to sustain the plaintiff's claim of estoppel or waiver.

The policy sued on contains this provision:

"No agent shall have power to alter or change in any way the terms of this contract, to extend credit, to waive forfeiture, or to write any thing upon the policy. No alteration or waiver of any of the terms of this policy shall be valid unless in writing and signed by the president and one other officer of the company, it being understood that the powers of the president herein stated shall not be delegated."

This, too, was a provision of the policy inserted by the insurer for its own benefit, and should not be given a broader or more extended meaning than should be reasonably attributed to the language used, and in determining the bearing it should have on the determination of this case we think the word "waiver" as it is therein used should not be given that broad and inclusive meaning synonymous with "estoppel," in which sense it is sometimes carelessly used in reports and by text-writers.

A distinction is drawn between waiver and estoppel when the two doctrines are discussed in their purely technical aspect. Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on, the right. An estoppel arises when the purpose or natural consequence of a person's representations or conduct is such as to induce another person to do or to omit some act, the doing or omission of which would turn out to his detriment and to the inducing party's benefit if the latter were permitted to take such advantage of it, and such an estoppel more often carries with it the implication of fraud than waiver does. Fairbanks, Morse & Co. v. Baskett, 98 Mo. App. 53, 71 S. W. 1113.

Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert a right which the law places on one as a consequence

of his own conduct which has resulted in injury or detriment to another. Libby v. Haley, 91 Me. 331, 39 Atl. 1004.

"Waiver belongs to the family of estoppel in a sense, and yet an estoppel * * * has connections that are no kin to waiver. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do."

"Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially." Kennedy v. Manry, 6 Ga. App. 816, 66 S. E. 29.[27] * * *

BENANTI v. DELAWARE INS. CO.

(Supreme Court of Errors of Connecticut, 1912. 86 Conn. 15, 84 Atl. 109, Ann. Cas. 1913D, 826.)

Action by Ciro Benanti against the Delaware Insurance Company. From a judgment for plaintiff, defendant appeals. Error, and new trial ordered.

WHEELER, J.[28] The answer sets up that the policy provided: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after the loss." And that "this entire policy * * * shall be void * * * if the interest of the insured be other than unconditional and sole ownership." And that the plaintiff both before and after the loss falsely stated the value of the stock which was the subject of the loss, and made other false statements as to the amount of the loss, all of which statements were known by the plaintiff to be false. And that the plaintiff did not truly state his interest when the insurance was effected; on the contrary, he stated that he was the sole and exclusive owner of the property insured when he had a partner who, as such, had a part ownership in the property insured.

The defendant complains of the charge of the court that the issue of false statements made subsequent to the issuance of the policy concerning the value of the property insured and the amount of the loss was an affirmative defense raised by the defendants upon whom rested the burden of proving it. The defendant insists that, as the burden of proving compliance with the terms and conditions of the policy was on the plaintiff, he assumed the burden of this issue as one of the

[27] The court then held that the conduct of the defendant's agents had been such as to constitute an estoppel. The condition subsequent was thus nullified. See, also, Hansell-Elcock Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 177 Ill. App. 500 (1913).

[28] Part of the opinion is omitted. The error found was on a matter not now under consideration.

had to prove, in order to recover, not only the issuance of the policies, but the death of Mr. Tesson prior to that of his wife. Failing in this, a recovery could not have been had. The same result follows, so far as the claim of her estate is concerned, from the submission. The burden of proving survivorship rests upon her administrator, since his claim is through her. Not being able to make such proof, the proceeds go, as the parties obviously intended they should when the policies were issued, to the representatives of the insured, who take under the policies and not under a survivorship. Dunn v. New Amsterdam Casualty Co., 141 App. Div. 478, 126 N. Y. Supp. 229; Fuller v. Linzee, 135 Mass. 468; Hildenbrandt v. Ames, 27 Tex. Civ. App. 377, 66 S. W. 128.

In the Massachusetts case the insurance company promised to pay the sum insured to the wife or assigns within 90 days after due notice and proof of death of the husband, and, in case she should die first, then the amount of the insurance should be payable to their children. The husband, wife, and all of the children were lost at sea, and there was no direct evidence as to which survived the other. The court held that the interest of the wife, under the policy, was contingent upon her surviving her husband, and that neither her assigns nor personal representatives could show any right to the insurance money, except upon proof of such survivorship.

In reaching the conclusion that the estate of Mrs. Tesson is not entitled to the proceeds of the policies, United States Casualty Co. v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641, has not escaped my attention. The decision in that case seems to have been put upon the ground that the beneficiary had a vested interest, subject to being divested by death prior to the insured, and for that reason the court held that the burden was upon the representatives of the insured to prove his survivorship. I have been unable to adopt the reasoning which led the court to that conclusion. There the policy was payable to the beneficiary, if living at the time of the death of the insured, who did not have the right to change the beneficiary. In this respect the case is distinguishable from the one now before us. Mrs. Tesson did not have a vested interest. All she had was an expectancy, subject to be defeated by the assured's designating another beneficiary or failure on her part to survive him. Lane v. De Mets, 59 Hun, 462, 13 N. Y. Supp. 347.

I am of the opinion that the judgment of the Appellate Division is right, and should be affirmed, with costs.[30]

[30] A case with some points in common is Cage v. Acton, 1 Ld. Raym. 515 (1700). Did Mr. Tesson's administrator have more than an "expectancy"? What facts would he have had to prove in a suit against the insurance company?

If this is a cov. not to sue, is not the
[ac]tion immediately destroyed, rather
[tha]n when the P brings suit.
If the agreement is a cond. subsequent
the rt. of P to sue is in existence, & not
[destroy]ed until suit — & if so how can D
[obli]gation be a mere moral obligation?

edness may be retired in installments; in the event that installments are paid interest is to be computed only on balance due.

"In view of the fact that W. G. MacDonald and Ernest N. Smith were equal partners in the MacDonald Sales Company up to the signing of this acknowledgment and attached agreement, and that W. G. MacDonald voluntarily agreed to release Ernest N. Smith from his partnership with attending possibilities of considerable financial loss, and agrees to pay Ernest N. Smith ultimately a sum considerably greater than his actual partnership interest, it is part and parcel of this acknowledgment of indebtedness that it shall be void should legal steps of any kind be taken to force payment, or should the indebtedness be transferred without the permission of W. G. MacDonald.

"[Signed] W. G. MacDonald.

"Accepted: [Signed] Ernest N. Smith."

We think the clause in this unusual document, that if suit should be brought to enforce collection the obligation shall be void, is a valid and enforceable covenant not to sue, and that the promise to pay the sum agreed constituted merely a moral obligation.[32]

The parties to this agreement were of age and of competent understanding; and as the contract appears to have been freely and voluntarily entered into, and is one that is not against public policy in any respect, it should be upheld. It would be a grave injustice to defendant to hold that an action would lie to enforce the payment of the amount mentioned in this instrument, when it appears that a part of the consideration for the promise to pay was the stipulation on the part of the payee that the obligation should be void if suit should be brought thereon. The right to enforce any obligation which the plaintiff may have had against the defendant was his, and he could do with it as he saw fit—could agree to relinquish it, or insist on preserving it. Whichever course plaintiff deemed proper to adopt was no matter of public concern, and affects no question of public policy. Gitler et al.

[31] Part of the opinion is omitted.

[32] There was a similar provision in Monroe v. Martin, 137 Ga. 262, 73 S. E. 341 (1911).

v. Russian Co. et al., 124 App. Div. 273, 108 N. Y. Supp. 793; 9 Cyc. 335; Richardson v. Thomas et al., 28 Ark. 387.[33] * * *

The judgment is affirmed.

GRAY v. GARDNER.

(Supreme Judicial Court of Massachusetts, 1821. 17 Mass. 188.)

Assumpsit on a written promise to pay the plaintiff $5,198.87, with the following condition annexed—viz., "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14th, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note unconditional had been given by the defendants, for the value of the oil estimated at 60 cents per gallon; and the note in suit was given to secure the residue of the price estimated at 85 cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on October 1st, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants, and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had, otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman for the defendants. As the evidence at the trial was contradictory, the question on whom the burden of proof rested became important. We hold that it was on the plaintiff. This was a condition precedent. Until it should happen, the promise did not take effect. On the non-occurrence of a certain contingent event, the promise was to be binding, and not otherwise. To entitle himself to enforce the promise, the plaintiff must show that the contingent event has not actually occurred. * * *

[33] The court here cited the following authorities: **Barnard v. Cushing**, 4 Metc. (Mass.) 230, 38 Am. Dec. 362 (1842); **Nelson v. Von Bonnhorst**, 29 Pa. 352 (1857); Greenhood, Public Policy, 469.

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event—viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them, and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance, and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.[34]

SMART v. HYDE.

(In the Court of Exchequer, 1841. 8 Mees. & W. 723, 151 Eng. Rep. 1231.)

Assumpsit. The declaration stated that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised the plaintiff that the mare was sound, and averred as a breach that the mare was not sound.

The defendant pleaded, amongst other pleas, thirdly, that, before the promise, he the defendant sent the mare to a certain place for the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following:—"Terms of private sale. A warranty of soundness, when given at this repository, will

[34] In Lovatt v. Hamilton, 5 M. & W. 639 (1839), a suit was brought for nondelivery of oil; the contract providing: "We have this day sold you 50 tons of palm oil, to arrive per Mansfield. * * * In case of nonarrival, or the vessel's not having so much in, * * * this contract to be void. The Mansfield arrived with only 7 tons. It was held that the arrival of the oil in the Mansfield was a condition precedent.

In Hotham v. East India Co., 1 T. R. 638 (1787), the defendant chartered plaintiff's ship and promised to load 900 tons freight, but no claim for short tonnage was to be allowed unless the shortage was first determined by arbitrators. It was held that the plaintiff's right of action "vested" on failure to load, and that defendant must allege and prove failure to arbitrate. Query: Was not the arbitration a condition subsequent to the defendant's duty to load but precedent to his duty to pay damages?

remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the mean time a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas; such certificate to set forth the cause, nature, or description of any alleged unsoundness;" of all which the plaintiff, before and at the time of making the said promise, had notice. The plea then averred, that the sale was a private sale, and that the promise, and the buying from the defendant, took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the parties; and although the time limited by the said rules for the delivery of the notice and certificate had elapsed before the commencement of this suit, yet no such notice or certificate had been delivered by or for the plaintiff, at the office of the said R. Lucas. Verification.

Special demurrer, assigning for causes, that the plea amounted to the general issue: that whereas the plaintiff had declared on an absolute and unqualified undertaking that the mare was sound, the defendant had not confessed and avoided the same, nor had directly denied such promise, but had stated matters for the purpose of qualifying such promise, and of shewing that the warranty remained in force only until twelve at noon of the day after the sale, and was a warranty against such unsoundness only as the plaintiff might discover within such period.

Crompton, in support of the demurrer. The plea attempts to shew that there was a qualification of the warranty, and that the contract was different from that declared upon, and it therefore amounts to the general issue. [PARKE, B. The warranty, as set out in the declaration, is an absolute one. The plea admits the statement in the declaration, but sets out new facts, for the purpose of shewing that there was no breach of contract; it does not deny a sale of the horse, or the warranty that the horse was sound.] On the warranty stated in the plea, there is to be no responsibility at all in certain cases, and that is a qualification which might have been given in evidence under the general issue. In Bywater v. Richardson (1 Ad. & Ell. 508; 3 Nev. & M. 748), where there was a similar condition, Littledale, J., treats it as a qualified warranty. [PARKE, B. You say that the contract which would have to be proved would vary from that stated in the declaration, and therefore might be given in evidence under the general issue.] Yes. In Latham v. Rutley (2 B. & Cr. 20; 3 D. & R. 211), the declaration stated a contract to carry goods from London, and deliver them safely at Dover; the contract proved was to carry and deliver safely, fire and robbery excepted; and it was held to be a variance. Here the contract stated in the declaration is, that the defendant will be generally answerable for the unsoundness of the mare; but the contract stated in the plea is, that he will not be answerable at all, if the act be not done

within a given time. In Latham v. Rutley, Abbott, C. J., says, "the result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated." [PARKE, B. The contract there stated was a contract to carry the goods safely, not a limited contract, if the goods were not affected by fire or robbery. Here the contract alleged is, that the defendant undertook that the mare was sound: that he is to be responsible if unsound is merely an inference from that.] Where a condition merely limits the amount of damages, it is true that it need not be stated in the declaration; Clarke v. Gray (6 East, 564); but where the contract, as in this case, is qualified by conditions, it is a variance to state it as absolute in its terms. In Howell v. Richards (11 East, 633), it was held, that, if a covenant for quiet enjoyment be restrained by any qualifying context, it must be stated, and if not, that the defendant might take advantage of it under the plea of the general issue, as being an untrue statement of the deed in substance and effect. Tempany v. Burnaud (4 Campb. 20), and Browne v. Knill (2 Brod. & B. 395), are authorities to the same effect. In Whittaker v. Mason (2 Bing. N. C. 359; 2 Scott, 567), the plaintiff declared upon a contract of sale of certain books; the defendant pleaded that the books were sold subject and according to the usage and course of dealing observed among booksellers in London; to which the plaintiffs replied de injuria; and on demurrer to the replication, it was held that the plea in effect amounted to the general issue. [PARKE, B. There the plea set up a different contract; here the plea does not alter the consideration or the promise.] The omission to state the qualification entirely alters the legal effect of the contract. The case is distinguishable from Syms v. Chaplin (5 Adol. & Ell. 634; 1 Nev. & P. 129), which was an action against a coach proprietor for the loss of a parcel above the value of £10; for the omission to declare the value of the parcel did not qualify the nature of the contract, but was a matter which avoided it, and therefore required to be specially pleaded. The general rule is, that contracts are entire, and it is only an exception to that rule, that where a part of the contract does not affect the rest which is declared upon, such part need not be stated.

J. Henderson, contra. The plea is good. The truth of the facts stated in it is consistent with the contract alleged in the declaration. The defendant says, True it is I promised that the horse was sound, and it turned out to be unsound, but there were collateral circumstances which prevented your right to sue from arising. Where, indeed, the plea discloses a contract different from that alleged in the declaration, it is bad, as amounting to the general issue. The cases which have arisen since the New Rules on indebitatus assumpsit, shew that where, if the plea be true, the declaration is not, in that case the plea is open to demurrer, as amounting to the general issue. In Latham

v. Rutley, the promise alleged was absolute, but the contract proved was a qualified one, and therefore did not support the promise declared on. But where there is an absolute promise, and the defence is that its efficacy has been destroyed by matters occurring subsequently, those matters must be specially pleaded. In Hotham v. The East India Company (1 T. R. 638), where there was a covenant in a charter-party, that no claim for short tonnage should be allowed, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights; it was held, that this not being a condition precedent to the plaintiff's right to recover for short tonnage, but a matter of defence to be taken advantage of by the defendants, the not averring performance was no ground for arresting the judgment. That case resembles the present. It was not necessary for the plaintiff to aver performance of the condition annexed to this warranty; it is sufficient for him to allege the contract and breach. The fact on which the defendant relies is collateral to the original contract, and therefore ought to be pleaded specially.

Crompton, in reply. The contract as set out in the plea affects the consideration stated in the declaration, for the plaintiff is bound to give notice of the unsoundness before a specified time, in order to render it an absolute warranty. Hotham v. East India Co. turns on the distinction between covenant and assumpsit, and on the rule which is peculiar to the former, that a party need not set out more covenants than those of the breach of which he complains; but that is not applicable to assumpsit. The condition which it is not requisite to state is such a one as does not qualify the original promise. The narrow point is—does this plea affect the liability which the defendant is under, upon the contract alleged in the declaration? It is submitted that it does; it shews that he is not absolutely bound; whereas on the contract as stated in the declaration he is so. Latham v. Rutley is in point. [PARKE, B. In that case there was no promise to carry safely at all events; here there was an absolute warranty of soundness.]

PARKE, B. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The declaration states, that, in consideration that the plaintiff would buy a mare of the defendant, the defendant promised that she was sound. Then there is a special plea, which states, that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which provided that the warranty of soundness was to remain in force up to a certain time only, unless notice of the unsoundness was in the mean time given; and it goes on to aver, that the sale took place subject to those rules, and that no notice was delivered within the time specified. It appears to me that such plea is not bad as amounting to the general issue. It admits the contract and the promise, but shews it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that

the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration; but upon that point I give no opinion. It is enough to say, that every word of this plea is consistent with the contract stated in the declaration.

ALDERSON, B. The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract, as alleged in the declaration.

GURNEY, B., and ROLFE, B., concurred.

Judgment for the defendant.[35]

RAY v. THOMPSON.

(Supreme Judicial Court of Massachusetts, 1853. 12 Cush. 281, 59 Am. Dec. 187.)

Assumpsit for the price of a horse sold to the defendant. The defence was that the horse was sold under a conditional contract, with a right to return him within a specified time, if not satisfactory to the defendant, and that the defendant did so return him. At the trial in the court of common pleas before Mellen, J., the plaintiff offered evidence tending to prove that during the time limited by the contract for the return of the horse, and while he was in the defendant's possession, the defendant misused and abused the horse, whereby he was materially injured and lessened in value, and that the plaintiff did not accept him in return; which evidence, the presiding judge, on objection by the defendant, rejected, and, the verdict being for the defendant, the plaintiff alleged exceptions to the ruling.

PER CURIAM. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition, he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defend-

[35] See, also, Head v. Tattersall, L. R. 7 Ex. 7, 25 L. T. 631, 41 L. J. Ex. 4 (1871).

ant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an indebitatus assumpsit, without setting out the conditional contract. Moss v. Sweet, 3 Eng. Law & Eq. 311, 16 Adol. & E. 493.

New trial ordered.[36]

[36] A condition subsequent (like conditions precedent) is not infrequently a voluntary act of the party on whom the contract duty rests. He then has a power to terminate such duty. This power may itself be conditional, but need not be. Redington v. Hartford, 85 N. J. Law, 704, 90 Atl. 284 (1914), promise to pay $60,000 in 10 annual installments, with the privilege of an extension on any installment by asking for it; Golden Cycle Min. Co. v. Rapson Coal. Min. Co., 188 Fed. 179, 112 C. C. A. 95 (1911), bilateral contract for all coal buyer "may use" on its mine for 3 years, with power to terminate by 90 days notice in case buyer should itself acquire a coal mine; Chicago Fire Brick Co. v. General Roofing Mfg. Co. 133 Ill. App. 269 (1907), power "to cancel this order not later than next Tuesday in case we find that we are unable to set a satisfactory carpenter; Farmers' Handy Wagon Co. v. Newcomb, 192 Mich. 634, 159 N. W. 152 (1916), the notice of termination is not operative until it is received; Fritz v. Pennsylvania Fire Ins. Co., 85 N. J. Law, 171, 88 Atl. 1065, 50 L. R. A. (N. S.) 35 (1913), same; Fraenkel v. Friedmann, 199 N. Y. 351, 92 N. E. 666 (1910); Strander v. McIntosh, 169 Wis. 403, 172 N. W. 717 (1919). See, also, New Zealand Shipping Co. v. Société de France, [1919] A. C. 1 (1918); Mackey Wall Plaster Co. v. United States Gypsum Co. (D. C.) 244 Fed. 275 (1917); International Filter Co. v. La Grange Ice & Fuel Co., 22 Ga. App. 167, 95 S. E. 736 (1918), option to buy to become absolute unless lessee gave notice to the contrary. Observe constantly that the fact operating as a condition may be subsequent to the primary contractual obligation while its nonoccurrence may be precedent to the secondary obligation or duty to pay damages.

Cases above should be compared with those on "Parol Exoneration and Rescission," post, pp. 948–957, where the discharge is by virtue of a new agreement and not by exercise of a power reserved in the old agreement.

The distinction between a condition precedent and a condition subsequent, as well as that between a condition and a promise or covenant, has been largely dealt with in the law of property. There too the condition is an operative fact, but the legal relations to which it is precedent or subsequent in time are those which constitute ownership or "title." (The analysis of these relations should be made in the course on property.) If the fact is a condition precedent, it must exist before title will vest in the grantee; if it is a condition subsequent, upon its coming into existence a title that has already vested in the grantee will be devested.

In Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac, 290 Ill. 133, 124 N. E. 793, 7 A. L. R. 1422 (1919), a church lot was conveyed "on condition that the said church be and remain connected with the Hauges Lutheran Synod." Disconnection with the Synod was held to be a condition subsequent, and the clause in the conveyance was not a mere covenant. The court said, "It must be conceded that the words 'on condition,' in a deed, are apt words to create a condition; yet such words have often been construed, in view of the context, as creating a covenant rather than a condition. * * * It has been held that a covenant or condition may be created by the same words. The chief distinction between a condition subsequent and a covenant pertains to the remedy in the event of a breach, which in the former subjects the estate to a forfeiture and in the latter is merely a ground for recovery of damages. * * * A covenant is an agreement duly made between the parties to do or not to do a particular act."

Conditions subsequent and covenants are distinguished in Northwestern University v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13 (1919); Liepenbrock v. Luiz, 159 Cal. 716, 115 Pac. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084 (1911); Gunsenhiser v. Binder, 206 Mass. 434, 92 N. E. 705

WILMINGTON & R. R. CO. v. ROBESON.

(Supreme Court of North Carolina, 1845. 27 N. C. 391.)

The defendant subscribed for 30 shares in the plaintiff company. The subscription paper recited that the State had promised to take two-fifths of the stock, on condition that the other three-fifths should be subscribed by private citizens, and each subscriber's promise was limited as follows: "Provided, however, that if a sufficient subscription is not obtained, to secure the subscription of the State, within twelve months from this date, each of us may, if we think proper, withdraw his subscription, and be entitled to receive back whatever sum may have been advanced thereon, within twelve months from this time—February 1st, 1837." Between February, 1837, and February, 1838, the defendant paid several instalments on his stock, and one in March, 1838, and was, from time to time, notified to pay other instalments, which he neglected to do, and this suit was commenced in 1843, to recover the balance due on his subscription. The writ issued the 30th day of March, 1843. The plaintiffs produced no evidence to show, that, within the twelve months, as specified in the articles of subscription, three-fifths of the stock had been taken by private subscribers, so as to insure the taking by the State of two-fifths.

The defendant asked that verdict be directed in his favor.

NASH, J.[37] This is not a case of pleading, but its rules will throw much light upon the question submitted to our decision. The instruction prayed for is based upon the supposition, that the procuring the three-fifths subscription within the twelve months, was a condition precedent to the defendant's being bound to pay for the stock he took. If it was, a condition precedent, then the plaintiffs were bound to set it forth in the declaration, and aver its fulfillment, or show some cause for its non-performance. 1 Chit. Pl. 310. It is true that in every action upon a contract, whether under seal or by parol, the contract must be substantially set forth, that is, it is sufficient to show the substance and legal effect. 1 Chitty on Pleading; Lent and another v. Padelford, 10 Mass. 230, 6 Am. Dec. 119. Nor is it requisite to set forth more of the contract than the portion, the breach of which is complained of. 1 Chit. on Pleading, 299; 4 Taun. 285; Tempest v. Ranling, 13 East, 18. In the latter case, Lord Ellenborough says, "It is enough to state that part truly, which applies to the breach complained of, if that, which is omitted, do not qualify that which is stated." Howell against Richards, 11 East, 638, is to the same effect. If the portion of the contract omitted is important to the plaintiff's case,

(1910); Cavanagh v. Iowa Beer Co., 136 Iowa, 236, 113 N. W. 856 (1907); Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 350 (1892); Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732 (1881). See, further, Anson, Contracts (Corbin's Ed.) §§ 358, 359.

[37] The concurring opinion of Ruffin, C. J., and part of the discussion of the supposed differences between a proviso and an exception are omitted.

the defendant may take advantage of it under the general issue, as a fatal variance. The part of the contract, here omitted, neither qualifies the contract, nor discharges, of itself, the liability of the defendant. The contract is not, that the failure to secure the State's subscription of two-fifths should make void the defendant's liability; but it gives him the right, if he choose to exercise it, of discharging himself by withdrawing the subscription within a limited time, and demanding the money he may have paid. The failure of the State's subscription does not discharge him; he must discharge himself. The error consists in not distinguishing between a proviso and an exception. A proviso is properly the statement of something extrinsic of the subject matter of the contract, which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance. An exception is the taking some part of the subject matter of the contract out of it. A proviso need not be stated in the declaration, for this, says Mr. Chitty, ought to come from the other side. 1 Saunders, 334, n. 2; Sir Richard Hotham and others v. East India Co., 1 Term R. 645. In the latter case, Ashurst, Justice, in speaking of the circumstance which was omitted in the declaration, observes, "This, therefore, being a circumstance, the omission of which was to defeat the plaintiff's right of action, once vested, whether called by the name of a proviso, by way of a defeasance, or a condition subsequent, it must in its nature be a matter of defence, and ought to be shown by the defendants." [38] How stands this case? The defendant had subscribed for thirty shares of stock, and had neglected to pay up the instalments as they fell due. This was admitted. Here then was a breach on his part, and a right of action vested in the plaintiffs. How was this vested right to be divested? By its being made to appear that the subscription of the State had not been secured in the required time. And, according to Justice Ashurst, it was either a proviso or condition subsequent, to be shewn by the defendant, and could not be a condition precedent. * * * We are of opinion, then, that the court could not have given the instruction requested, because procuring the subscription of the State was not a condition precedent to the liability of the defendant; and, therefore, he was not discharged, because it was not secured in the time specified. It was a condition subsequent, or rather a proviso, the benefit of which could have been claimed by the defendant, if he had thought it his interest to do so, and availed himself of the privilege in proper time.

The proviso is, if the subscription of the State is not secured in twelve months from the 1st of February, 1837, then, not that the defendant's subscription shall be null and void, but that the defendant shall be at liberty to withdraw his subscription within the same time. The charge of his Honor upon this part of the case, we think erroneous, and, if it was or could be, under the circumstances, injurious to

[38] Accord: Ætna Indemnity Co. v. George A. Fuller Co., 111 Md. 321, 342, 73 Atl. 738, 74 Atl. 369 (1909).

the defendant, we should feel ourselves constrained to grant him a new trial. The company, the plaintiffs, had until the close of the last day of the twelve months, to secure the subscription of the State, and although, by the terms of his contract, the defendant was called on to withdraw his subscription within the same period, yet the law will allow him a reasonable time, after the lapse of the year, to avail himself of it. He could not immediately ascertain the fact. One month after the expiration of the time, to-wit, in March, 1838, he paid up another instalment. Five years thereafter, he is sued for the instalments still due, and in all this time he has not exercised the right he had reserved to himself, of withdrawing his subscription and demanding of the company the money he had previously paid, nor has he yet done it; but, from anything disclosed in the case, is now in the enjoyment and exercise of all the rights and privileges of a stockholder. The proviso was inserted for his benefit; there is nothing in it compulsory on him. He was at liberty to take advantage of it, if he chose. He has not so done. He has made his election to retain his stock, as being his interest, and comes now too late, to ask to be discharged.

ELLIOTT v. BLAKE.

(In the King's Bench, 1662. 1 Lev. 88.)

Covenant and declares, That the defendant covenanted to deliver to him 1500 measures of saltpetre before such a day, and that he had not done it; the defendant demands oyer of the deed, wherein the covenant was as before said. Provided, That if any mischance happen by fire or water to disable him, that he should be excused; and pleads that he was disabled by accident of fire. Issue thereupon and verdict for the plaintiff. And it was moved in arrest of judgment, that there was a variance between the deed on which he declared and that produced in Court; for the one is absolute and the other conditional. But judgment was given for the plaintiff, for he need not declare on more of the deed than the covenant, and it is on the defendant's part to show the proviso, which goes by way of defeasance of the covenants.[39]

[39] In accord: Wheeler v. Bavidge, 9 Ex. 668 (1854), charter party to deliver, the act of God, the Queen's enemies, fire, etc., always excepted; Fike v. Stratton, 174 Ala. 541, 56 South. 929 (1911), contract to complete work by a certain date, "delays beyond contractor's control excepted;" the burden of alleging and proving such excepted causes was held to be upon the defendant because "peculiarly within his knowledge."

It is sometimes provided by statute that the defendant must specifically allege the particular conditions precedent the existence of which he means to contest. See Board of Education of City of Wildwood v. Richmond Const. Co., 92 N. J. Law, 496, 105 Atl. 220 (1918); Thomas v. Walden, 57 Fla. 234, 48 South. 746 (1909); Delaware River Quarry & Construction Co. v. Board of Chosen Freeholders of Hunterdon County, 86 N. J. Law, 294, 90 Atl. 1023 (1914).

See, in general, Kendall v. Brownson, 47 N. H. 186, 196 (1866).

CADWELL v. BLAKE.

(Supreme Judicial Court of Massachusetts, 1856. 6 Gray, 402.)

Action of contract, commenced on the 5th of April, 1854, by the assignees in insolvency of David Ames and John Ames, upon an agreement in writing made by the latter with the defendants on the 26th of January, 1853.

The following are the material parts of that agreement:

"The said D. & J. Ames hereby sell to the said Blake & Valentine all the right, title and interest which the said D. & J. Ames have in the machinery and fixtures now at their paper mill at Chicopee Falls. They also agree that said Blake & Valentine shall have the right which said D. & J. Ames have to manufacture white paper, made from straw and other materials; which right has been assigned to said D. & J. Ames by Jean Theodore Coupier and Marie Amadee Charles Millier, and as described in the application of said D. & J. Ames for letters patent of the United States. They also agree to instruct the said Blake & Valentine fully in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and to communicate to them from time to time all the improvements which they, the said D. & J. Ames, shall make in said art, and give them the benefit thereof; which instructions the said Blake & Valentine are to keep secret, so far as secrecy can be preserved consistently with their business.

"The said Blake & Valentine are to pay for said machinery and fixtures four thousand dollars, in four equal annual payments, with annual interest from date. Payment is to be made in paper, manufactured according to the process above mentioned, at the market price of such paper at the time when each payment shall become due, the paper to be delivered at the Western Railroad freight depot in Springfield. They also agree to take possession of said machinery and fixtures by the fourth of July next, and proceed as soon as may be with the manufacture; and to pay to said D. & J. Ames, for the right to manufacture said white paper," a certain share of the profits, if the profits exceed two cents a pound; otherwise, nothing.

"If any dispute or disagreement shall arise between the parties in regard to the estimate of the profits, it shall be referred to three disinterested men, one to be chosen by each party, and the third by the two referees, and the award shall be binding on the parties."

"If the said D. & J. Ames shall, upon request, refuse to teach the said Blake & Valentine the art of making said paper as above mentioned, they shall forfeit, as liquidated damages, distinct from all the other liabilities under this contract, the sum of four thousand dollars."

The declaration set forth the agreement, and averred that David Ames and John Ames delivered said machinery and fixtures to the defendants according to the terms thereof, and the defendants accepted

and received the same; that the defendants owed the plaintiffs therefor the sum of one thousand dollars with interest, and also the interest due on four thousand dollars, as therein stipulated; and that the plaintiffs had been ready to receive the paper therein specified, yet the defendants had not delivered the same, but had refused so to do.

Answer, 1st. That the defendants entered into said agreement, upon the consideration and for the purpose of securing the right to manufacture white paper from straw by the process therein named, and of obtaining the necessary instructions in said art and mystery; that D. & J. Ames and the plaintiffs had failed to fulfill their contract in this behalf, and had neglected and refused to secure to the defendants the right to manufacture according to said process, and to instruct them in the art and mystery thereof although repeatedly requested by the defendants so to do, and had prevented the defendants from using said process. 2d. That there had been a failure of consideration for the contract on their part; that said machinery and fixtures were of no value to them; without said instructions and said right to manufacture; and they had offered to return them. 3d. That D. & J. Ames were not the proprietors of said right to manufacture, and had not at the time, nor obtained since, any effectual assignment thereof, or any right to contract with the defendants therefor; or else had failed to avail themselves of such assignment, and had abandoned, lost, and suffered themselves to be deprived of the right to use said process, and of the patent issued therefor; whereby their agreement to give the defendants such right had been defeated, and the defendants prevented from using said process and from manufacturing said paper. 4th. That the defendants by such failure to secure to them said right and to give them such instructions, had been prevented from fulfilling the agreement on their part. 5th. That D. & J. Ames were requested to teach the defendants the art and mystery of making said paper according to said process, but neglected and refused so to do, and thereby incurred a forfeiture under said agreement of the sum of four thousand dollars as liquidated damages; which the defendants claimed the right to apply to offset and cancel all claims of the plaintiffs under the agreement.

At the trial in this court, the defendants admitted the execution of the agreement, and the delivery to them of possession of the paper mill, machinery and fixtures about the 1st of March, 1853. The plaintiffs then rested their case.

The defendants contended that the plaintiffs were not entitled to recover, without proving "1st. That D. & J. Ames had such an assignment of the right as their contract states; 2d. That they had availed themselves of it, and made it effectual to secure to themselves the patent, or at least a right to manufacture under it for themselves and the defendants; 3d. That they had conveyed or secured to the defendants the right to use the process; 4th. That they had instructed the defendants in the art of making said paper."

The plaintiffs denied that it was necessary for them to offer any further evidence, or that any of the matters alleged in the answer constituted a good defence to the action.

Bigelow, J., ruled that the plaintiffs had made out a prima facie case, and would be entitled to a verdict, unless the defendants went forward and offered evidence of the matters set out in their answers; and reported the case for the determination of the full court, upon these two questions: 1st. The correctness of his ruling as to the sufficiency of the case as presented by the plaintiffs; 2d. The sufficiency of the grounds of defence set forth in the answer; a new trial to be had if, upon either of these points, the opinion of the court should be in favor of the defendants.

The arguments and decision upon this report were had at the last September term.

SHAW, C. J. No question arises in the present case as to the pleading; the declaration is perhaps sufficient, under the new practice act, to enable the plaintiffs to recover, inasmuch as it does briefly aver the performance on the part of D. & J. Ames, and the plaintiffs, their assignees in insolvency, of all things on their part, by the terms of the contract, to be performed. But it is a question of proof; did the plaintiffs offer sufficient proof of performance on their part, to enable them to recover? This again depends on the construction of the contract, and whether, according to its true interpretation, the stipulation for the payment of $4,000 and interest, in paper to be manufactured by the process contemplated by the contract, was independent, and to be performed absolutely by such payment; or was it dependent and conditional, and to be performed only on condition that certain other things should be first performed on the part of the said D. & J. Ames?

The contract consists of several articles on both sides, is expressed in terms somewhat brief, and it is not easy to gather from it the full and clear intent of the parties. The great purpose of the contract seems to have been for D. & J. Ames to transfer to the defendants a right, a useful and beneficial right, to manufacture and sell white paper in so cheap a manner and in such quantities as to yield a profit, which right D. & J. Ames had acquired so far as it could be acquired by assignment before patent, and of which they were expecting to become the patentees by a patent to be regularly issued by the competent authority of the United States. The particular right is not otherwise specifically described and identified than as a right which had been assigned to them by Coupier & Millier, and as described in the application of D. & J. Ames for letters patent. It manifestly looked to the expectation that D. & J. Ames were to be the patentees, because they were the assignees and had applied for a patent, and because they stipulated to extend to the defendants all the benefit of the improvements which they should make.

In construing a mutual agreement, in which there are several stip-

ulations on both sides, the question, whether one is absolute and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done, to decide correctly the order in which they are to be done.

It is contended that, as the machinery and fixtures were to become the property of the defendants at once, at a fixed price of $4,000, payable at a certain time, they were to pay for them at all events, whether the manufacture of paper by the new process should go on or not. There would be more force in this argument if it appeared that the fixtures and machinery thus sold were adapted to the general purposes of paper-making, and had a market value, independently of the new process, and especially if the time for making the payment had been fixed at a time before the acts to be done on the other side.

But in this case, for aught that appears, the machinery and fixtures would be of little value except for manufacturing by the new process. And possibly the defendants may have stipulated to pay a sum greater than their value for these articles, in consideration of the advantages expected from the whole contract.

The stipulation, that the price of the machinery and fixtures should be paid at a fixed time, affords no criterion for determining that the stipulation is independent; because there was ample time, before the first payment, for D. & J. Ames to transfer the machinery, afford all the necessary instruction, execute and deliver a license conveying to the purchasers a right to manufacture, and do all other acts relied on as conditions precedent.

But the strong ground on which the court are of opinion that these acts of D. & J. Ames were conditions precedent is, that these payments were to be made by a delivery of paper, to be manufactured by this new process from straw and other materials, at the then market value. This process is recognized and represented in the contract itself as an art and mystery, to be kept secret as far as practicable, not yet patented, and of which, therefore, there was no specification in the patent office, from which the process could be learned. The machinery sold may have been that of the inventors, adapted to the making of paper by this process.

It seems to us that these two stipulations—to deliver the machinery, and to give the instruction—stand upon the same footing, because both were necessary to the making of paper by this process. The stipulation to instruct in the art and mystery was absolute and affirmative, like that to deliver the machinery, not dependent on request. There was a distinct stipulation, that if they should refuse to instruct, on request, they should be liable to liquidated damages; but it has a distinct object, and does not supersede the other.

Without instruction in this art and mystery, the defendants might

not know the method of preparing the straw and using the machinery; without these, this kind of paper could not be made, it could have no market price, the defendants could not make it, and of course could not deliver it.

When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment, sufficiently distant to have the work done in the meantime. Suppose B agrees to build, at his own shop, a carriage for A, of A's materials; A stipulates seasonably to furnish materials, and to pay B in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A is a condition precedent. Without it, B cannot perform. He must build it of A's materials. Even building it of his own would not be a performance. B has his shop, his tools and his workmen all ready, but A does not furnish the materials. If B sues A, averring readiness to perform, he may recover. But if A sues B for not building the carriage, it would be a good answer that A himself had not furnished the materials; because, whatever else the contract may contain, this is in its nature a condition precedent.

The court are therefore of opinion that the plaintiffs, as a part of their own case, should not only have averred, but should have offered proof at the trial, that D. & J. Ames gave full and ample and reasonable instruction to the defendants, or—which is of the same legal effect, in matters of contract for doing specific acts—that they tendered and offered such instruction, in regard to the preparation of the material and the use of the machinery, to enable them to make the paper in the manner and of the material proposed, which the defendants declined receiving.

The court are also inclined to the opinion that the legal effect of the stipulation of D. & J. Ames with the defendants was, that they should have a full right to manufacture paper, by the process therein indicated, whatever the nature of the right then was or might become by the obtaining of a patent, which it appears by the contract they expected to obtain, or in failure of such patent, such right as they should hold from the assignment to them by Coupier & Millier. They were embarking in a new and expensive enterprise; and should another person obtain a patent, which might happen, they might be placed in a situation in which they could not carry on the manufacture without infringing the right of another. If the patent was obtained by D. & J. Ames, it seems to us that they should have tendered to the defendants an assignment of the patent, or at least a right under it; or that, if the application was still pending, or had been denied, and there was no patent, that fact should have been averred. But we have not placed our decision ordering a new trial mainly on

that ground; but throw out the suggestion, for the consideration of parties, should a new trial be had.

But there is another ground upon which the court are of opinion that a new trial ought to be had. Perhaps both points reserved in the report depend substantially upon the same question of construction of this contract, namely, whether any of the stipulations of D. & J. Ames constituted conditions precedent; because, if they did, and so far as they did, and the defendants have averred the performance of them, they would, if proved by the defendants, as they offered to do, be a good defence. Upon looking at the answer, we think that, even if the plaintiffs had made out a prima facie case, several of the facts stated in the answer would have been competent for the defendants to prove; and, if proved, would have been available in defence, either by way of bar, or in reduction of damages.

New trial ordered.

The plaintiffs then amended their declaration by inserting an averment "that the said D. & J. Ames instructed the defendants in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and offered them further instructions if they should need it, and full examination of the premises of the said D. & J. Ames, and permission to take dimensions, and to be shown the use and application of whatever they might desire to inquire about, and to give them all needful information which they should require."

The defendants demurred to the declaration, for that it did not state a legal cause of action, substantially in accordance with the rules contained in the St. of 1852, c. 312; "because it does not allege that the plaintiffs, or said D. & J. Ames, had secured to the defendants the right to manufacture paper by the process named in said contract, nor that the defendants have the right to manufacture according to the terms of the contract."

SHAW, C. J. The court are of opinion that this demurrer is well taken and must be sustained. It is true there is no warranty, in terms, of a right to manufacture paper by the process referred to; but we think such a warranty and condition results from the provisions of the contract, the whole of which must be taken together. D. & J. Ames agree that the defendants shall have the right to manufacture white paper from straw and other materials, which right has been assigned to D. & J. Ames by Coupier & Millier. It is not merely hypothetical, such right as they have, if they have any; but an express stipulation that they shall have the right, and an affirmative averment of the fact, that it has been assigned to them, so that they have the power to assure it, with an intimation that the assignment is of such a character as to induce them to apply for a patent, which, if granted, would secure to them an exclusive right. If they had such an assignment, whether they obtained a patent or not, it would pre-

defendants were entitled to act upon the assumption that the plaintiff meant what he said, and they were not required to go through the idle ceremony of making a physical tender. They did all that they were obliged to do when, having the means of getting the car, they "were ready and willing to deliver the Lozier 6 automobile at the time specified for delivery in said contract." Adams v. Turner, 73 Conn. 38, 46, 46 Atl. 247; Smith v. Lewis, 26 Conn. 110, 118. There has been no failure on the part of the defendants to deliver this car, and the judgment, so far as the action upon the note was concerned, should have been for the defendants.[42]

The remaining reasons of appeal that require consideration are based upon the measure of damages for the defendants adopted by the trial court. In count 1 of the complaint the plaintiff seeks to recover for the defendants' breach of their contract, and in count 2 upon the $700 note. The defendants alleged under their special defense to both counts and as a basis of recovery on their counterclaim, that the plaintiff had notified them that he would not accept the car contracted for, if tendered, and, further, that they had lost in consequence of this breach of contract by the plaintiff seven hundred dollars. The defendants, if entitled to recover under their counterclaim, were entitled to recover under our common law such sum as would put them, so far as it can be done by money, in the same position they would have been in if the contract had been performed.

In the absence of special circumstances requiring a different rule, the damages recoverable by a vendor for refusal to take goods contracted for is the difference at the time and place of delivery, between the contract price and the market price. Jordan Marsh & Co. v. Patterson et al., 67 Conn. 480, 35 Atl. 521. But we recognize that this rule is not an unbending one, that the circumstances may require its modification in order to effectuate the cardinal purpose, "just compensation for the loss incurred." And the loss must be such as "may reasonably be supposed to have been in the contemplation of the par-

[42] That a repudiation suspends the other party's duty of further performance, see Wetkopsky v. New Haven Gas Light Co., 90 Conn. 286, 96 Atl. 950 (1916); Roach v. Harty Coal Co., 79 W. Va. 793, 92 S. E. 458 (1917); General Bill-Posting Co. v. Atkinson, [1909] A. C. 118 (1908); Pearce v. Alward, 163 Mich. 313, 128 N. W. 210 (1910).

But in order to privilege the other to quit, the repudiation must be definite and go to the essence of the contract. Ackley & Co. v. Hunter-Benn & Co.'s Co., 166 Ala. 295, 51 South. 964 (1910), "it is not every disagreement as to the terms of a contract which authorizes one of the parties thereto to declare the contract annulled": Wheeler v. New Brunswick & C. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341 (1885), a letter claiming that by "ton" was meant 2,000 pounds instead of 2,240 was no repudiation—four justices dissenting; Hardeman-King Lumber Co. v. Hampton Bros., 104 Tex. 585, 142 S. W. 867 (1912), a statement that one is going to quit, while at the same time continuing to work, is no repudiation; Bannister v. Victoria Coal & Coke Co., 63 W. Va. 502, 61 S. E. 338 (1908); Bare v. Victoria Coal & Coke Co., 73 W. Va. 632, 80 S. E. 941 (1914); Curtis v. Sexton, 142 Mo. App. 179, 125 S. W. 806 (1910); Consorzio, etc., v. Northumberland Ship. Co., 121 L. T. 628 (1919).

ties at the time they made the contract." Jordan Marsh & Co. v. Patterson et al., 67 Conn. 480, 35 Atl. 521. Section 64 of the Sales Act (Public Acts 1907, c. 212) reaffirms our rule for measuring damages in case of breach of a contract of sale by the contractee or vendee.

The market price to these defendants of a Lozier 6 was undoubtedly less than its selling price, since they were selling agents who purchased, and took title to the cars they disposed of. Section 64 provides as a measure of damages the difference between the contract price and the market price "in the absence of special circumstances showing proximate damage of a greater amount." The circumstance that these defendants were selling agents and purchased cars at a rate lower than the market price of the cars to the public made the ordinary measure of damages inadequate. The defendants lost by the plaintiff's breach the difference between the contract price and what the car ready for physical delivery to the plaintiff would have cost them, which would have been the purchase price of the car plus the expense, if any, of delivery and of making it ready for delivery. This is the application to the facts of this case of section 64. It requires the person who has failed to keep his contract of sale to pay the loss caused to the contractor who has kept his contract. Lee v. Harris, 85 Conn. 212, 82 Atl. 186. The defendants, as vendors or contractors, were entitled to show what a Lozier 6 car would have cost them in the same way a manufacturer might show the cost of an article manufactured by him. The defendants would thus recover the profits they would have made had the plaintiff carried out his contract. In such a case profits are not speculative, but certain and ascertainable, and the legitimate fruits of the contract. Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953; Dimmick v. Hendley, 117 Md. 458, 84 Atl. 171; Poppenberg v. Owen & Co., 84 Misc. Rep. 126, 146 N. Y. Supp. 478. * * *

Since the defendants retained the Studebaker car and the agreed price of this car was $700, the plaintiff should be allowed this sum, and the defendants should be allowed their profit had the plaintiff fulfilled his contract. The judgment should have been for the difference between these sums and for the plaintiff if the $700 exceeded the profit, and for the defendants if the profit exceeded the $700.

There is error, the judgment is reversed, and a new trial ordered. In this opinion the other Judges concurred.

SIR ANTHONY MAIN'S CASE.

(In the King's Bench, 1596. 5 Coke, 20 b.)[43]

The case in effect was, that Sir Anthony Main did lease certain land to Scot for 21 years by indenture, and covenanted that at any time during the life of Scot, upon surrender of his lease, Sir Anthony, &c.

[43] Part of the report is omitted.

would make a new lease during the residue of the years, and bound himself to perform the covenants, &c. And now in debt on the said obligation by Scot against Sir Anthony he pleaded that Scot did not surrender, &c. To which Scot replied, and said, that after the said lease Sir Anthony had accepted a fine sur conusans de droit come ceo, &c. and by the same fine granted and rendered the land to the conusee for 80 years: upon which the defendant did demur in law. And it was adjudged for the plaintiff. And in this case three points were resolved:

1. That Sir Anthony Main had broken his covenant without any surrender made, for by the said fine levied by him for 80 years, he had disabled himself either to take a surrender, or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless, lex nemini cogit ad vana seu inutilia peragenda: but it would be vain to compel him to make a surrender to him who cannot take it; and although the lessee in this case by the words of the indenture ought to do the first act, scil. to make the surrender, yet when the lessor hath disabled himself not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. Vide 32 E. 3. Barre, 264. & 21 E. 4. 55. a. If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before the said feast, you have forfeited your obligation, although you repurchase the land again before the feast, because you were once disabled to make the feoffment. * * *

2. It was resolved, if a man seised of lands in fee, covenants to enfeoff J. S. of them upon request, and afterwards he makes a feoffment in fee of the said lands; now in this case J. S. shall have an action of covenant without request. And that in effect is all one with the principal case.

3. It was resolved that in the case at Bar, if the said term of 80 years were but an interest of a future term, so that Scot notwithstanding that might make the surrender, yet in such case Scot should have an action of covenant without making any surrender; for true it is that he may surrender; but also true it is, that Sir Anthony after such surrender cannot make the new lease, which was the effect that the surrender should produce; and therefore in as much as the lessor hath disabled himself to make a new lease, which is the effect and end of the surrender, and that which he ought to do on his part, the lessee shall not be enforced to make the surrender, which is the first thing to be done on his part, for by the surrender he would lose his old term without a possibility of having the new according to the lessor's covenant. * * *

NEWCOMB v. BRACKETT.

(Supreme Judicial Court of Massachusetts, 1819. 16 Mass. 161.)

The declaration was in case, "for that the said B. at, &c. on the 8th of August, 1808, by his memorandum in writing of that date, by him subscribed, acknowledged that he had then and there received of the plaintiff a bill of sale of one half of the sloop Union and her apparel, the consideration whereof the said B. then and there acknowledged in writing under his hand to be 200 dollars; which sum the said B. then and there, in said memorandum by him subscribed, promised the plaintiff to account to him for in a transfer of a deed which the said B. then held against one Jackson Field's estate, as soon as the plaintiff should pay said B. the residue of a debt to him, which should not exceed 100 dollars. And the plaintiff avers that the transfer of a deed against said J. Field's estate, mentioned in said memorandum, was to be a transfer, assignment and conveyance of the land, described in a certain deed made to said B. by one J. Field, which land the said B. then and there promised to convey to the plaintiff. And the plaintiff further avers that the said B. on the 19th of April, 1810, by his deed of release and quitclaim, by him duly executed, did release and quitclaim to one J. N. Arnold all the right, title and interest, which he the said B. then had to a certain real estate described in said deed, which said real estate was the same of which the said B. then held a deed from said J. Field, and of which the said B. was then in possession, and which he had in and by said memorandum engaged to transfer to the plaintiff; and upon which transfer he had engaged to account for said 200 dollars. And the plaintiff further avers, that the said B. had not before said 19th of April accounted to the plaintiff for said 200 dollars, in a transfer of a deed held by him, the said B., against said J. Field's estate. And the plaintiff further says, that the said B., by his deed aforesaid made to said J. N. Arnold, has broken his promise aforesaid, and become unable to perform the same, according to the terms thereof. To the damage, &c."

The defendant demurred to this declaration, and assigned the following causes of demurrer.

1. That the plaintiff hath not alleged or shown, that he has ever paid or tendered to the defendant the residue of said debt, mentioned in the declaration.

2. That he has not alleged or shown, that he has paid or offered to pay to the defendant the sum of 100 dollars, mentioned in the declaration.

3. That he has not alleged or shown, that he ever requested the defendant to transfer to him the deed which the defendant held against J. Field's estate, or to assign and transfer to him the land mentioned in the declaration.

The demurrer was joined by the plaintiff.

PARKER, C. J.[44] The contract set forth in the declaration is substantially, that in consideration of the value of a sloop sold by the plaintiff to the defendant, estimated at 200 dollars, the defendant would, upon payment of 100 dollars by the plaintiff, which was due to the defendant from one Field, and to secure which he had taken a deed of Field's estate, convey said estate to the plaintiff; and the breach of the contract alleged is, that the defendant had disabled himself from performing the contract, by conveying the same estate to another person.

The declaration is demurred to, and the objection to it is, that the plaintiff had neither paid, nor offered to pay, the debt of Field to the defendant; and therefore has no title to the action.

No time is fixed in the contract, within which the money was to be paid, or the estate conveyed to the plaintiff. The plaintiff then had a reasonable time, by virtue of the contract, to perform his part of it; and the defendant might have hastened him, by tendering the deed, and demanding the money which the plaintiff had assumed to pay.

It is implied in the contract, on the part of the defendant, that he would do nothing by which he should become unable to perform it; and by making a deed to another person, he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the 200 dollars in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage. * * *

The declaration, in the case at bar, shows that the defendant had conveyed to a stranger the land, which he promised to convey to the plaintiff. This excuses the plaintiff from tendering the money, and entitles him to damages from the breach of the contract.

Declaration adjudged good.

CANDA et al. v. WICK.

(Court of Appeals of New York, 1885. 100 N. Y. 127, 2 N. E. 381.)

ANDREWS, J. The referee found, upon sufficient evidence to justify the finding, that the reasons assigned by the defendant on the twenty-first of September, 1881, for refusing to receive the balance of the brick of the cargo of the schooner Ellen were groundless. He further found that the brick were of the quality specified in the contract, and that there was sufficient available space for piling them. Upon the defendant's refusal to permit the plaintiffs' cartmen to continue the delivery, the plaintiffs offered to deliver the balance of the cargo, and stated to the defendant that if brick advanced in price they could

[44] Part of the opinion is omitted.

not be held responsible for the delivery on the contract. The defendant persisted in his refusal to receive any more brick from the cargo of the Ellen, assigning the reasons before stated, viz., defective quality and want of space.

The plaintiffs had a right to make delivery on the contract on the twenty-first of September. The written memorandum is silent as to the time of delivery, but the evidence shows that prompt delivery and acceptance were contemplated, and that this was one of the conditions upon which the plaintiffs entered into the contract. The tender and refusal constituted, we think, a breach of the contract by the defendant. It was not necessary that the plaintiffs should tender the whole 400,000 brick in order to put the defendant in default. It was not contemplated that the entire number should be delivered in one mass, but, as is evident from the situation of the parties and the surroundings, they were to be delivered from time to time, at the convenience of the plaintiffs, and without delaying the defendant in prosecuting the work in which they were to be used. When the defendant refused, without adequate reason, to accept the cargo of the Ellen, the plaintiffs were at liberty to treat the contract as broken, and were not bound to make an actual tender of the remainder of the brick before bringing the action. This would have been a useless ceremony.[45] The warning given by the plaintiffs to the defendant, that his refusal would absolve them from any obligation on the contract, was not, as is claimed, equivalent to an assertion of a right on their part to regard the contract as still subsisting and executory, or as a reservation of a

[45] In accord: Ripley v. McClure, 4 Ex. 345 (1849); Cort v. Ambergate, etc., R. Co., 17 Q. B. 127 (1851); Laird v. Pim, 7 M. & W. 474 (1841); Jones v. Barkley, Doug. 684, 1st Ed. 659 (1781); Braithwaite v. Foreign Hardwood Co., [1905] 2 K. B. 543, 3 B. R. C. 580 (1905); Jureidini v. National British and Irish Millers' Ins. Co., [1915] A. C. 499 (1914), arbitration a condition precedent, but nullified by repudiation; Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35 (1906); Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869 (1904); Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126 (1908); Southern Sawmill Co. v. Ducote, 120 La. 1052, 46 South. 20 (1908); New Mexico-Colorado Coal & Mining Co. v. Baker, 21 N. M. 531, 157 Pac. 167 (1916); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); Geo. Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 84 N. E. 595 (1908); Puls v. Casey, 18 Okl. 142, 92 Pac. 388 (1907); Browne & Co. v. John P. Sharkey Co., 58 Or. 480, 115 Pac. 156 (1911); Douglas v. Hustead, 216 Pa. 292, 65 Atl. 670 (1907); Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189 (1914); United States v. Behan, 110 U. S. 338, 4 Sup. Ct 81, 28 L. Ed. 168 (1884); many cases are cited in 47 L. R. A. (N. S.) 427, note 25 (1911).

A repudiation does not so operate, unless it is made known to the other party and before performance by him is due. Terrell v. Nelson, 177 Ala. 596, 58 South. 989 (1912); Makepeace v. Dilltown Smokeless Coal Co., 179 App. Div. 60, 166 N. Y. Supp. 92 (1917); Rauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45, 162 Pac. 125 (1917).

A doubtful or conditional statement does not nullify the condition precedent. Hasler v. West India S. S. Co., 212 Fed. 862, 129 C. C. A. 382 (1914), "if the boat goes to N., she will probably be late, and if we do not get cargo, we will cancel"; Hoggson Bros. v. First Nat. Bank of Roswell, 146 C. C. A. 65, 231 Fed. 869 (1916), under existing conditions we "would prefer not to do the work."

right to deliver the brick, if they should so elect. The letter of October 4, 1881, shows that on several occasions, after the twenty-first of September, the plaintiffs were willing to go on with the contract, but the defendant was not ready, and only became ready when brick had greatly advanced in price.

The right of action having accrued from the transaction of September 21st, it was not waived, as matter of law, by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by the defendant until the advance in the market had materially changed the situation. The price which the plaintiffs received for the brick on sale to other parties was immaterial, in view of the facts that they were delivered on contracts made prior to September 21st, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the plaintiffs.

The judgment should be affirmed.

LEMLE v. BARRY et al.

(Supreme Court of California, 1919. 183 Pac. 148.)

Action by Julius Lemle against Mary M. Barry and others. Judgment for defendants, and plaintiff appeals. Reversed.

WILBUR, J.[46] This action is brought by the vendee to recover from the vendor the initial payment of $5,000 made by the vendee at the time of the execution of the written contract for the sale of land Plaintiff appeals from a judgment rendered upon sustaining a general demurrer. The contract, which is set out as an exhibit to the complaint, was entered into July 31, 1912, for the sale of the "Barry ranch," containing 9,400 acres of land, at the price of $15 per acre. The terms of payment were thus stated:

"$5,000 to be paid on the execution of this agreement; one-half of the full purchase price to be paid on or before 60 days after the execution of this agreement; balance to be secured by note and mortgage payable on or before 3 years after date; said note and mortgage to be of approved form and with the usual covenants and conditions found in mortgages of real property. The same to bear interest at the rate of 6 per cent. per annum, payable annually," etc.

It also provided: "It is expressly understood between the parties hereto that the said party of the second part shall at the expiration of 60 days from and after the second payment herein stipulated and agreed to be paid, and provided further that said second party shall have made said first payment as herein agreed and otherwise conformed to said stipulation and agreement, be entitled to enter upon and take possession of said premises and farm the same in a manner pursued for like land; but said party of the second part hereby and here-

[46] Part of the opinion is omitted.

in agrees not to sell, convey, or otherwise incumber the whole or any portion of said land until said deed and mortgage has been executed according to the terms herein and heretofore contained."

The agreement also contained the usual provision that time is of the essence of the agreement, including the following provision, to wit: "And the said parties of the first part, on receiving such payments at the time and in the manner above mentioned, agree to execute and deliver to the party of the second part, his administrators or assigns, a good and sufficient deed to the property above described."

Apparently the parties contemplated that upon the making of the 60-day payment, the vendor would execute a deed and the vendee execute a note and mortgage for one-half of the balance of the purchase money. This construction of the contract seems to accord with the conduct of the parties, for, within 60 days from the date of the contract, the vendors furnished the vendee an abstract of title continued to August 12, 1912. On September 17, 1912, the vendee's attorney reported to the vendee his conclusion with reference to the abstract of title, and on or about said date the vendee communicated said report to the vendors with a written demand that the alleged defects therein be corrected. The attorney's report upon the abstract in question, which is set out in full in the complaint, is to the effect that it appeared therefrom that the vendors owned the title in fee to an undivided four-sevenths of most of the property known as the Barry ranch, and that three-sevenths belonged to Mary M. Barry (five-fourteenths) and to John H. Barry (one-fourteenth). Other objections to the title are not clear, in the absence of the abstract, which is referred to in the report.

One objection is that the abstract shows that one and one-third acres of land had been deeded to the trustees of the Cottonwood school district. It is alleged in the complaint that the vendors never at any time have corrected or remedied the defects in their title, and that they never have presented a good and merchantable title to said premises, and have never been able to convey to the plaintiff a good and sufficient and merchantable title to said premises, and it is also alleged that the vendors have never performed or offered to perform any of the covenants contained in their agreement or tendered the plaintiff any deed or conveyance to said property. It is further alleged that on June 4, 1913, the vendors delivered to the vendee a notice, set out in the complaint in part, as follows:

"You are hereby notified that you have forfeited any and all rights which you may hold in and to that certain agreement * * * dated the 31st day of July, 1912, * * * and said parties of the first part therein hereby declare such forfeiture by reason of your noncompliance with the terms and conditions of said agreement, and hereby terminate the same; * * * that subsequent to the service of such notice * * * the plaintiff demanded of the vendors the return to him of the $5,000; which he had paid them;" that the ven-

dors requested of plaintiff time to consider his demand, and particularly to consider the objections which the plaintiff had made to their title to said premises, which request plaintiff granted, and from time to time, at the request of the vendors, extended the time for the vendors to consider plaintiff's demand and the ground of his objection to said title until November 13, 1914, when the vendors, for the first time, notified the plaintiff that they would not return to him the $5,000, or any part of the same. * * *

The effect of a complete failure and of a defect of title of the vendor upon the relations of vendor and vendee has frequently been considered by the courts of this state. Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title, or no title at all, at the time of the execution of the contract of sale, does not invalidate the contract of sale.[47] Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Backman v. Park, 157 Cal. 607, 610, 108 Pac. 686, 137 Am. St. Rep. 153; Krotzer v. Clark, 178 Cal. 736, 174 Pac. 657; Kerr v. Reed, 39 Cal. App. 11, 179 Pac. 399. "In a case such as this it is permissible for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish." Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72, quoted with approval in Backman v. Park, supra, 157 Cal. 610, 108 Pac. 687, 137 Am. St. Rep. 153. It is sufficient, therefore, if the vendor has good title at the time he is called upon to perform. One-half of the purchase price (inclusive of the initial sum of $5,000) was to be paid 60 days after the execution of the contract. We may assume, as the parties seem to have done, and as we think the contract means, that the vendors were to make the contemplated deed upon such payment of one-half the price. The making of the deed and the payment of that part of the price were therefore dependent and concurrent conditions. In such case, even though time is of the essence of the contract, the vendor cannot put the vendee in default until he has tendered his deed. Boone v. Templeman, 158 Cal. 290, 297, 110 Pac. 947, 139 Am. St. Rep. 126, and cases cited; Sausalito, etc., Co. v. Sausalito Imp. Co., 166 Cal. 308, 136 Pac. 57. It follows that on June 4, 1913, the vendee was not in default for failure to make the payment due 60 days from the date of the contract, and that the attempt to declare a forfeiture on the theory that the vendee was in default was unavailing, and that the contract still remained in full force and effect. Boone v. Templeman, supra, 158 Cal. 298, 110 Pac. 947, 139 Am. St. Rep. 126.

Under the circumstances the vendors' notice was, in effect, an unauthorized attempt to abandon the contract. It is true that their ac-

[47] A repudiation by the buyer would make it unnecessary for the seller to acquire title or to clear up defects. Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566 (1917).

tion was predicated upon the erroneous claim that the vendee was in default for failing to make the 60-day payment. If the vendee, in fact, had been in default, a notice that the contract was terminated would have been proper, and the vendors would be no longer bound either to convey the land or refund the purchase money. Such notice would have been in strict accord with the contract. Glock v. Howard, 123 Cal. 1, 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Oursler v. Thatcher, 152 Cal. 739, 93 Pac. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 549, 123 Pac. 363; Cross v. Mayo, 167 Cal. 594, 140 Pac. 283; Myers v. Williams, 173 Cal. 301, 159 Pac. 982. As it was, the vendee immediately upon receiving the vendors' unwarranted notice had the right to treat the same as an abandonment of the contract, and to the return of the installment of the purchase price theretofore paid. Glock v. Howard, supra. The vendee, it is true, delayed his demand for reimbursement, and when made it remained under consideration for some months by the vendors, until November 13, 1914, when they finally refused to make such repayment and failed to go on with the contract. With reference to the long delay of the vendee in making such demand for reimbursement, it is sufficient to say that the vendors requested delay, and that, although the contract was in effect all this time, no effort was made by the vendors to correct the title, or to tender a deed, and they did not withdraw their declaration that the contract was terminated. Hence the legal effect of the demand of the vendee for the return of the purchase money paid was the same as though made at once.

The judgment is reversed.[48]

NEW ENGLAND MUT. FIRE INS. CO. v. BUTLER.

(Supreme Judicial Court of Maine, 1852. 34 Me. 451.)

Assumpsit. The plaintiffs are a Mutual Fire Insurance Company. On the 24th Nov., 1847, they issued a policy to the defendants for three years, and received their note of that date for $250, "payable in such portions and at such times as the directors may, agreeably to their charter and by-laws, require." By these proceedings, the defendants became members of the company.

By section 10, of the act of incorporation, it is provided, that "all assessments shall be determined by the directors, and shall always be in proportion to the original amount of the deposit note; and any member of said company, or his legal representatives, neglecting or refusing to pay the amount which he may be assessed on his note in

[48] That a repudiation creates an immediate right to restitution with a correlative money debt in the repudiator, see Ballou v. Billings, 136 Mass. 307 (1884); Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716 (1859), semble; Elder v. Chapman, 176 Ill. 142, 52 N. E. 10 (1898); Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560 (1856).

conformity to this Act, for the space of thirty days after demand shall have been made for the payment of the same in manner the said directors shall appoint, shall be liable to the suit of said directors for the recovery of the whole amount of said note with costs of suit."

On Jan'y 12, 1848, an assessment was duly made for the payment of losses incurred by the company. The amount assessed against the defendants was $4.25. On June 7, 1848, they received from the treasurer a written notice as follows, viz.:

"Treasurer's Office, Concord, N. H., June 5, 1848. The assessment on your deposit note, amounting to $4.25, which was ordered by the directors on the 12th of Jan'y last, remains unpaid. By a vote of the corporation, passed at the annual meeting on the 23d of May, 1848, your insurance is suspended in thirty days after you have been notified by letter or otherwise, if payment be not made; and should your property be destroyed by fire, during such suspension, you will have no remedy upon this company. The directors rely upon the prompt payment of the assessments to meet losses, and if these fail, the members of the company cannot receive their pay when their property is destroyed by fire. Be pleased to transmit the amount of your assessment at once to the office by mail or otherwise.

"Yours, &c., Jno. Whipple, Treas."

An assessment of $33.75, was made on Nov. 15, 1848, and a further one of $40.00, was made on July 15, 1849. This suit was brought to recover these last two assessments; the amount of the first one, $4.25, having been previously tendered.

The defence was based upon the notice of the 5th of June, 1848, given as aforesaid to the defendants.

The case was submitted to the Court for a legal decision.

SHEPLEY, C. J. The suit is upon a note given by the defendants to the corporation in payment, of so much as should be required, of the premium for a policy of insurance issued to them for the term of three years. It is admitted that they thereby became members of the corporation and liable to be affected by its charter, by-laws, and regulations. And that the assessments claimed were duly made; the last two of which the defendants refused to pay.

The defence rests upon a notice or communication made on June 5, 1848, by the treasurer of the corporation, that by a vote passed at its annual meeting holden on May 23, 1848, their "insurance is suspended in thirty days" after they have been notified, "if payment be not made; and should your property be destroyed by fire during such suspension, you will have no remedy upon this company."

The argument for the defendants concedes, that the corporation by its charter, or by-laws, or by the conditions of the policy, or of the note, had no right to suspend the risk for neglect of prompt payment of assessments. A mutual insurance company by its contract with one of its members becomes as perfectly bound by the terms of that contract, as it would, if made with a stranger. The vote of the corpora-

tion can amount to no more, than the declaration of one party to a contract, that he will consider himself discharged from it, if the other party does not perform his part of another contract, which formed the consideration of it.

When the contracts of the respective parties are not dependent, the omission of one to perform punctually, does not authorize the other to rescind or annihilate his own contract. The policy and the note were independent contracts, neither could be suspended or rescinded by one party without the consent of the other.

If the defendants had suffered by a loss of their property within the terms of their policy and had claimed an indemnity from the corporation, its own vote passed before that time, that their policy was suspended, could have had no effect upon their rights. It could only have been considered as a vain effort made by a party to relieve itself from its contract without the consent of the other party. And to do it upon terms and in a manner not contained in any charter, by-law or stipulation operative upon both parties.

It is said, that the vote of the corporation "was a gross and palpable violation of the contract on the part of the company;" and it is thence inferred, that the other party was discharged.

The violation of a contract by a party to it, which will discharge another party, must consist of some omission of an act required or commission of one forbidden by it and essential to the continued performance of the contract. A mere declaration made by a party, that he will not do a future act, which it has not and may not become his duty to perform, or a mere denial, that upon a future contingency, the other party shall not have any benefit from the contract, is not such a violation of it, as will without the assent of the other destroy its efficacy.

The defendants might, as the argument for them alleges, have had a right "to take them at their word," if they had notified them, that they consented that the policy should terminate upon the conditions named in their vote.

Having continued to the termination of their policy to have the right to enforce it for the recovery of any loss, that might have occurred within its terms, they cannot be relieved from the performance of their contract which formed the consideration of it. Defendants defaulted.[49]

[49] That the mutual promises of an aleatory contract of this sort are usually held to be independent, see cases ante, p. 685, 690, note.

(b) Anticipatory Repudiation as a Cause of Action

(Including Power of Retraction)

HOCHSTER v. DE LA TOUR.

(In the Queen's Bench, 1853. 2 Ellis & Bl. 678.)

Declaration, "for that, heretofore, to wit on 12th April, 1852, in consideration that plaintiff, at the request of defendant, would agree with the defendant to enter into the service and employ of the defendant in the capacity of a courier, on a certain day then to come, to wit, the 1st day of June, 1852, and to serve the defendant in that capacity, and travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary to wit," £10 per month of such service, "the defendant then agreed with the plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st day of June, 1852, for three months" on these terms; "and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay the plaintiff" on these terms: averment that plaintiff, confiding in the said agreement and promise of the defendant, "agreed with the defendant" to fulfil these terms on his part, "and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid." That, "from the time of the making of said agreement of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant, in the capacity aforesaid, on the said 1st June, 1852, and to serve the defendant in that capacity, and to travel with him on the continent of Europe as a courier for three months certain from the day and year last aforesaid, and to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said 1st June, 1852, have entered into the said service and employ of the defendant in the capacity, and upon the terms and for the time aforesaid; of all which several premises the defendant always had notice and knowledge; yet the defendant, not regarding the said agreement, nor his said promise, afterward and

before the said 1st June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the said 1st June, 1852, for three months, or on, from or for, any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his, the plaintiff's, part, and from being ready and willing to perform the same on the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined his said promise and engagement;" to the damage of the plaintiff. The writ was dated on the 22d of May, 1852.

Pleas: 1. That defendant did not agree or promise in manner and form, etc.; conclusion to the country. Issue thereon.

2. That plaintiff did not agree with defendant in manner and form, etc.; conclusion to the country. Issue thereon.

3. That plaintiff was not ready and willing, nor did defendant absolve, exonerate, or discharge plaintiff from being ready and willing, in manner and form, etc.; conclusion to the country. Issue thereon.

4. That defendant did not refuse or decline, nor wrongfully absolve, exonerate, or discharge, nor wrongfully break, put an end to or determine, in manner and form, etc.; conclusion to the country. Issue thereon.

On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who, in April, 1852, was engaged by defendant to accompany him on a tour to commence on June 1st, 1852, on the terms mentioned in the declaration. On May 11th, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on May 22d. The plaintiff, between the commencement of the action and June 1st, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till July 4th. The defendant's counsel objected that there could be no breach of the contract before the 1st of June. The learned judge was of a contrary opinion, but reserved leave to enter a nonsuit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same term, obtained a rule nisi to enter a nonsuit or arrest the judgment. In last Trinity Term.

Hannen showed cause. * * * If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted; and, accordingly, in Cort v. Ambergate &c. R. Co. (17 Q. B. 127) this court after considering the cases, decided that in such a case the plaintiff might recover, though

he was no longer in a position to fulfil his contract. That was a contract under seal to manufacture and supply iron chairs. The purchasers discharged the vendors from manufacturing the goods; and it was held that an action might be maintained by the vendors. It is true, however, that in that case the writ was issued after the time when the chairs ought to have been received. In the present case, if the writ had been issued on the 2nd of June, Cort v. Ambergate &c. R. Co. would have been expressly in point. The question, therefore, comes to be: Does it make any difference that the writ was issued before the 1st of June? If the dicta of Parke, B., in Phillpotts v. Evans, 5 M. & W. 475, are to be taken as universally applicable it does make a difference; but they cannot be so taken. In a contract to marry at a future day, a marriage of the man before that day is a breach. Short v. Stone, 8 Q. B. 358. The reason of this is, that the marriage is a final refusal to go on with the contract. It is not on the ground that the defendant has rendered it impossible to fulfil the contract; for, as was urged in vain in Short v. Stone, the first wife might be dead before the day came. So also, on a contract to assign a term of years on a day future, a previous assignment to a stranger is a breach. Lovelock v. Franklyn, 8 Q. B. 371. [Lord CAMPBELL, C. J. It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in May incapacitate him from travelling in June? It was possible that he might do so.] It was; but the plaintiff, who, so long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st of June, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did. In Planchè v. Colburn (8 Bing. 14) the plaintiff had contracted with defendants to write a work for "The Juvenile Library;" and he was held to be entitled to recover on their discontinuing the publication; yet the time for the completion of the contract, that is for the work being published in "The Juvenile Library," had not arrived, for that would not be till a reasonable time after the author had completed the work. Now in that case the author never did complete the work. [Lord CAMPBELL, C. J. It certainly would have been cruelly hard if the author had been obliged, as a condition precedent to redress, to compose a work which he knew could never be published. CROMPTON, J. When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you

liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty." This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal. They were all considered in Elderton v. Emmens (6 C. B. 160). Lord CAMPBELL, C. J. The counsel in support of the rule have to answer a very able argument.]

Hugh Hill and Deighton, contra. In Cort v. Ambergate &c. R. Co., the writ was taken out after the time for completing the contract. That case is consistent with the defendant's position, which is, that an act incapacitating the defendant, in law, from completing the contract is a breach, because it is implied that the parties to a contract shall keep themselves legally capable of performing it; but that an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal; but till then it may be retracted. Such is the doctrine in Phillpotts v. Evans (5 M. & W. 475) and Ripley v. McClure (4 Exch. 345). [CROMPTON, J. May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?] If he adopts the defendant's notice, which is in legal effect an offer to rescind, he must adopt it altogether. [Lord CAMPBELL, C. J. So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle. ERLE, J. Do you go one step further? Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on the 1st of June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?] It would be, in such a case, a question of fact for a jury, whether there had not been an exoneration. In Phillpotts v. Evans, it was held that the measure of damages was the market price at the time when the contract ought to be completed. If a refusal before that time is a breach, how could these damages be ascertained? [COLERIDGE, J. No doubt it was possible, in this case, that, before the 1st of June, the plaintiff might die, in which case the plaintiff would have gained nothing had the contract gone on. Lord CAMPBELL, C. J. All contingencies should be taken into account by the jury in assessing the damages. CROMPTON, J. That objection would equally apply to the action by a servant for dismissing him before the end of his term, and so disabling him from earning his wages; yet that action may be brought immediately on the dismissal; note to Cutter v. Powell (6 T. R. 320)]. It is quite possible that the plaintiff himself might have intended not to go on; no one can tell what intention is. [Lord CAMPBELL, C. J. The intention of the defendant might be proved by show-

ing that he entered in his diary a memorandum to that effect; and, certainly, no action would lie for entering such a memorandum. But the question is as to the effect of a communication to the other side, made that he might know that intention and act upon it.]

Cur. adv. vult.

Lord CAMPBELL, C. J., now delivered the judgment of the Court.

On this motion in arrest of judgment, the question arises, Whether, if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. Short v. Stone (8 Q. B. 358). If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. Ford v. Tiley (6 B. & C. 325). So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. Bowdell v. Parsons (10 East, 359). One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day, but this does not necessarily follow; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman en-

gaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage.

In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton v. Emmens (6 C. B. 160), which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it.

If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st of June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.

Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852, according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The

man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages, but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. Leigh v. Patterson (8 Taunt. 540) only shows that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to Bowdell v. Parsons (10 East, 359), might have been brought before that time, as soon as the vendor had sold and delivered them to another. Phillpotts v. Evans (5 M. & W. 475) was a similar case, and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat; the Court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered; the Court professing to proceed upon the rule laid down in Startup v. Cortazzi (2 C. M. & R. 165), where no question arose as to the right to bring an action before the stipulated day of delivery on a renunciation of the contract.

Parke, B., whose dicta are entitled to very great weight, certainly does say in Phillpotts v. Evans, with reference to the notice by the defendants that they would not accept the corn: "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it." But the learned judge might suppose that the notice did not amount to a renunciation of the contract; and, if he thought that, after such a renunciation, the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In Ripley v. M'Clure (4 Exch. 345) it is said that, under a contract for the sale and delivery of goods, a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract; but the court intimated no opinion upon the question whether, there being a contract to do an act at

a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract. And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done.

The only other case cited in the argument which we think it necessary to notice is Planchè v. Colburn, (8 Bing. 14) which appears to be an authority for the plaintiff. There the defendants had engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the composition of the treatise; but, before he had completed it, and before the time when in the course of conducting the publication it would have appeared in print, the publication was abandoned. The plaintiff thereupon, without completing the treatise, brought an action for breach of contract. Objection was made that the plaintiff could not recover on the special contract for want of having completed, tendered, and delivered the treatise, according to the contract. Tindal, C. J., said: "The fact was, that the defendants not only suspended, but actually put an end to, 'The Juvenile Library;' they had broken their contract with the plaintiff." The declaration contained counts for work and labour: but the plaintiff appears to have retained his verdict on the count framed on the special contract, thus showing that, in the opinion of the court, the plaintiff might treat the renunciation of the contract by the defendants as a breach, and maintain an action for that breach, without considering that it remained in force so as to bind him to perform his part of it before bringing an action for the breach of it. If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action, and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a court of error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.[50]

[50] In accord: Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1900), citing other cases; Colorado Yule Marble Co. v. Collins, 144 C. C. A. 376, 230 Fed. 78 (1915); Weber v. Grand Lodge of Kentucky, F. & A. M., 169 Fed. 522, 95 C. C. A. 20 (1909); Fox v. Kitton, 19 Ill. 519 (1858); B. B. Ford & Co. v. Lawson, 133 Ga. 237, 65 S. E. 444 (1909); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Platt v. Brand, 26 Mich. 173 (1872); Listman Mill Co. v. Dufresne, 111 Me. 106, 88 Atl. 354 (1913); Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332 (1895); Holt v. United Security Life Ins. Co., 76 N. J. Law, 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691 (1909); Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436 (1887); Wester v. Casein Co., of America, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377 (1912); Hart-Parr Co. v. Finley, 31 N. D. 130, 153 N. W. 137, L. R. A. 1915E, 851, Ann. Cas. 1917E, 706

DINGLEY et al. v. OLER et al.

(Supreme Court of the United States, 1886. 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984.)

MATTHEWS, J.[51] This was an action of assumpsit, brought by Dingley Bros. in the superior court of the county of Kennebec, in Maine, against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement, whereby it was averred the defendants undertook and promised, in consideration of 3,245.25 tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendants' ice-houses, in the year 1880. The case was removed by the defendants into the circuit court of the United States for the district of Maine, when the cause was put at issue by a plea of non assumpsit, and was submitted to the court by the parties, the intervention of a jury having been duly waived. The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of $7,335.35. Exceptions were taken by each party to rulings of the court, on which errors are assigned, the cause being brought here for review on writs of error sued out by the respective parties. The court found as matter of fact, that late in the season of 1879 the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the season; that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of sixth September, 1879, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms. The total delivery was 3,245.25 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice; and he replied that he did not know about

(1915); Frost v. Knight, L. R. 7 Ex. 111 (1872) defendant promised to marry plaintiff after the death of defendant's father; suit brought at once when defendant married another woman, although the father was still living.

Bankruptcy, making performance impossible, is a breach by anticipation, and creates an immediate right, provable in the bankruptcy proceedings. Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580 (1916); Board of Commerce of Ann Arbor, Mich., v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486 (1915); In re Neff, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349 (1907).

One has no right of action merely because he has reason to anticipate that the other will be unable to perform on time, and this is true, even though time is of the essence. Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 376 (1911).

[51] Part of opinion omitted.

that,—delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, "we must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here, (that is, fifty cents,) or give you ice when the market reaches that point." The plaintiffs, tenth July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered fifteenth July, 1880, reciting the circumstances of the case, and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: "We cannot, therefore, comply with your request to deliver the ice claimed, and respectfully submit that you ought not to ask this of us," etc., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver 3,245.25 tons of ice from their houses on the Kennebec river during the year 1880; that the year means the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery; and that the letters of July 7th and 15th, from the defendants to the plaintiffs, contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action can be maintained, though brought before the close of the season, but that the damages are not to be reckoned by the price of ice in July; that what the plaintiffs lost was 3,245.25 tons of ice sometime during the season; that the price of ice went down after July to two dollars a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law the plaintiffs below excepted, contending that the right to fix the time for delivery under the contract had vested in them; that it was properly exercised by their demand in July, 1880; that the refusal to deliver at that time constituted the breach of the contract by the defendants, and fixed the damages at five dollars per ton, the market value of the ice on that day.

The defendants below excepted, contending on their part that the letters of July 7th and 15th did not constitute an unequivocal refusal to deliver any ice during the season, amounting to a renunciation, and, in that sense, a breacn of the contract; and that the action was prematurely brought, the right of action, if any, not accruing until after the expiration of the period within which, by the terms of the contract, they had the option to deliver.

The letter of July 7, 1880, from the defendants to the plaintiffs, is as follows:

"Baltimore, Md., seventh July, 1880.

"Messrs. Dingley Bros., Gardiner, Me.—Dear Sirs: As per promise of our W. M. O., we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of September 9, 1879, on this head, as follows: 'In fact, we do not propose for you to become losers on account of extending us this accommodation.' Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so. We are very sorry, indeed, that this question should have arisen between us, who have been on such friendly terms hitherto; but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you by taking some) to expect us to give you ice now worth $5 per ton when we have letters of yours offering the ice that we got at fifty cents per ton. We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complication should arise between us, and assuring you of our innocence in the matter, we are,

"Yours, truly, W. M. Oler & Co."

The letter was answered by Dingley Bros., on July 10, as follows:

"Gardiner, July 10, 1880.

"Messrs. W. M. Oler & Co., Baltimore—Dear Sirs: Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us. Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your proposition, made under date of September 6th, viz.: 'It would, of course, be more convenient for us to ship this cargo from our own houses; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you. We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo, and return same to you next year from our houses.' Upon this we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery seems to us hardly right. Now, whatever the final settlement of this matter is to be, we want you to

fill our order; otherwise, we cannot tell what the result might be. It is not in our minds to do otherwise than right with any one, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter; and assure you that your regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

"Truly yours, Dingley Bros."

The defendants' letter of July 15th was in reply to this, and is as follows:

"Baltimore, Md., fifteenth July, 1880.

"Messrs. Dingley Bros., Gardiner, Me.—Gentlemen: Yours of 10th duly received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances, we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences, took more. Now you ask us, at a time when we are pressed by our sales and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th. You do not reply to our arguments, but simply ask us to surrender our well-formed opinion. Can you reasonbly ask us to do this? Is not your usually clear and equitable judgment clouded by the manifest considerations of self-interest pressing upon you? We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever

before. We are deprived of the services of W. Geo., and therefore cannot come to see you. With regards, we are,

"Yours truly, W. M. Oler & Co."

To this letter no answer was returned, and the present suit was brought six days after its date.

We agree in opinion with the circuit court that, according to the terms of the contract, the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses. * * *

We differ, however, from the opinion of the circuit court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7th the defendants say: "We must therefore decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs; for, in their answer of July 10th, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you [the defendants] will take a more favorable view upon further reflection," etc. Here, certainly, was a locus penitentiæ conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15th, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now, you ask us at a time when we are pressed by our sales, and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated: This does not seem to us to be fair," etc. "We cannot, therefore, comply with your request to deliver to you the ice

claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein, and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

[The court here discussed several authorities, and quoted Benjamin on Sales, 424, that "a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."]

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below, judgment will be given that they take nothing by their writ of error.[52]

DANIELS v. NEWTON.

(Supreme Judicial Court of Massachusetts, 1874. 114 Mass. 530, 19 Am. Rep. 384.)

WELLS, J. This action is for breach of an agreement in writing, under seal, for the purchase of certain land from the plaintiff by the defendants. The time for performance is indicated by two clauses; one that "said premises are to be conveyed within thirty days from this date;" the other that "in case the said parties of the second part should fail to sell their estate at the expiration of the thirty days, then we agree to extend this agreement for thirty days." The inference from the latter clause is that the defendants were to have the whole thirty days for performance on their part, and in the contingency mentioned, thirty days more. Such was the effect given to the terms of the written instrument, by the ruling at the trial, and we think correctly.

The plaintiff relied upon a supposed breach of the agreement by the defendants within the thirty days; to wit, May 29, the writing being dated May 15, and thereupon had brought his action May 30. The ruling of the court upon this point was that if the defendants "fixed a

[52] See, also, Hasler v. West India S. S. Co., 212 Fed. 862, 129 C. C. A. 382 (1914); Hoggson Bros. v. First Nat. Bank of Roswell, 146 C. C. A. 65, 231 Fed. 869 (1916); Edwards v. Proctor, 173 N. C. 41, 91 S. E. 584 (1917); Vittum v. Estey, 67 Vt. 158, 31 Atl. 144 (1894).

day, within said thirty days, for the performance of said agreement by the respective parties, and the plaintiff was then ready to perform his part, and the defendants then refused absolutely to perform said agreement on their part, then or at any other time, that would be a breach of the agreement on their part for which the plaintiff can maintain this action."

We do not understand this ruling to have been based upon the supposition of an oral agreement in regard to the time of performance varying the terms of the written instrument as an executory contract. It would have been clearly erroneous in that aspect; first, because no such substituted agreement is set forth in the declaration; secondly, because such an oral agreement in regard to land would be within the statute of frauds, and could not be so enforced.

Subsequent oral agreements in regard to the mode and time of performance of written contracts relating to land, are doubtless admissible to affect the question whether the conduct of either party, as proved, constitutes a breach of his written agreement. In that aspect, the evidence adduced by the plaintiff in this case was competent, and might have warranted the jury in finding a breach of the contract by the defendants, if they did not revoke their refusal within the thirty days, even without any further offer to perform on the part of the plaintiff.

The action having been brought immediately upon the refusal, and within the time allowed for performance by the terms of the written contract sued upon, the effect of the ruling was that an absolute refusal of performance, purporting and intended to be a refusal to fulfil the contract at any time, would be of itself a breach of a contract for acts to be done within a time not yet expired, so that an action would lie forthwith. The proposition involved in this ruling, to wit, that there may be a breach of contract, giving a present right of action, before the performance is due by its terms, seems to have been adopted by recent English decisions. Frost v. Knight, L. R. 7 Ex. 111 (1872); Hochster v. De la Tour, 2 E. & B. 678 (1853).

It is said to be applicable, not only in cases where performance has been rendered impossible by the voluntary conduct of the party, as, in agreements for marriage or conveyance of land, by marriage or conveyance to another, and by way of exception to the general rule formerly maintained, but to the full extent of a general rule; so that an absolute and unqualified declaration of a purpose not to fulfil or be held by the contract, made by one party to the other, may be treated as of itself a present breach of the contract by repudiation, as well before as after the time stipulated for its fulfilment by such party. The point was elaborately discussed in Frost v. Knight, by Lord Chief Justice Cockburn; and the principle evolved is expressed in these propositions, on page 114:

"The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has

arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage."

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote."

The first of these two propositions would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. We see no reason for a distinction which should exclude it from the same rule that applies to other promises in writing, in respect to what will constitute a breach of the principal contract between the maker and payee. We are not aware, however, that any decision has carried out the rule by applying it to such contracts; and we doubt if the learned jurists who propounded it would have been willing to follow it to that extent.

The doctrine has never been adopted in this Commonwealth nor has it received any recognition, so far as we are able to learn, beyond that in Heard v. Bowers, 23 Pick. 455, 460. The court in that case, refer to Ford v. Tiley, 6 B. & C. 325, 327, and 5 Vin. Ab. 224; the doctrine announced in Ford v. Tiley being, as it appears to us, an erroneous application of the maxims contained in Viner.

A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. Frazier v. Cushman, 12 Mass.

277; Pomroy v. Gold, 2 Metc. 500; Hapgood v. Shaw, 105 Mass. 276; Carpenter v. Holcomb, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. Phillpotts v. Evans, 5 M. & W. 475; Ripley v. M'Clure, 4 Exch. 345; Lovelock v. Franklyn, 8 Q. B. 371.

The case of Ford v. Tiley, 6 B. & C. 325, cited in Heard v. Bowers, was an action on an agreement of the defendant that he would, as soon as he should become possessed of a certain public house, execute a lease thereof to the plaintiff for a term of years from December 21, 1825. There was in fact an outstanding lease of the premises to another, to expire at midsummer, in 1827. Before that term expired, the defendant joined with the trustees, who held the legal title, in a lease to another party for 23 years. It was held to be a breach of his agreement with the plaintiff, for which an action would lie at once; because the defendant had given up his right to have the possession, and put it out of his power, so long as his own lease for twenty-three years should last. It does not appear that the suit was brought before December 21, 1825; nor that the time when the defendant would become possessed, was mentioned in the agreement. It was not the case of an agreement to make a lease at a named future day. The outstanding lease was an extrinsic fact, merely affecting the occurrence of the contingency upon which the performance of the agreement depended; it had no other force in the contract. When, therefore, the defendant made a lease to a stranger, he could no longer say that he was prevented from becoming possessed by the outstanding previous lease, because he had put it out of his power to come into possession, if that were surrendered or otherwise terminated. The plaintiffs' right to have a lease presently was subject only to a contingency, of which the defendant had no longer the ability to avail himself. The judgment accords with the rule we have indicated. But in giving judgment, Bayley, J., citing 1 Rol. Ab. 248, 5 Vin. Ab. 225, 21 Ed. IV, 55, and Co. Litt. 221 b, proceeds to say: "Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be a breach of a contract to grant a lease to J. S. at a given day, and a fortiori will it be a breach so long as the lease to such stranger remains in force."

It seems to us, however, that the reasoning from conditions of forfeiture or defeasance to executory contracts is illogical. If one, having an estate on condition, by his own act in dealing with the estate, puts it out of his power to perform or comply with the condition, he does what is inconsistent with the terms upon which alone he has the estate; and his grantor may reenter, even before the time of stipulated performance, not because of a new right acquired by the terms of the agreement, but because the right of the other party having become forfeited or extinguished by his breach of the condition, or violation of the terms of his tenancy, the grantor or feoffor is restored to

his former estate and right. It is by virtue of that right or title that he enters, the other party being no longer able to avail himself of his conditional estate or right. The analogy holds good if the plaintiff's right to require performance of the agreement awaits only a contingency which the defendant removes by making it impossible, which was the real case in Ford v. Tiley. It gives no support to the very different proposition that, in a contract to be performed on a given day, the voluntary disability of one party will entitle the other to require performance, or to have an action for non-performance, before that day arrives.

The distinction is recognized by the authorities referred to by Mr. Justice Bayley. Lord Coke says: "And herein a diversity is to be observed between a disability for a time on the part of the feoffee, and a disability for a time of the part of the feoffor." In the one case, albeit "a certain day be limited, yet the feoffee being once disabled is ever disabled." "And the reason of the diversity is, for that, as Littleton saith, maintenant by the disability of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor or his heirs; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day." Co. Litt. 221 b; 5 Vin. Ab. 224, Condition, B. c.

We have examined with care the opinions of Lord Chief Justice Cockburn in Frost v. Knight, and of Lord Campbell in Hochster v. De la Tour, and we are not convinced that the conclusions at which they arrive are founded in sound principles of jurisprudence, or sustained by the authorities cited in their support.

Frost v. Knight was an action upon a promise to marry the plaintiff on the death of the defendant's father. The defendant broke off the engagement by announcing his intention not to fulfill his promise. The action was brought without waiting for the death of the defendant's father. The plaintiff having recovered a verdict, judgment was arrested by the Court of Exchequer: but on error it was held in the Exchequer Chamber, that she was entitled to retain the verdict. The Lord Chief Justice cites Lovelock v. Franklyn, 8 Q. B. 371, and Short v. Stone, 8 Q. B. 358, as having "established that where a party bound to the performance of a contract at a future time, puts it out of his own power to fulfil it, an action will at once lie." Neither decision cited establishes that proposition, where a definite time for performance is appointed by the terms of the contract; but only where the plaintiff was entitled to require performance upon some previous act or request which the conduct of the defendant has dispensed with.

Short v. Stone was upon a promise to marry the plaintiff "within a reasonable time after request." The defendant married another, and this was alleged as the breach. It was held that request was not necessary, and need not be alleged. It was rendered unavailing, and

therefore unnecessary, by the act of the defendant, which was of itself a breach of the contract by rendering performance impossible. No question arose, or could arise, whether the action was premature, because there was no future time certain for performance. The defendant had made the only limit of time impossible.

Lovelock v. Franklyn was upon an agreement to assign a lease, at any time within seven years, upon payment of a sum named. The decision is explicitly upon the ground that the option as to the time, within the seven years, was with the plaintiff. "The defendant is to be ready throughout." Coleridge, J., p. 375. Denman, C. J., says: "Here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more, on the point now before us, than that if an act is to be performed at a future time specified, the contract is not broken by something which may merely prevent the performance in the mean time. We are introducing no novelty. In all the cases put for the defendants, the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready." Patteson, J., says: "In this particular contract, the defendant has undertaken to keep himself ready for the whole time." So far from being sustained by this case, the proposition, to which it is cited by Lord Chief Justice Cockburn, is most carefully excluded, if not expressly disavowed.

The proposition, even if established, is not decisive of the case now before us. We have discussed it, however, because it has an important bearing upon the argument, and is essential to the result reached in Frost v. Knight. The Lord Chief Justice, taking it as established by the cases cited, proceeds to the next step. He says, "The case of Hochster v. De la Tour, upheld in this court in the Danube & Black Sea Co. v. Xenos, [13 C. B. (N. S.) 825,] went further, and established that notice of an intended breach of a contract to be performed in futuro had a like effect."

Hochster v. De la Tour appears to us to be the only case which sustains this position as an adjudication, although that decision has been recognized in several subsequent cases. Avery v. Bowden, 5 E. & B. 714, 6 E. & B. 952; Wilkinson v. Verity, L. R. 6 C. P. 206. It was an action upon a contract of hiring to go as courier for the plaintiff from June 1, 1852, at monthly wages. There was notice of renunciation of the employment, and the action brought May 22, 1852, was sustained. Lord Campbell says: "But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable

to an action for breach of promise of marriage. Short v. Stone, 8 Q. B. 358." The statement we have already made of Short v. Stone, will show how the essential fact in that case is mistaken, and the reason of the decision misapplied. He adds: "If a man contracts to execute a lease on and from a future day for a certain term, and, before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract. Ford v. Tiley, 6 B. & C. 325." We have already shown in what manner Ford v. Tiley fails to sustain the position for which it is cited.

In Bowdell v. Parsons, 10 East, 359, cited by Lord Campbell, as showing that upon a contract for sale and delivery of goods at a future time, an action "might have been brought before that time as soon as the vendor had sold and delivered to another," the only question was of the necessity of alleging time and place of request to deliver; the plaintiff being entitled to delivery on request.

In Planche v. Colburn, 8 Bing. 14, also cited, no time was specified. The plaintiff would have been entitled to his compensation upon performance of the service he undertook, which was the preparation of an article or work for the defendant's periodical publication within a reasonable time. He had begun the work towards performance on his part. Full performance by him was rendered useless, and practically prevented by the defendant's abandonment of the enterprise. The case in reality establishes nothing more than that the plaintiff was entitled to treat the contract as rescinded, and recover for what he had done upon a quantum meruit.

Elderton v. Emmens, 4 C. B. 479, 6 C. B. 160, and 4 H. L. Cas. 624, was upon a contract of employment. The plaintiff had entered upon the service and was dismissed. The case recognizes a right of action, founded upon the defendant's obligation to continue the plaintiff in his service, and a breach of that obligation by wrongfully dismissing him. From the opinions of Martin, B., 4 H. L. Cas. 648, and of Talfourd, J., p. 652, it would appear that the action was not brought until after the term of stipulated service had expired. But we conceive that it would have afforded no support to the doctrine for which it was cited, if it had been brought immediately upon the dismissal of the plaintiff; because that was the time for performance of the defendant's agreement to employ the plaintiff, for breach of which the action was brought.

The Danube & Black Sea Co. v. Xenos, 13 C. B. (N. S.) 825, by which Hochster v. De la Tour is said to have been upheld, was an action upon an agreement by which the plaintiff was to receive and carry freight for the defendant, the shipment to commence on August 1st, and the action was not brought until after August 1st. The only question was whether a repudiation of the agreement, notified to the plaintiff before August 1st, and not recalled, excused the plaintiff from making an offer to perform on that day, and was sufficient to

show a breach of the agreement. The judgment is in accordance with that in Ripley v. McClure, 4 Exch. 345, and with the plain rule of law that when the plaintiff is prevented by the defendant from performing the service or doing the act which will entitle him to the fruits of his contract, he is thereby excused from performance on his part, and is entitled to an appropriate remedy by action. Scot v. Mainy, Poph. 109; Goodman v. Pocock, 15 Q. B. 576; Cort v. Ambergate, &c., Railway Co., 17 Q. B. 126.

But the question, in what mode and at what time that remedy may be sought, must depend upon the provisions of his contract, and the nature of the rights to which it entitles him, and which are affected by the conduct of the other party. Throughout the whole discussion, both in Hochster v. De la Tour and Frost v. Knight, the question as to what conduct of the defendant will relieve the plaintiff from the necessity of showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of; the court dealing only with the conduct of the defendant in repudiating the obligations of his contract.

Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed.

That this is the natural and ordinary rule seems to be recognized by Lord Campbell, when he declares that "it cannot be laid down as a universal rule," and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true "that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." L. R. 7 Ex. 114. But preceding "inchoate right" is discovered, and a corresponding obligation implied, upon which there may be held to be "a breach of the

contract when the promisor repudiates it and declares he will no longer be bound by it."

In Hochster v. De la Tour, Lord Campbell assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance; "they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation;" and "it seems to be a breach of an implied contract if either of them renounces the engagement." In Frost v. Knight, the Lord Chief Justice remarks of the promise to marry: "On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties." "Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage."

These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement "by reason of the future nonperformance" will be "virtually involved," "as one of the consequences of the repudiation of the contract," it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts, having a future day for their performance, include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future nonfulfilment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfil their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration,

whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action therefore cannot be maintained.

Exceptions sustained.[53]

JOHNSTONE v. MILLING.

(In the Court of Appeal, 1886. L. R. 16 Q. B. Div. 460.)

Appeal from the order of the Queen's Bench Division directing that judgment should be entered for the defendant on the counterclaim for damages to be ascertained by a reference.

The defendant in the action set up a counterclaim for damages for breach of a covenant contained in a lease by which the plaintiff covenanted with the defendant to rebuild the demised premises. The reply stated, among other things, that the plaintiff had not received any notice to rebuild from the defendant as required by the terms of the covenant, and also that the lease was surrendered by the defendant before the time at which the obligation to rebuild would have arisen.

The action was, after issue joined, remitted to the county court for trial.

The facts with regard to the claim are immaterial to this report.

The facts with regard to the counterclaim appeared at the trial to be as follows: In June, 1881, premises, of which the plaintiff was owner subject to certain mortgages, were demised to the defendant by the plaintiff and his mortgagees for the term of twenty-one years from May 12th, 1880, subject to a proviso for sooner determination of the same, the rent being by the terms of the lease made payable to the plaintiff, until the mortgagees gave notice to the lessee in writing to pay it to them, and, upon such notice being given, to the mortgagees. The lease contained a covenant by the plaintiff that after the expiration of the first four years of the term the plaintiff would, on receipt from the lessee of six calendar months' notice in writing requiring him so to do, forthwith proceed to rebuild the premises with-

[53] In accord: Porter v. Supreme Council, American Legion of Honor, 183 Mass. 326, 67 N. E. 238 (1903); Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757 (1894); King v. Waterman, 55 Neb. 324, 75 N. W. 830 (1898), semble; Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760 (1897), overruled: See Hart-Parr Co. v. Finley, 31 N. D. 130, 153 N. W. 137, L. R. A. 1915E, 851, Ann. Cas. 1917E, 706 (1915); South Gardiner Lumber Co. v. Bradstreet, 97 Me. 165, 53 Atl. 1110 (1902).

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1900), Fuller, C. J., said: "The opinion of Judge Wells in Daniels v. Newton is generally regarded as containing all that could be said in opposition to the decision of Hochster v. De la Tour, and one of the propositions upon which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

in the period and in the manner specified by the covenant. It was provided that the lessee might at the end of the first four, seven, or fourteen years of the lease determine the same by giving to the person or persons for the time being in the receipt of the rent six calendar months' notice in writing of his intention so to do.

The defendant gave the requisite notice to determine the lease at the end of the first four years. He stated in evidence at the trial that during his tenancy he spoke to the plaintiff constantly about getting the money to rebuild the premises; that the plaintiff said he was unable to do so, but that he expected a loan society who had a second mortgage on the premises might advance money; that the plaintiff's declaration of inability to get the money for rebuilding extended over the last two years and a half of the defendant's tenancy; that he made it constantly in answer to the defendant's direct question, and at other times in conversation both before and after the expiration of the four years; and that it was in consequence of such declaration that he (the defendant) gave notice to determine the lease. The defendant further stated that he continued to occupy the premises for about three months after the determination of the lease paying rent to the mortgagees; that after the lapse of the lease the plaintiff came to him and voluntarily told him that he was utterly unable to find the money, but that he (the defendant) continued the tenancy on the chance of the plaintiff's getting the money.

The county court judge found that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff both before and after the surrender of the lease told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant in consequence of the plaintiff stating that he was and would be unable to find the money for rebuilding the premises surrendered the lease, and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counterclaim.

The county court judge, however, held the contrary, and found a verdict both on the claim and on the counterclaim for the plaintiff, and entered judgment accordingly.

A rule nisi for a new trial was obtained by the defendant in the Queen's Bench Division, and the Divisional Court (Huddleston, B., and Cave, J.), upon the argument of the rule, made the order against which the plaintiff appealed.

Lord ESHER, M. R.[54] The question before us arises entirely on the counterclaim. The claim therein set up is for damages for breach of a covenant in a lease whereby the landlord undertook to rebuild the premises upon notice. It is quite clear that there was no breach of the covenant in the ordinary sense of the term, because no notice to re-

[54] The concurring opinions of Bowen and Cotton, L. J. J., are omitted.

build had been given, and the tenant had exercised the right given him by the lease of putting an end to the term at the expiration of the first four years, and consequently the lease was determined before the time at which the obligation to rebuild under the covenant would have accrued.

The lease being so put an end to, it is quite clear that the lessee could not sue the lessor for breach of the covenant in not rebuilding after the expiration of the four years. That being so, the cause of action is thus shaped on behalf of the defendant. It is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he was unable and would be unable to find the money for rebuilding when the time came. It is insisted that such declaration amounted to a declaration of his intention not to perform the contract, and was intended as a repudiation of it, or that, if it was not so intended, the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of the contract; and it is accordingly contended that there was a breach of the contract by anticipation before the time for its performance arrived, for which the defendant was entitled to damages, and that the fact that the defendant afterward exercised his option of determining the lease is immaterial, for in so doing the defendant only acted for the benefit of the landlord in order to minimize the damages arising from his repudiation of the contract. The evidence shows, and the county court judge has found as a fact, that the lessor did a considerable time before the expiration of the four years, in answer to the questions of the lessee, repeatedly say that he was unable and would be unable to find the money for rebuilding, and the judge finds that in consequence the defendant surrendered the lease. It appears, however, from the evidence that he did not at once throw up the lease and give the premises into the hands of the plaintiff, but that he waited till the last six months of the four years and then gave the requisite notice to determine the term in accordance with the provisions of the lease. Upon these findings the county court judge decided that the defendant could not maintain his counterclaim. The case then went to the Divisional Court, which held that, either upon those findings, or on the inferences that ought to be drawn from them, the defendant had a right of action on the covenant, and therefore that the county court judge was wrong.

Now on what principle can it be that the defendant had a right of action on the covenant? As I have said, it cannot be on the ground that there was a breach of the covenant in the ordinary sense of the term, because the defendant never gave any notice to rebuild, and he put an end to the term, so that the time when the covenant was to be performed never arrived. Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of Hochster v. De La Tour. In those

cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract—that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue.[55] Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract. We are asked, as it seems to me, by the counsel for the defendant to lay down a new principle, but I do not think we can do so consistently with the established doctrines of law on the subject. We have therefore to consider whether the defendant can bring his case within the doctrine as to anticipatory breach of contract as already laid down.

The first question is whether the plaintiff intended to repudiate the contract when he made the statements relied upon with regard to his inability to find the money for rebuilding. Did he mean to say that, whatever happened, whether he came into money or not, his intention was not to rebuild the premises? It does not seem to me that what he said naturally leads to the inference that such was his intention,

[55] In accord: Zuck v. McClure, 98 Pa. 541 (1881); Traver v. Halsted, 23 Wend. (N. Y.) 66 (1840); Nilson v. Morse, 52 Wis. 240, 9 N. W. 1 (1881). But where there is a definite repudiation and no retraction thereof, the other party does not lose his privilege of not performing or his right to damages for an entire breach, merely by continuing to urge performance for thirty days. United Press Ass'n v. National Newspaper Ass'n, 237 Fed. 547, 150 C. C. A. 429 (1916). See also Hadfield v. Colter, 103 Misc. Rep. 474, 170 N. Y. Supp. 643 (1918), a valuable case for analysis.

and I think, having regard to the terms of his finding, that the county court judge declined to draw that inference. If he declined to do so, I think we ought not to do so, unless it is a necessary inference from what the plaintiff said. It does not appear to me that it is. If we ought not to draw that inference from what the plaintiff said, it seems to me to follow as a matter of course that the defendant was not entitled to draw it; and the result is that the defendant fails in the very first point which it is necessary for him to establish—viz., that the plaintiff at the time when he made these declarations of his inability to find the money for rebuilding intended to repudiate his liability on the contract, or that he made use of expressions entitling the defendant to suppose that he did so. That being so, his case is gone.

But, assuming the contrary, then comes the question whether the defendant elected to treat the plaintiff's statement as a wrongful repudiation of the contract. That involves, first of all, the question whether he could so treat it. The contract made between the plaintiff and the defendant was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach could not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract.

Therefore it seems to me that the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But whether he could do so or not, it seems to me that in fact he did not. He did not renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease.

I think, therefore, that on every point necessary to establish his counterclaim the defendant fails. For these reasons, with great deference to the Divisional Court, before whom these points do not appear to have been developed so clearly as they have been before us, I think their decision cannot be supported, and that the judgment of the county court judge was correct.

KELLY v. SECURITY MUT. LIFE INS. CO.

(Court of Appeals of New York, 1906. 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661.)

Action by William Kelly against the Security Mutual Life Insurance Company. From a judgment in favor of plaintiff, affirmed by the Appellate Division (106 App. Div. 352, 94 N. Y. Supp. 601), defendant appeals. Reversed, and new trial granted.

The complaint contains two counts, in the first of which the plaintiff alleged, in substance, that in August, 1889, the defendant, a domestic corporation duly authorized, issued to him its policy of insurance for $1,000, payable on his death to his wife, the policy being referred to as part of the complaint; that the plaintiff performed his part of the contract, but the defendant wrongfully declared said policy forfeited, and refused to continue it in force; that the beneficiary transferred her rights thereunder to him and that the policy was worth to him $1,000, in which amount he alleged he had sustained damages. The second count was upon a like policy payable to the children of the plaintiff, who transferred their rights to him before the commencement of the action. Judgment was demanded for the sum of $2,000, with costs. Each policy was a certificate of the defendant admitting the plaintiff to membership, subject to certain specified conditions, including the prompt payment of quarterly dues on the days named. Upon his death his wife in one case and his children in the other, became entitled to payment from the reserve fund of the sum of $1,000. The failure to pay dues rendered the contract void and forfeited all payments made thereon, with an unimportant exception. The answer alleged as an affirmative defense that the policies became null and void on the 2d of May, 1903, because the plaintiff failed to pay the premiums which fell due on that day as required by the contracts. The question sent to the jury was whether the defendant by its course of dealing with the plaintiff had waived strict performance as to the payment of dues on the law day. They were instructed if they found a waiver to bring in a verdict in favor of the plaintiff for the present value of the policies, including interest. The jury found a general verdict for the plaintiff for $1,289.78. The judgment entered thereon was unanimously affirmed by the Appellate Division, and the defendant appealed to this court.

VANN, J. (after stating the facts). Before any evidence was taken at the trial the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, but the motion was denied and the defendant excepted. This ruling survives unanimous affirmance by the Appellate Division, and is open to review by this court. Jones v. Reilly, 174 N. Y. 104, 66 N. E. 649; Sanders v. Saxton, 182 N. Y. 477, 478, 75 N. E. 529, 1 L. R. A. (N. S.) 727, 108 Am. St. Rep. 826. The defendant was not required to present the question by demurrer or answer, but could raise it by motion made at the trial. Weeks v. O'Brien, 141 N. Y. 199, 203, 36 N. E. 185; Code Civ. Proc. § 499.

The case made by the complaint was not in equity to relieve from forfeiture and reinstate the policy, but purely at law to recover damages for the breach of its contract by the defendant. The only promise made by the defendant in the contract was to pay a sum of money on the death of the plaintiff, but no breach of that promise was alleged.

The plaintiff is still living, and nothing is yet due upon the contract, according to its terms. What breach was alleged? The only allegation on that subject is that the defendant wrongfully declared the contract "void and forfeited," denied that the plaintiff had "any rights thereunder," and refused "to continue said policy in force." How or why, when, to whom or by whom the defendant declared the contract forfeited, or denied the plaintiff's rights thereunder, or refused to continue it in force, is not stated. There is no allegation of a refusal to receive premiums, or give receipts therefor, or that the defendant had never recognized its contract, or that it had not retracted its repudiation, or that it was in such a position that it could not retract. The pleader was satisfied with the conclusion that he set forth. This was not a breach of the contract, because the time for performance by the defendant had not arrived. An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance?

The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of a special character, even in the jurisdictions where it obtains at all. It is not generally applied to contracts for the payment of money at a future time and in some states the principle is not recognized in any way whatever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 858, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other states and in the Federal courts the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 Sup. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell, 7 O. C. D. 657; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914; Roebling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this state it seems to be limited to contracts to marry (Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516); for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285); and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policy holders.

The plaintiff alleges a breach only by anticipation. We held directly against his contention in a recent case which we regard as con-

trolling. Langan v. Supreme Council Am. L. of H., 174 N. Y. 266, 66 N. E. 932. That was an action at law founded upon a certificate of insurance, whereby the defendant promised, upon the death of the plaintiff, to pay his wife a sum not exceeding $5,000. The plaintiff alleged performance until the "defendant by its wrongful act broke the said contract, and declared the same void." He further alleged that the defendant had "failed to carry out the conditions of the contract by declaring that it will not perform the contract or pay the insurance agreed to be paid, and that, upon his death, the beneficiary will not then be entitled" to the sum specified, "and that by reason of the breach of the aforesaid contract by defendant, plaintiff has sustained damages in the sum of $5,000." A judgment for $1,505.96, "the present value of the policy," was affirmed by the Appellate Division, but reversed by this court, upon the ground that "there was no breach of contract * * * which justified an action for damages; that the action of the plaintiff" in tendering performance "preserved the contract of insurance as it was; that he was not, thereupon, compelled to a course of inaction, but might resort to a court of equity, * * * and compel the defendant to live up to its contract."

The principle of that case controls this. Both actions were at law to recover damages for the breach of the same kind of a contract and in the same way. As we held that an action at law would not lie in that case because there was no breach, and that the remedy of the plaintiff was in equity, we are compelled to hold the same way in this case. The plaintiff had no right to sue for damages before the time for performance by the defendant had arrived. He had sustained no damages, for the policy was still in force, and if it refused to recognize its obligation thereunder he could compel recognition by a judgment exactly adapted to the situation.

The judgment below should be reversed, and a new trial granted, with costs to abide event.[56]

O'NEILL v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

(Supreme Court of New Jersey, 1904. 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422.)

Action by Thomas O'Neill against the Supreme Council American Legion of Honor. Demurrer to pleas overruled.

PITNEY, J.[57] The declaration avers that in the year 1891 the defendant was a corporation of the state of Massachusetts, engaged in business in the state of New Jersey, and made a contract under seal with the plaintiff, known as a benefit certificate (set forth in full in the pleading), whereby it was certified that the plaintiff was a companion

[56] Dissenting opinion of Edward T. Bartlett, J., is omitted.

[57] Parts of the opinion are omitted.

of the American Legion of Honor, and thereupon, in consideration of full compliance by him with all by-laws of the supreme council of that order, then existing or thereafter adopted, and the conditions in the benefit certificate contained, the supreme council agreed to pay to the plaintiff's sister, in trust for his six children, the sum of $5,000, upon satisfactory proof of the plaintiff's death while in good standing upon the books of the supreme council. It alleges that the contract was made in consideration of the payment by the plaintiff of the assessments or premiums which might from time to time be called by the defendant. It avers payment by the plaintiff of all assessments called, and performance by him of all conditions, until the defendant broke the contract and declared the same void. It sets up that the defendant has failed, neglected, and refused to carry out the conditions of the contract, in that on August 22, 1900, on December 10, 1901, and on divers other days between those dates, the defendant declared to the plaintiff that it would not perform the contract or pay the insurance money thereby agreed to be paid, and that upon the plaintiff's death the beneficiaries would not be entitled to receive the sum of $5,000, and that the defendant would not pay the same, but that the beneficiaries should receive only $2,000. The declaration further avers that upon the breach of the contract by the defendant as aforesaid, and upon the several dates mentioned above, the plaintiff tendered to the defendant the same monthly assessments and payments as had been theretofore called or required by the defendant upon the the contract, and the plaintiff offered and agreed to continue making such payments, and in all respects offered to comply with the terms and conditions of the contract; yet the defendant refused to accept from the plaintiff the assessments so tendered, and refused to recognize the contract or continue it in force; whereby the plaintiff has sustained damages, to recover which the action is brought.

The defendant has pleaded the general issue and five special pleas. To each of the latter the plaintiff demurs. The first question for consideration is whether the declaration sets forth a good cause of action. The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance. Numerous reported decisions have laid down the doctrine that where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant.

This doctrine has been followed in the English courts for more than half a century.[58] * * *

In the leading case of Hochster v. De La Tour, Crompton, J., said, during the argument: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time (meaning, of course, for purposes of further performance); but I will hold you liable for the damage I have sustained, and I will proceed to make that damage as little as possible by making the best use I can of my liberty.' This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal." And Lord Campbell, C. J., in delivering judgment, said: "It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. * * * The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

The same rule prevails in the Supreme Court of the United States. Roehm v. Horst (1899) 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, where numerous previous decisions of the same court are cited. And the great weight of authority in the state courts is to the same effect:[59] * * *

[58] The court here cited Hochster v. De La Tour, 2 El. & Bl. 678, 22 L. J. Q. B. 455 (1853); Cort v. Ambergate, etc., Ry. Co., 17 Ad. & El. (N. S.) Q. B. 127 (1851); Avery v. Bowden, 5 El. & Bl. 714, 6 El. & Bl. 953 (1855); Danube, etc., Ry. Co. v. Xenos, 11 Com. Bench (N. S.) 152 (1861), affirmed on appeal in Exchequer Chamber, 13 Com. Bench (N. S.) 825; Frost v. Knight, L. R. 7 Exch. 111 (1872); Johnstone v. Milling, L. R. 16 Q. B. Div. 460 (1886); Synge v. Synge, 1 Q. B. 466 (1894).

[59] The court cited Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516 (1870); Howard v. Daly, 61 N. Y. 362, 374, 19 Am. Rep. 285 (1875); Ferris v. Spooner, 102 N. Y. 10, 5 N. E. 773 (1886); Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436 (1887); Nichols v. Scranton Steel Co., 137 N. Y. 471, 487, 33 N. E. 561 (1893); Kadish v. Young, 108 Ill. 170, 177, 43 Am. Rep. 548 (1883); Roebling's Sons Co. v. Lock Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 (1889); Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33 (1894); Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275 (1881); Crabtree v. Messersmith, 19 Iowa, 179 (1865); McCormick v. Basal, 46 Iowa, 235 (1877); Hosmer v. Wilson, 7 Mich. 294, 304, 74 Am. Dec. 716 (1859); Platt v. Brand, 26 Mich.

Sands in sickness and health as long as she lives. I, Jane M. Sands, do promise to pay Mary F. Ga Nun $70.00 a month for the support of the house and her clothes as long as I live, and at my death she is to have $20,000 that she will find in the safe deposit in New York, and she is to take my keys and distribute the packages in box as they are marked, and all my clothing and wearing apparel and silver. In short, everything in the house shall be Mary F. Ga Nun's. [Signed] Jane M. Sands. Louis W. Jansen, A. S. Leonard, M. D., W. G. Bouvier, Witnesses."

The trial court found as facts that, in pursuance of such contract, the plaintiff undertook the care and maintenance of Miss Sands, and continued the same until May, 1900, when Miss Sands left her, and removed from the plaintiff's home in Brooklyn to the defendant's residence in Poughkeepsie, with whom she some time afterwards entered into a similar oral contract with defendant, but for less compensation; that she continued to reside with the defendant until she died on August 17, 1906, leaving a will in which she made the defendant her sole legatee and devisee, and appointed her sole executrix; which will was duly admitted to probate by the surrogate of Westchester county, who issued letters testamentary to the defendant, who thereupon duly qualified, and since has acted as such executrix. The court also found that there was a breach of the contract by decedent in the early part of May, 1900, at which time she left the house of the plaintiff with the intention of never returning to reside with the plaintiff, and with the intention of never permitting the plaintiff to care for her, all of which was well known to the plaintiff at the time decedent left her house and went to live with the defendant at Poughkeepsie; that the plaintiff then employed a lawyer to enforce her claim against the decedent, and he presented bills for the $70 per month up to May 1, 1900, and wrote to the decedent, demanding payment, and threatening action if payment was not made.

This action was brought on the 31st day of May, 1907, after the death of Miss Sands, and the court found as conclusions of law that, more than six years having elapsed after the breach of the contract, the plaintiff's right of action was barred by the statute of limitations.

None of the other issues raised by the pleadings have been tried out or determined, and consequently the only question brought up for review is that upon which the trial court has based its judgment.

The clause of the contract in which Miss Sands agreed to pay the plaintiff $70 a month for the support of the house and her clothes, for which the plaintiff presented a bill up to the 1st of May, 1900, presents no question in dispute. There can be no doubt but that such payments were due and payable monthly, and that the amount thereof, at the time the bill was presented, then being due and payable, the statute commenced to run, and, six years having elapsed before her death, the plaintiff's claim, therefore, became barred by the statute. We do not

understand, however, that the plaintiff in this action claims to recover for the monthly allowance specified, but bases her right of action upon the further promise of Miss Sands that at her death the plaintiff is to have the $20,000, which she would find in the safe deposit box.

The trial court, as we have seen, was of the opinion that there was a breach of the contract in its entirety at the time the decedent left the plaintiff's house, and that the statute also ran as to the claim for $20,000. In reaching this result, the learned justice in his opinion refers to the case of Henry v. Rowell, 31 Misc. Rep. 384, 64 N. Y. Supp. 488, affirmed on the opinion below, 63 App. Div. 620, 71 N. Y. Supp. 1137, as an authority upon this subject, which he was bound to follow. That was an action on quantum meruit to recover for the value of 12 years board and lodging furnished by the plaintiff to the decedent in her lifetime, under an agreement to board and lodge her in his household as long as she should live; she agreeing to leave him by will all of the property she should own at the time of her death. After receiving board and lodging from the plaintiff for 12 years, the decedent left his abode and went elsewhere, and lived for 14 years thereafter, and then died, leaving a will in which she disposed of her property to other persons. Subsequently that action was brought. In that case it was held that there was a breach of the contract at the time that the decedent left the plaintiff's residence, and that the statute of limitations commenced to run at that time; that there was but one cause of action available to the plaintiff, and that was for the value of the board and lodging furnished by him up to that time. In that case there was no agreement to pay a definite sum for board and lodging per month or by the year; the only agreement to pay therefor being the promise of the decedent to make a will giving the plaintiff all of her property. It is therefore apparent that but one cause of action existed in that case. But whether the court correctly held that the action could not be maintained after the testatrix's death by reason of the running of the statute, we now express no opinion.

The case we have now under review differs from the above case, for under the agreement that decedent promised to pay the plaintiff $70 a month for the support of the house, etc., that being a definite, fixed amount, payable monthly, for which an action could have been maintained therefor at the end of each month. With reference to the other provision of the agreement, instead of the decedent promising to make a will giving the plaintiff all of her property, she agreed at her death that the plaintiff is to have the $20,000 in her safe deposit box, and, instead of this action being brought for the value of services rendered on quantum meruit, it is brought upon the contract; the plaintiff claiming the stipulated sum expressed therein. It may be that but one cause of action exists in favor of the plaintiff for the breach of the $20,000 clause of the contract, and that such an action could have been maintained at the time the decedent left the plaintiff's house and went to

reside elsewhere. But, in view of the fact that the plaintiff might meet with misfortune, disabling her from carrying out her part of the contract to care for the decedent "in sickness and in health as long as she lives," thus rendering the determination of the amount of her damages uncertain and difficult to prove, she saw fit to wait until the amount specified in the contract became due by the terms thereof. Did she have the right to do this? In answering this question, we shall assume, for the purposes of this review only, that the breach of the testatrix's contract was of such a character as to amount to a notice to the plaintiff that she would not carry out the provision with reference to the giving her $20,000 at the testatrix's decease, and that an action for damages could have been maintained immediately after such breach. The question thus arises as to whether the plaintiff was bound to treat the contract as broken and bring her action, or might she, at her option, treat the contract as still in force, and wait until the sum specified became due under its terms?

In this case, as we have seen, the breach occurred after partial performance. This fact was deemed of importance in the case of Henry v. Rowell, supra, but we fail to see how it affects the right of the plaintiff to exercise her option. It is quite true that there is a distinction made in the authorities with reference to contracts which still are wholly executory, and are to be performed in the future; but the distinction pertains to that which would constitute a breach of such contracts. Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie; whereas, by a partially executed contract, the breach may result from a failure to perform some of the provisions of the contract. But in either case, after a breach by one party, the rights of the other party and his remedies are the same as to the unexecuted provisions of the contract. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285.

The leading case upon the subject of remedies is that of Hochster v. De la Tour, 2 Ellis & Blackburn, 678. In that case the contract was wholly executory. On the 12th day of April, the defendant had agreed to employ the plaintiff in the capacity of a courier for a period of three months from the 1st day of June. But subsequently, and before the 1st day of June, the defendant gave the plaintiff notice that he would not require his services. Lord Campbell, after discussing the authorities, states his conclusions as follows: "But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under

another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. * * * The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

In Frost v. Knight, L. R. 7 Ex. 111, Cockburn, C. J., after referring to the case of Hochster v. De la Tour supra, and other cases, says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."[64] * * *

A further citation of authority hardly seems necessary, for the general rule is that a right of action does not accrue upon a contract until it is executed, or payment thereunder becomes due by its terms, and the statute of limitations does not commence to run until that event happens. The right to bring an action previous to that event is exceptional, and is only permitted in cases of a breach of a contract by one of the parties which permits the aggrieved party at his option, to maintain an action for such breach, and recover the damages he has suffered on account thereof. In reaching this conclusion, we have assumed, as above stated, that the breach was of such a character as to

[64] The court has cited as in accord: Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1900); Heery v. Reed, 80 Kan. 380, 102 Pac. 846 (1909); Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 83, 8 C. C. A. 14 (1893), Taft, J., and Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40, 3 L. R. A. (N. S.) 1042, 112 Am. St. Rep. 601, 6 Ann. Cas. 60 (1906).

permit the bringing of an action for damages. We do not, however, wish to be understood as deciding that question, for the rule that renunciation of a continuous executory contract by one party before the day of performance, giving the other the right to sue at once for damages, is usually applied only to contracts of a special character; and the question whether it applies to such a contract as we have under review we leave undetermined. Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; Adenaw v. Piffard, 202 N. Y. 122–129, 95 N. E. 555; 25 Cyc. 1074. * * *

Judgment reversed and new trial granted.

SMITH & RICE CO. v. CANADY.

(Supreme Judicial Court of Massachusetts, 1912. 213 Mass. 122, 99 N. E. 968.)

Bill by the Smith & Rice Company against James W. Canady to compel specific performance. From a decree dismissing the bill, plaintiff appeals. Affirmed.

MORTON, J. This is a bill in equity to compel specific performance by the defendant of the following agreement under seal:

"I agree to sell and convey, by warranty deed conveying a good title, free from all incumbrances, to Smith & Rice Co., corporation, of Worcester, Massachusetts, for the sum of thirteen hundred dollars, the following described property: The farm on which I now live in Spencer, Mass., known as the McKonik farm, the deed of which is recorded in Worcester District, Deeds Book 1875, page 307. Also all wood cut on farm and in shed at house and what hay may be left in the barn. Possession of said premises and a deed of the same shall be delivered to the same Smith & Rice Co. on or before the 10th day of April, 1911. Payment of the purchase money shall be made upon delivery of the deed. Witness my hand and seal this 9th day of March, 1911.

"Witness: [Signed] James W. Canady. [Seal.]"

The case was duly heard and a decree was entered dismissing the bill without costs. The plaintiff appealed.

It appeared that shortly after the defendant signed the agreement he attempted to revoke the offer contained in it by means of the following letter which was sent by him to and received by the plaintiff:

"Spencer, Mar. 17th, 1910.

"Mr. Rice—Dear Sir: I give you notice that I do hereby revoke my offer to sell to you my farm in Spencer. You don't agree to buy it nor do you give me a penny or other thing to hold it until you find out whether you want it or not and at the last moment you can tell me you don't want it and I lose other customers. That is not fair or right.

"Yours, [Signed] J. W. Canady."

The letter appears to be dated 1910, but that is obviously a mistake for 1911. The court found that the attempted revocation contained in this letter was abandoned and given up by the defendant some time about April 1, 1911. The facts found by the court warranted such a finding. What was found by the court was that "some time about April 1, 1911, at the request of the plaintiff, the defendant went to the office of the plaintiff's attorney, and while there discussed with the plaintiff the matter of the conveyance; was asked by the plaintiff then to execute and deliver a deed of the premises, to which demand the defendant replied that he was not bound to do such [so] under his agreement before the 10th day of April, 1911. The plaintiff then requested the defendant to remain a short while until he, the plaintiff, could procure at a nearby bank money sufficient to make a tender. This request the defendant refused to comply with and left the office." It also appeared that the defendant thereafter caused a proper deed of conveyance to be prepared and remained at his dwelling house on the premises the entire day of the 10th of April, ready and able to deliver possession and title in accordance with his offer.

These facts plainly warranted a finding that the attempted revocation had been abandoned and given up by the defendant, and that the plaintiff must have so understood it and was bound to govern itself accordingly. The offer made by the defendant required the plaintiff to tender on or before April 10th the amount for which the defendant agreed to sell and convey the farm. What took place in the office of the plaintiff's attorney plainly did not constitute a tender, and the court found that "the plaintiff thereafter, before the bringing of this bill, never made demand upon the defendant for a deed of the premises, nor tendered nor offered to tender the price to be paid for such conveyance." The time named in the offer was of the essence of the agreement made by the defendant, and even if what took place in the attorney's office could be construed as an acceptance by the plaintiff of the defendant's offer the plaintiff was bound to tender performance on its part before the expiration of the time named, in order to entitle itself to a conveyance of the farm. As already observed, it is clear that what took place in the attorney's office did not constitute a tender, and it is expressly found that thereafter, before the bringing of the bill, the plaintiff made no demand for a deed and did not offer to pay the price required for a conveyance. There was no such refusal to convey on the part of the defendant as to dispense with a tender. Mengis v. Carson, 114 Mass. 410. The attempted withdrawal of the offer was abandoned, not only without objection so far as appears on the part of the plaintiff, but in consequence, as it could have been found, of his holding the defendant to his offer and of the defendant's recognizing that he was bound to convey if the plaintiff insisted upon his doing so and complied with the conditions on which the offer was made. As was said in Mengis v. Carson, supra: "A mere declaration of unwillingness which shows only a passing

intention on the part of the defendant of which he may repent, and which does not amount to an assurance that the other party is relieved from the part required of him" does not excuse the plaintiff from performing such part. The defendant's recognition of his obligation to convey if the plaintiff insisted upon it was shown by his statement to the plaintiff, when the plaintiff asked for a deed, that he was not bound to give a deed till April 10th, and by the fact that he caused a proper deed to be prepared and was ready and able to give title and possession on the 10th day of April. There was nothing to excuse the plaintiff from a proper tender on or before the 10th day of April, and the plaintiff not having made such tender was not entitled to a conveyance and the bill was rightly dismissed.

Decree affirmed with costs of appeal.[65]

(c) MEASURE OF DAMAGES—MITIGATION OF DAMAGES

SCHELL v. PLUMB.

(Court of Appeals of New York, 1874. 55 N. Y. 592.)

GROVER, J.[66] The contract of the testator to support the plaintiff during her life and his violation thereof are found by the verdict. The judge held that upon these facts the plaintiff was entitled to recover, not only the expense of her support to the commencement of the action, but the entire amount of such expense during her life. To this the defendants excepted, insisting that if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or at most, to the time of the trial. Upon this question the authorities are somewhat conflicting; but an examination satisfies me that the rule adopted by the judge is sustained by those best considered. Fish v. Folley, 6 Hill, 54, was an action upon a covenant of the defendant's intestate with the plaintiff to furnish him with sufficient water from the intestate's mill-dam to carry his fulling mill and carding machine, unlimited in duration.

[65] The repudiator has no power of retraction after the other party has accepted it as final and acted in reliance thereon. Ripley v. McClure, 4 Exch. 345 (1849); Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378 (1890); Nilson v. Morse, 52 Wis. 240, 9 N. W. 1 (1881). But prior thereto he has such power. Avery v. Bowden, 5 E. & B. 714 (1856); Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548 (1883); Roebling's Sons' Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 (1889); Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760 (1897).

[66] Part of the opinion is omitted. The Northampton life tables were held admissible to prove plaintiff's life expectancy.

It was held that a previous action in which damages were recovered up to the commencement of the action was a bar to a subsequent action for breaches after the commencement of the former action. Nelson, C. J., says in the opinion that the covenant stipulated for a continued supply of water to the plaintiff's mills, and in this respect may be appropriately styled a continuing contract; yet, like any other entire contract, a total breach put an end to it and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it in the former suit. This is in principle precisely analogous to the present case. Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period, but the contract was entire and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract. Shaffer v. Lee, 8 Barb. 412, was an action upon a bond conditioned to furnish the obligee and his wife with all necessary meat, etc., during both and each of their lives. It was held to be an entire contract, and that a failure to provide according to the substance and spirit of the covenant amounted to a total breach, and that full and final damages might be recovered for the future as well as the past. It is obvious that the right to recover a full equivalent upon a breach is the same when the contract is by parol as when it is evidenced by an instrument under seal. Dresser v. Dresser, 35 Barb. 573, was upon a like contract by parol, and it was held that upon a breach the entire damages might be recovered.

The counsel for the appellants insists that such cannot be the rule, for the reason as he insists, that it is impossible to ascertain the damages, as the duration of life is uncertain, and a further uncertainty arising from the future physical condition of the person. Guthrie v. Pugsley, 12 Johns. 126, and Wager v. Schuyler, 1 Wend. 553, show that the former reason has no force. In each of these cases the value of a life estate in real estate was determined in actions upon the breach of covenants of warranty, as to which the uncertainty as to the duration of life was the same as in the present case. It may be further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount. The counsel for the appellants cites cases where it has been held that in actions for a continuing injury to real estate, damages can only be recovered to the commencement of the action, and that subsequent actions may be brought for damages sustained thereafter. This is the undoubted rule in this class of actions, but has no application to actions upon contracts which are entire. Cases are also cited applying the same rule in actions upon covenants to repair. Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369, was of the latter class. Ferguson v. Ferguson, 2 N. Y. 360, was a case, as ap-

pears from the facts stated, of a partial and not total breach of the contract, in which it was correctly held that a recovery could only be had for the partial breaches that had occurred. * * *

Judgment affirmed.[67]

WIGENT v. MARRS.

(Supreme Court of Michigan, 1902. 130 Mich. 609, 90 N. W. 423.)

Action by Gardner A. Wigent against Thomas Marrs, administrator of the estate of Chloe R. McClung, deceased. There was a judgment in favor of defendant, and plaintiff brings error. Affirmed.

HOOKER, C. J. Plaintiff recovered a verdict and judgment in an action of assumpsit before a justice of the peace, which was reversed in the circuit court on appeal. The declaration was upon the common counts. The facts were undisputed, and in substance are as follows: In May, 1901, defendant's intestate gave a written order to plaintiff's agents for a monument to be erected upon her lot in the cemetery at the agreed price of $100, the same to be completed between that date and June 30, 1901, unless unforeseen causes should prevent, and in that event as soon thereafter as practicable. It was to be set upon a foundation to be erected by her. The contract was approved by the plaintiff on May 14th, of which Mrs. McClung was notified, and at the same time the monument was ordered to be made at the quarry. The latter part of June the plaintiff notified her to get the foundation ready, in response to which she wrote him that he need not bring that monument, as it did not come according to agreement. On July 5th plaintiff replied, stating that the monument was well under way, and he could not allow her to countermand her order; that it would be delivered as soon as completed, and would be strictly according to contract, and she was requested to have her foundation built as soon as possible. In response to this she wrote: "You have not done according to agreement at all. You was to have it up by the 30th of June at the farthest. We are not obliged to wait your motion, so, if you bring it, you may take it back." The plaintiff had the monument completed and set up upon a foundation erected by himself. This action was brought to recover the contract price and $1.50 for the foundation, with interest from August 23, 1900.

It was shown that the delay was caused by unforeseen circumstances. No complaint was made of the workmanship, which was such that the monument could not be used for any other purpose. The defendant claims that the plaintiff, upon receipt of Mrs. McClung's letter, had no legal right to complete the contract and recover the price; that his

[67] In accord: Parker v. Russell, 133 Mass. 75 (1882); United Press Ass'n v. Natl. Newspaper Ass'n, 237 Fed. 547, 150 C. C. A. 429 (1916); Golden Cycle Min. Co. v. Rapson Coal Min. Co., 188 Fed. 179, 112 C. C. A. 95 (1911); Speirs v. Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825 (1901); Sutherland v. Wyer, 67 Me. 64 (1877), servant discharged.

only remedy was to recover in damages for a breach of the contract. Plaintiff, on the other hand, claims that it was competent to treat the contract as performed, and that he is entitled to recover the contract price upon the common counts. It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. In Mechem, Sales, § 1091, the author says: "The law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that stage in its progress." "The contract is not rescinded, but broken; and, immediately the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation for that purpose to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." Id. § 1092.

This subject is discussed in the case of Hosmer v. Wilson, 7 Mich., at page 305, 74 Am. Dec. 716, where Mr. Justice Christiancy says: "And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages. In Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, 21 Vt. 21." Mr. Justice Christiancy adds that: "This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties." In the case of Danforth v. Walker, 37 Vt. 244, the court said of a similar case: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party." See, also, Butler v. Butler, 77 N. Y. 472, 33 Am. Rep. 648; Clause v. Printing Press Co., 118 Ill. 612, 9 N. E. 201.

We are cited by plaintiff's counsel to the case of Black v. Herbert, 111 Mich. 638, 70 N. W. 138, as a case on all fours with the present case, but we think it is readily distinguishable. In that case, after re-

nunciation the parties met by appointment, and the plaintiff was permitted to alter and set up the monument. It became, therefore, a question for the jury whether or not the contract had been performed. Renunciation must be more than mere idle talk of nonperformance; it must be a distinct, unequivocal, and absolute refusal to receive performance or to perform on his own part. Mechem, Sales, § 1087. The party attempting to renounce may withdraw his renunciation and have the contract performed (Id. § 1090), and it would seem that the defendant in that case did so. There are only two theories upon which the common counts could be relied upon in this case: First, upon the theory that the contract had been performed, and that the contract price was therefore recoverable; and, second, for the work and material used in the foundation built by the plaintiff. The undisputed facts show that the contract was not performed on receipt of the renunciation, and there could be no recovery for the erection of the foundation, because the plaintiff was never requested to build it, but, on the contrary, was prohibited from doing anything further in performance of the contract. The only redress that the plaintiff would be entitled to recover would be damages for the breach of the contract if renunciation should be found to be unwarranted, which does not appear.

It follows that the judgment must be affirmed.

HART-PARR CO. v. FINLEY.

(Supreme Court of North Dakota, 1915. 31 N. D. 130, 153 N. W. 137, L. R. A. 1915E, 851, Ann. Cas. 1917E, 706.)

Action by the Hart-Parr Company, a corporation, against Frank Finley. From a judgment for defendant, plaintiff appeals. Affirmed, and rehearing denied.

Goss, J.[68] This action is to recover $2,400 damages as the purchase price of an engine plaintiff claims to have sold and delivered defendant, together with an additional $104 freight charge thereon. June 10, 1912, defendant executed and delivered the usual written machinery order to plaintiff. It was duly accepted. Before the stipulated time for delivery, defendant notified plaintiff he would not receive the engine and to cancel his order. Plaintiff refused cancellation, insisting upon full performance. On receipt of defendant's written notice of revocation, and on June 29th, plaintiff wrote defendant as follows:

"Referring to your letter of June 22d, in which you ask us to cancel your order, wish to say that we cannot do this. * * * The order contains no provision for cancellation, and like any other contract it cannot be abrogated or annulled without the consent of all the parties thereto. We will ship you the engine promptly on July 15th [the date specified for shipment in the order], and will carry out our part

[68] Parts of the opinion and the opinion on rehearing are omitted.

of the contract in every detail. We shall then insist that you carry out yours, and you have absolutely no grounds whatever upon which to refuse to do so."

Defendant's reply, duly received, was: "Yours of the 28th of June, refusing to cancel order, at hand. * * * Now I positively will not receive said engine and do not think you are giving me a square deal in trying to hold me up. If it is a case of damages, make a statement and I will consider it. But if you wish to go to law, I am ready."

On July 15th, the earliest date fixed for performance, plaintiff tendered the engine to defendant f. o. b. at Forest River, according to the terms of the contract. He refused to accept it or to execute and deliver his notes or pay the freight. On August 13th, and within the stipulated period for performance, plaintiff took said tractor to the home of defendant, and unconditionally tendered it to him in performance of its obligation. Defendant refused to receive the engine, which plaintiff then left at his farm, against his expressed wishes and protest and without his consent. The freight from the factory to Forest River was $104.

These are the findings. The appeal is from the judgment of dismissal, raising only the legal conclusions to be drawn from the findings. The decision is the answer to whether a suit can be maintained for the purchase price and freight added, as for damages suffered by the failure of the defendant to receive the stock engine ordered for future delivery to him, where, before the time for delivery, he had given plaintiff his unequivocal and unconditional notice of cancellation of his order and that he would neither receive the engine nor pay for it, with defendant refusing to receive or pay for the engine and insisting upon his repudiation.

Plaintiff claims: (1) That the attempted cancellation and notice was ineffectual for any purpose and amounted to but defendant's offer that the contract might be canceled, which offer was rejected, leaving the written contract in force, under which, however, it was not obliged to tender the engine in the face of the defendant's offer and refusal to receive it, but nevertheless it claims it did deliver it to him, and thereby parted with its title, and therefore can recover damages as for the purchase price; and (2) irrespective of the passing of title, the order should be construed as authorizing a recovery for $2,400 and freight, inasmuch as such is plaintiff's contract rights, because payment was not conditioned upon the passing of title as a condition either precedent or concurrent. Defendant asserts that: (1) Title did not vest in defendant, as the contract was repudiated before delivery, upon which repudiation an action for damages only for such breach is accorded to the seller, with the measure of damages recoverable fixed by section 7156, C. L. 1913, as declared, where the title does not pass to the purchaser; and (2) that a purchaser has a right to stop performance of an executory contract of purchase and sale by notice of its cancellation, and the question of breach of contract by anticipation is

not involved; and (3) that, upon notice of cancellation, it became the duty of the seller to mitigate its damages, rather than enhance them, and that freight paid for the shipment made after notice of cancellation was such an enhancement of its damages.

The questions presented are whether: (1) This purchaser had a right to cancel his executory contract of purchase while it remained wholly executory; (2) the effect of his attempted cancellation thereof; (3) the measure of damages for the breach; and (4) the effect of cancellation to mitigate such damages.

The difficulty is not in passing upon the issues in the light of the common law alone or of our statutes but declaratory thereof, but instead arises in their solution in harmony with both the common law and consonant in reason with the holding and the principles announced in Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, wherein was repudiated the common-law doctrine that there could be an anticipatory breach of a wholly executory contract of purchase and sale. Stanford v. McGill is the bulwark behind which the plaintiff is entrenched. Under the doctrine of that case, it reasons that this attempted cancellation is ineffectual, except to relieve it from the necessity of making a tender; that the contract never was breached until refusal to accept the tendered property; that the attempted cancellation in no wise relieved defendant from his obligation to purchase and pay the purchase price, inasmuch as it constituted but a mere offer, the rejection of which left the contract unaffected, and under which it has performed promptly and punctually upon the first day upon which it could elect to perform; that it thereby cast title upon defendant and can recover the purchase price therefor; that it can recover as damages for freight paid, because, if it can disregard the cancellation at its pleasure that cannot logically furnish a foundation for minimizing such damages necessarily incurred in moving the machine to Forest River, that it might be there for tender on July 15th; that, under the reasoning of Stanford v. McGill, it had the right to expect that, notwithstanding defendant's attempted repudiation, he would nevertheless repent thereof upon a tender made to him, and perform; that accordingly it had the right to make shipment and place itself in readiness to perform its part on the first day possible; that it is therefore entitled to recover at least the freight, inasmuch as that damage should not be mitigated on any plea that it should take notice of a futile attempt at cancellation and anticipate that defendant's refusal would be the result of the tender, to do which is diametrically contrary to one of the chief reasons for the holding in Stanford v. McGill. And appellant can confidently inquire why it should be compelled to recognize an attempted repudiation for purposes of mitigation of damages, inoperative under Stanford v. McGill, to relieve defendant from his performance, and when the attempted repudiation itself did not affect the original rights of plaintiff under the contract.

How can you mitigate as to the amount of the necessary expense of performance when the contract is unaffected by the attempted repudiation and consequently valid as an entirety during the time the expense to be mitigated was incurred? Plaintiff propounds, in effect, these questions for answer. "A party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to such damages as will compensate the other for the loss he has sustained by having his performance checked at that stage of its progress." 2 Mechem on Sales, § 1091. This is the settled law even in Massachusetts (which, together with North Dakota and Nebraska, are the only states rejecting the doctrine of anticipatory breach of executory contracts), as there declared in Collins v. Delaporte, 115 Mass. 159–162, in these words: "A party to an executory contract may stop the performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits"—and is also recognized as the law in Parker v. Russell, 133 Mass. 74.

But the application of this general rule of law seems inconsistent with the doctrine that there can be no anticipatory breach, but yet that the notice, although not operating to affect the contract rights in the least, nevertheless as to damages recoverable may in effect "stop performance." As all the law is to this effect, our holding could be based upon this principle alone as to this phase of the case. However, to do so and to cite, affirm, or leave intact the declared doctrine in Stanford v. McGill would seem to be applying a general rule of law unharmonious with logical results of the principles and reasoning in that case. Recent authorities sustain the doctrine of anticipatory breach: 6 R. C. L. §§ 384–387.[69] * * *

When Stanford v. McGill was decided, there may have been some doubt about what the trend of authority might be in the future, but the contrary rule has since been unanimously followed, and the law generally applicable to executory sale contracts settled in harmony therewith. As no property rights can be involved, inasmuch as no rule of property could have grown out of that decision, no harm can come from harmonizing the law in this jurisdiction with that generally prevailing. Accordingly Stanford v. McGill to that extent is overruled. The notice of repudiation given was such as might have authorized plaintiff to have considered the entire contract as breached, and brought its action immediately for damages, had it so elected. But this it did not do, and the option to do so rested with it; and, at the time stipulated for performance, plaintiff was charged with notice previously given that the defendant would not receive the property, which obviated nec-

[69] The court here cited many recent cases, most of which appear in previous notes herein, and quoted from O'Neill v. Supreme Council American Legion of Honor, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422 (1904), and Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1900).

essity of a tender or of any further act by it. Sections 5775 and 5824, C. L. 1913. It could treat the contract as subsisting "up to the time when performance should commence, for the purpose of insisting that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms or persist in his resolution not to perform upon his part. But the party who has not broken his compact is not allowed to treat it as in force for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, and then enforce the payment of the contract price." [70] * * *

As to the assertion that title was vested in defendant, and that therefore it could sue for the purchase price, title could not be cast upon defendant in the face of his persistent refusal to accept title or the engine. There are cases where delivery may be constructively made or may be presumed, but that is not ours. The contract remains executory, and no title passes as on an executed sale until the buyer accepts a delivery of the property.[71] * * *

The purchase price cannot be recovered as the measure of damages, in the absence of a provision in the contract to the contrary, unless title to the goods has vested in the purchaser, as the transfer of title and payment therefor are in contemplation of law concurrent acts, and "if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened." White v. Solomon, 164 Mass. 516, 42 N. E. 104, 30 L. R. A. 537; Reeves & Co. v. Bruening, 13 N. D. 157, 166, 100 N. W. 241; Minneapolis Mch. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993, construing section 7156, C. L. 1913.

Plaintiff claims the right to recover independently of the passing of title, as on a contract stipulating for the payment of money without the passing of title being a condition either precedent or concurrent to payment. There are two equally conclusive answers to this contention: First, there is no basis in the pleadings for such a claim as it sues as for recovery of a purchase price of property sold and delivered; and, secondly, the contract itself negatives such a claim, showing on its face to be a contract for the purchase and sale of personal property with payment by notes stipulated to be made as a condition concurrent up-

70 The court here cited section 5536, C. L. 1913; Nichols & Shepard Co. v. Paulson, 6 N. D. 400, 71 N. W. 136 (1897); Colean Mfg. Co. v. Blanchett, 16 N. D. 341, 113 N. W. 614 (1907); Reeves & Co. v. Bruening, 13 N. D. 157, 166, 100 N. W. 241 (1904); Colean Mfg. Co. v. Feckler, 20 N. D. 188, 195, 196, 126 N. W. 1019 (1910); Westby v. J. I. Case Threshing Mach. Co., 21 N. D. 575, 589, 590, 132 N. W. 137 (1911).

71 The court here cited 6 R. C. L. 1026; Danforth v. Walker, 37 Vt. 239 (1864); Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783 (1891); Collins v. Delaporte, 115 Mass. 159 (1874); Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80 (1892); note to 33 Am. St. Rep. 795, 796; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548 (1883); Roebling Sons Co. v. Lock-Stitch Fence Co., 130 Ill. 660, 22 N. E. 518 (1889); Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807, and note (1908).

on delivery of such property with title the consideration for the notes. Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807.

To summarize in conclusion. Defendant had the right to tender a breach of the contract by notice that he would never perform, which repudiation plaintiff might have elected to accept as a present and immediate breach. Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, is to this extent overruled. Instead it elected to keep the contract alive until the stipulated time for performance arrived, when, defendant not having withdrawn his renunciation, it could dispense with tender of performance and sue for damages. This it elected not to do, but chose to make a tender and afford defendant a further opportunity to receive it, in the event of which reception of the property he could have been sued for the purchase price. However, he refused to receive either property or title, standing upon his repudiation of the contract, but thereby rendering himself liable for all damages accruing to the other party because of such breach. The measure of damages for breach is by section 7156, C. L. 1913, and the common law governed by a different rule from where title has been vested, in which event it is to be deemed to be the contract price. Section 7155, C. L. 1913. As this suit is for the contract price for goods sold and delivered, it is not maintainable. There is an entire failure of proof of damages. As to the freight paid, the findings do not disclose but what this expense was incurred after notice of repudiation operated to check further performance. That defendant did not observe it, if the freight expense was incurred thereafter, was at plaintiff's own election and taken at the hazard that it could induce defendant to later perform the contract. It is in contemplation of law an enhancement of damages after notice of repudiation, and is not recoverable.

Judgment affirmed.[72]

[72] It is now almost invariably held that in case of a repudiation before performance by the other party is completed, such other party cannot increase his recovery by continuing to perform. He has a right to damages caused by the breach, enforceable in express assumpsit; also, in the alternative, a right to the value conferred upon the repudiator by part performance, enforceable in indebitatus assumpsit; but he has not a right to the contract price enforceable in debt, nor has he the power to create such a right by continued performance. Clark v. Marsiglia, 1 Denio (N. Y.) 317, 43 Am. Dec. 670 (1845), service contract; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875); James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1886); Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273 (1893); Litchenstein v. Brooks, 75 Tex. 196, 12 S. W. 975 (1889); Little Butte Consol. Mines Co. v. Girand, 14 Ariz. 9, 123 Pac. 309 (1912); Bridgeford & Co. v. Meagher, 144 Ky. 479, 139 S. W. 750 (1911); Pierce v. Tennessee Coal, Iron & R. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591 (1899); Listman Mill Co. v. Dufresne, 111 Me. 104, 88 Atl. 354 (1913), goods shipped after repudiation; Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783 (1891), building erected; Richards v. Manitowoc & N. Traction Co., 140 Wis. 85, 121 N. W. 937, 133 Am. St. Rep. 1063 (1909); Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710 (1910).

It is often held that the plaintiff is prima facie entitled to the full contract

JAMESON v. BOARD OF EDUCATION.

(Supreme Court of Appeals of West Virginia, 1915. 78 W. Va. 612, 89 S. E. 255, L. R. A. 1916F, 926.)

Action by Hallie Janes Jameson against the Board of Education, etc. Judgment for plaintiff, and defendant brings error. Reversed, and judgment entered for defendant.

WILLIAMS, P. Plaintiff recovered a judgment against defendant for $609.67, the amount of seven months' wages, claimed to be due her on a contract of employment as teacher of music in the public schools of the cities of Benwood and McMechen, in the school district of Union, Marshall county, and by this writ of error defendant seeks a reversal.

Plaintiff declared upon the special contract, averring that she was employed by defendant for a period of nine months, beginning on the 11th of September, 1911, and continuing for nine school months, on an agreed salary of $75 per month, payable monthly; that throughout

price as his damages, and that the burden is on the repudiator to show that the plaintiff either did mitigate the loss or reasonably could have done so. See International Text-Book Co. v. Martin, 82 Neb. 403, 117 N. W. 994 (1908); Grant v. New Departure Mfg. Co., 85 Conn. 421, 83 Atl. 212 (1912), Wheeler, J., dissenting; Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 85 N. E. 877 (1908).

In sales of goods, where title has passed, of course debt lies against a repudiating buyer. Many cases also hold that, where the goods are ready for delivery at the time of repudiation, the seller can vest title in the buyer against his will and then get judgment for the agreed price. See American Uniform Sales Act, § 63(3); Williston, Sales, § 562; Dustan v. McAndrew, 44 N. Y. 72 (1870); Home Pattern Co. v. W. W. Mertz Co., 88 Conn. 22, 90 Atl. 33 (1914).

"Duty" to Mitigate Damages. In Rock v. Vandine, 106 Kan. 588, 189 Pac. 157 (1920), the defendant made a counterclaim for damages caused by inferior flour supplied by the plaintiff. The flour was unfit for bread as usually made, but was later used by the defendant as a permitted war-time substitute for flour. Mr. Justice Burch said:

"The plaintiff says it was the defendant's duty to mitigate his damages by using the flour in the way which would occasion the least possible loss. The defendant claimed nothing on account of loss of custom before he was permitted to make inferior bread under the substitute regulation. When the regulation became effective, he did use the flour in the most beneficial way.

"In this connection it may be observed that, according to the classification of jural relations proposed by the late Prof. Hohfeld, of Yale University, the term "duty" is misapplied in the statement of the plaintiff's contention relating to the defendant's counterclaim. The classification follows:

Jural Opposites	right no right	privilege duty	power disability	immunity liability
Jural Correlatives	right duty	privilege no right	power liability	immunity disability

Hohfeld, Fundamental Legal Conceptions, p. 65; 26 Yale L. J. 710.

"According to this classification, which appears to be sound, and which, if observed, ought to conduce to clarity of thought and precision of expression, the defendant rested under no duty to the plaintiff to mitigate damages by using the flour to the best advantage. If so, he himself would have been subject to an action for damages resulting from breach of the duty. The correct statement would be that the defendant rested under legal disability to counterclaim for damages which he might have prevented."

the term of employment she stood ready to perform her part of the contract; that she appeared at the schools on the morning of each school day and demanded of the respective superintendents thereof that her work be assigned her; and that she did actually perform her part of the contract. The declaration contains also the common counts in assumpsit. The only breach averred is the failure and refusal of defendant to pay the wages for the last seven months of the schools.

Defendant pleaded the general issue, and also tendered a special plea, which the court rejected on motion of plaintiff. It averred that plaintiff had theretofore sued defendant and recovered a judgment against it for $150, on account of salary claimed by plaintiff for the first two months of school, ending, respectively, on the 6th of October and the 3d of November, 1911; that it was proven, on the trial of that action, that defendant had revoked or attempted to revoke plaintiff's appointment as music teacher, and had refused to permit her to teach, and that she had not, in fact, taught, though she held herself in readiness to do so; and that said judgment is still in force. Wherefore defendant prayed judgment whether plaintiff ought to have or maintain her present action.

The case was tried by the court in lieu of a jury, upon an agreed statement of facts, from which it appears that the plaintiff was not permitted by defendant to teach; that it sued out a writ of injunction to prevent her from continually appearing at the schools for the purpose of teaching, which writ was later dissolved on her motion. It thus appears that plaintiff actually performed no part of the contract, although she was at all times ready to do so, but that she was prevented from performing by defendant.

There was a total breach of the contract by defendant's refusal to permit plaintiff to perform her part of it. Her right of action for that breach was then complete, and it was not necessary for her to appear at the schools each day and demand opportunity to perform the contract. She could not thereby make her cause of action any more perfect than it was the moment she was informed that defendant had refused to be bound by the contract. Her suit is not for damages for a breach of the contract of employment, but is a suit for wages claimed to be due under the contract, for services which were never actually performed. She seeks to treat the contract as subsisting until the end of the term, and broken only in respect of the promise to pay her the agreed monthly wages. This she cannot do. Having performed no services whatever, she cannot recover upon the promise, as if wages were earned. Her only right of action is for a breach of the contract. It is insisted that she is entitled to recover on account of constructive service; that, being always ready and willing to perform the contract, she should be regarded in law as having actually performed it. That doctrine was first announced by Lord Ellenborough in Gandell v. Potigny, 4 Campbell, 375, a nisi prius case

of the contract for her employment. This question we need not determine, for the reason that, if it could be so regarded, her former recovery is a complete bar to the present action.[74]

The judgment will be reversed, and, it being apparent from the agreed facts that plaintiff could not make out any better case if a new trial should be awarded, judgment will be entered here for defendant.[75]

MELACHRINO v. NICKOLL & KNIGHT.

(In the King's Bench Division, [1919] 1 K. B. 693.)

Award in the form of a special case stated for the opinion of the Court (pursuant to section 7, subsection [b], of the Arbitration Act, 1889), by a Board of Appeal of the Committee of Appeal of the Incorporated Oil Seed Association.

Messrs. Melachrino and Kaniskeri, as sellers, made two contracts with Messrs. Nickoll and Knight, as buyers, each dated November 24, 1916, and precisely similar in terms except as to price.

The form of the contracts used was the printed form of contract issued by the Incorporated Oil Seed Association for adoption by persons engaged in the oil-seed trade in sales of cargoes of Egyptian cotton seed with slight variations adopted by the parties. Each contract was for the sale of half a cargo of Egyptian cotton seed per steamship Asaos, to be shipped by the above steamship from Alexandria expected ready to load during December 1916. Payment to be made in London fourteen days from the seed being ready for delivery in exchange for shipping documents and for delivery order. By clause 11 of the contracts it was provided that in default of fulfillment of contracts by either party the other party should after giving notice in writing have the right of resale or repurchase as the case might be and the defaulters should make good the loss if any on demand and that in the event of the right of resale or repurchase not being exercised the damages if any for which the party in default might be liable should be settled by arbitration. On December 14, 1916, the sellers repudiated the contracts and wrongfully refused to deliver the cotton seed. On

[74] Two judges dissented, holding in a vigorous opinion (here omitted) that the plaintiff could maintain several actions for damages, though not adopting the constructive service doctrine.

[75] There is a direct conflict as to whether several actions are maintainable for breach of contracts of this kind. See, in accord: Doherty v. Schipper & Block, 250 Ill. 128, 95 N. E. 74, 34 L. R. A. (N. S.) 557, Ann. Cas. 1912B, 364 (1911). Contra: Canada-Atlantic & Plant S. S. Co. v. Flanders, 165 Fed. 321, 91 C. C. A. 307 (1908). See Mechem & Gilbert, Cases on Damages, pp. 310–319.

In Ryan v. Mineral County High School Dist., 27 Colo. App. 63, 146 Pac. 792 (1915), the school board elected plaintiff as principal of the high school at a salary of $1,200. It later repudiated this and offered him a position as principal of a grammar school at the same salary. He refused this. It was held that he was entitled to nominal damages only.

the same day the buyers accepted the repudiation and there was thus an anticipatory breach.

The arbitrators found that an average voyage from Alexandria to the United Kingdom was at the time about three or four weeks; that the seed might have been expected to be delivered at any time between January 10 and February 10, 1917; that the market price was above the contract price on December 14, 1916; that it began to fall on December 18, and was below the contract price during the whole of the period between January 10 and February 10, 1917. The buyers did not give notice in writing under clause 11 to repurchase and did not buy against the sellers but in accepting repudiation on December 14, 1916, claimed arbitration.

The sellers contended before the arbitrators that inasmuch as the buyers did not buy against the contracts, the proper time for assessing the measure of damages was the time at which the cotton seed ought to have been delivered.

The buyers contended that the measure of damages should be assessed at the time the sellers wrongfully refused to deliver the cotton seed, namely, on December 14, 1916.

In view of their finding that the cotton seed might have been delivered at any time from about January 10, 1917, to about February 10, 1917, the arbitrators were of opinion that no precise time was or could be fixed for delivery, and that the measure of damages should therefore be ascertained by the difference between the contract price and the market price at the time of the refusal to deliver. But in order to raise the question of law as to the proper time at which the damage should be assessed they stated this case for the opinion of the Court.

If the Court should be of opinion that the measure of damages should be assessed at the time at which delivery of the cotton seed might reasonably have been expected they awarded that the buyers were not entitled to recover any damages from the sellers other than nominal damages which they assessed at one shilling.

If the Court should be of opinion that the measure of damages should be assessed at the time at which the sellers wrongfully refused to deliver the cotton seed—namely, on December 14, 1916—they awarded that the sellers should each pay as damages to the buyers 1562 l. 10 s.

The question for the opinion of the Court was whether the true measure of damages was (as the arbitrators held) the difference between the contract price and the market price on December 14, the date of the refusal to deliver, or the difference at the time at which the cotton seed ought to have been delivered.

Dec. 10. The following judgment was read by

BAILHACHE, J. [who, after stating the facts, continued:] Upon these facts the question arises: Are the buyers' damages to be fixed with reference to the market prices on December 14, 1916, or with reference to the prices ruling at the time when the goods might be expect-

ed to be delivered? If the former the damages are substantial, if the latter nominal. The arbitrators have assessed the damages as at the date of the anticipatory breach.

There was a market for the goods and in that case the prima facie rules for the measurement of damages as laid down in s. 51 of the Sale of Goods Act, 1893, vary according to whether there is a fixed time for delivery or not. If there is no fixed time the measure is the difference between the contract price and the market price at the time of refusal to deliver. The first point to determine therefore is whether this was a contract of that kind. In my opinion it was not. The time was not certain but it was fixed by reference to the happening of an event—namely, the arrival of the Asaos in the United Kingdom. I take it that when section 51 speaks of no time being fixed for delivery it refers to those contracts in which no mention of time is made and which therefore are to be performed within the indefinite period known as a reasonable time under the circumstances.

In regard to other cases of which this is one the prima facie measure of damages is said to be the difference between the contract price and the market price at the time the goods ought to have been delivered—in this case the period between January 10 and February 10, 1917. In a constantly fluctuating market and if the prices during that period had ruled righer than the contract prices there might have been some difficulty in determining the proper price to be taken, but in this case that point does not arise, as at all times between those dates the market prices were below the contract prices.

Section 51 does not in terms deal with an anticipatory breach, and in the case of a breach by effluxion of time it is clear that it makes no difference to the measure of damages whether a buyer goes into the market or is content to take the difference in price without troubling to buy against the defaulting seller. The question to be decided is whether the same rule applies in the case of an anticipatory breach.

An anticipatory breach occurs when the seller refuses to deliver before the contractual time for delivery has arrived and the buyer accepts his refusal as a breach of contract.

In that case the following rules are well established, subject of course to any express provisions to the contrary in any particular contract.

Immediately upon the anticipatory breach the buyer may bring his action whether he buys against the seller or not.

It is the duty of the buyer to go into the market and buy against the defaulting seller if a reasonable opportunity offers. This is expressed by the phrase "It is the buyer's duty to mitigate damages." In that event the damages are assessed with reference to the market price on the date of the repurchase. If the buyer does not perform his duty in this respect the seller is none the less entitled to have damages assessed as at the date when a fresh contract might and ought to have been made.

As a corollary to this rule the buyer may if he pleases go into the market and buy against the seller: as he is bound to do so to mitigate damages, so he is entitled to do so to cover himself against his commitments or to secure the goods. In that case again the damages are assessed with reference to the market price at the date of the repurchase.

It is also settled law that when default is made by the seller by refusal to deliver within the contract time the buyer is under no duty to accept the repudiation and buy against him but may claim the difference between the contract price and the market price at the date when under the contract the goods should have been delivered.

Further, in the case of an anticipatory breach the contract is at an end and the defaulting seller cannot take advantage of any subsequent circumstances which would have afforded him a justification for nonperformance of his contract had his repudiation not been accepted.

In logical strictness it would appear to follow that equally the defaulting seller cannot take advantage of a fall in the market before the due date for delivery to escape liability for damages.

It looks therefore at first sight as though the date at which the difference between the contract price and the market price ought to be taken for the assessment of damages when the buyer does not buy against the seller should follow by analogy the rule adopted where the buyer goes into the market and buys, or where the breach is failure to deliver at the due date and should be at or about the date when the buyer intimates his acceptance of the repudiation though he does not actually go into the market against the seller. If so, in this case, the date would be about December 14, when the buyer claimed arbitration and so the arbitrators have found.

As against this line of reasoning it must be remembered that the object of damages is to place a person whose contract is broken in as nearly as possible the same position as if it had been performed. This result is secured by measuring damages either at the date of the repurchase, in the case of repurchase on an anticipatory breach, or at the date when the goods ought to have been delivered when there is no anticipatory breach whether there is a repurchase or not. In these cases the buyer gets a new contract as nearly as may be like the broken contract and the defaulting seller pays the extra expense incurred by the buyer in restoring his position.

Where however there is an anticipatory breach but no buying against the defaulting seller, and the price falls below the contract price between the date of the anticipatory breach and the date when the goods ought to have been delivered, the adoption of the date of the anticipatory breach as the date at which the market price ought to be taken would put the buyer in a better position than if his contract had been duly performed. He would if that date were adopted be given a profit and retain his money wherewith to buy the goods if so minded

on the fall of the market. It would be in effect, to use a homely phrase, to allow him to eat his cake and have it. Perhaps it is better to avoid figures of speech however picturesque and to say, to make a profit from the anticipatory breach while the contract if duly performed would have shown a loss—a position which is I think irreconcilable with the principles upon which damages are awarded as between buyer and seller.

In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can.

To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages.

I have discussed the position on principle apart from authority because, in my limited experience, I do not remember a case precisely like this.

I might perhaps have contented myself with basing my judgment upon the authority of Roper v. Johnson, L. R. 8 C. P. 167, and I should have done so but for the fact that I am not sure that when that case was decided one year after Brown v. Muller, L. R. 7 Ex. 319, the distinction between an accepted and unaccepted repudiation was as well established as it has since become. There are some observations in the judgments in that case which would not, I venture to think, now be supported, and the case turned largely on where the burden of proof lay. Subject however to these criticisms Roper v. Johnson, L. R. 8 C. P. 167, seems to me to support the conclusion at which I have arrived.

The result in this case is that the damages are nominal.[76]

[76] In Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548 (1883), it was held that, where the seller did not accept the buyer's anticipatory repudiation as final, the contract remained as before and the seller's right to damages was not limited by the market price at the date of repudiation. The seller was held to be safe in waiting and tendering performance as agreed, without making another forward contract for the sale of a similar quantity. It may be questioned whether the injured party should ever be required to make a risky "forward contract," speculative in character, in order to mitigate loss. Suppose it increases the loss! Stephen M. Weld & Co. v. Victory Mfg. Co. (D. C.) 205 Fed. 770 (1913). See Beale, Damages upon Repudiation, 17 Yale L. Jour. 443; also Comment, 17 Yale L. Jour. 611; Williston, Sales, § 589.

PAYZU, Limited, v. SAUNDERS.

(In the Court of Appeal. [1919] 2 K. B. 581.)

The defendant contracted to deliver certain installments of silk to the plaintiff, each installment to be paid for within thirty days, with a specified discount. The first installment was delivered, but the check sent in payment therefor was never received, and actual payment was thus greatly delayed. The defendant erroneously believed that the delay was caused by the buyer's inability to pay, and therefore refused to deliver any more silk, except on payment of cash. The plaintiff refused to pay cash and sued for breach.

The court held that under the Sale of Goods Act mere nonpayment not accompanied by repudiation did not justify the refusal of the defendant to deliver. The plaintiff appealed on the question of damages.[77]

BANKES, L. J. At the trial of this case the defendant, the present respondent, raised two points: First, that she had committed no breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of 2½ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned judge has given judgment upon that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this Court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. Upon this point McCardie, J., referred to British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London, [1912] A. C. 673, 689, where Lord Haldane, L. C., said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L. J., in Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20, 25: 'What the plaintiffs are entitled to is the full amount of the damage which they have really sustained by

[77] The statement of facts has been rewritten and the opinion of McCardie, J., in the Court of King's Bench, is omitted.

a breach of the contract. The person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'" It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondent had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON, L. J. I am of the same opinion. Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same.* The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach," and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London, per Lord Haldane, L. C., [1912] A. C. 673, 689. Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

Appeal dismissed.

*See opinion of Judge Burch in Rock v. Vandine, ante, p. 794, note 72. See, also, Ryan v. Mineral County High School Dist., ante, p. 798, note 75.

HOLLERBACH & MAY CONTRACT CO. v. WILKINS.

(Court of Appeals of Kentucky, 1908. 130 Ky. 51, 112 S. W. 1126.)

Action by J. Arch Wilkins against the Hollerbach & May Contract Company. Judgment for plaintiff, and defendant appeals. Affirmed.

BARKER, J.[78] This is an action for the breach of an alleged contract between appellee and appellant for the sale and delivery by the former to the latter of 4,000 cubic yards of broken rock to be used in constructing lock and dam No. 6 in Green river. Appellee alleged in his petition that appellant, a corporation, had secured the contract from the United States government to construct the lock and dam in question, and that in the construction of this work is needed about 4,000 cubic yards of broken stone of dimensions not less than one-half cubic foot nor larger than what a man could handle; that he entered into a contract with appellant by which he undertook to furnish it with the stone, and it agreed to pay him therefor 60 cents per cubic yard delivered on barges in Green river; that, after making this contract with him, the appellant willfully and arbitrarily broke it, and refused to permit him to go on with it. The damages were laid in the petition at $1,250, and were said therein to consist of $250 expended in opening up the quarry in order to get out the stone, and $1,000 which the appellee could have made in profit had he been allowed to execute his contract as made with appellant. The appellant in its answer denied the existence of the contract, and this was the real issue between the parties, although there are several questions discussed in the briefs. A trial of the case resulted in a verdict in favor of appellee for $500 and from the judgment based upon that verdict this appeal is prosecuted. * * *

The court did not err in not instructing the jury that it was the duty of the appellee, even if there was a breach of the contract, to use reasonable diligence to sell the stone contracted for to other parties. The principle for which counsel for appellant contend has no application to a contract like the one under discussion. It is true, where there is a contract for personal services, and there is a breach, the party whose services are to be engaged may not sit down and supinely permit the amount of his damages to grow. It is his duty to seek employment elsewhere, and the other party is only liable to the extent of the injury after the exercise of ordinary diligence by the complainant to obtain other employment still leaves him a sufferer by reason of the breach. In the case in hand the appellee had a rock quarry, and, although it might be true that he could have sold 4,000 cubic yards of rock to another party, that would not have diminished his damages in not being allowed to carry out his contract with appellant, because he was entitled, if he could, to sell all the rock in his quarry; and it in no wise minimized the damages he may

[78] Part of the opinion is omitted.

have sustained by the breach of appellant's contract that he might, perchance, have sold 4,000 yards of broken rock to some one else. This is quite different from a contract for personal services. There the contract cannot be performed for two different parties, and, when the employer refuses to carry out his contract for the personal services of the servant, the latter must look for another employer, and thus reduce the damages, arising from the breach, as much as possible.

We do not mean to be understood as limiting the application of the principle of avoidance of damages to breaches of contracts for personal service; on the contrary, the rule is of much broader application, and it would, perhaps, not be going too far to say that the duty of those complaining of violations of contracts to minimize their damages as much as the exercise of reasonable diligence will accomplish is the general rule appertaining to the right to recover damages therefor. The complainant should reduce his damages whenever the principle can be applied without sacrificing any substantial right. A fair illustration of the general application of the rule may be found in the supposition that the breach of the contract under discussion had been by appellee's refusing to deliver to appellant the stone contracted for. It would in the supposed case have been the duty of appellant to go out into the market and buy the stone, and it could only hold appellee liable for the difference between the contract price and what it had to pay for the stone on the market. This, from the very nature of the case, would cover all the damage it sustained by the breach of the contract. But the same principle is not applicable to the breach of contract complained of in this record. Appellee was entitled to enjoy the benefit of the profits of his contract with appellant, and, if he could have made as beneficial a contract with another, he was entitled to the benefits of that also. In other words, he was entitled to carry forward as many such contracts as he could make, and, if he succeeded in making more than one, he was entitled to both profits. Receiving the profits of one such contract would not tend to recoup his loss by reason of the breach of another. Sedgwick on Damages (8th Ed.) § 608. It was not necessary for the appellee to expressly offer to go on with the contract after the breach. He was informed by the appellant that it had contracted for the stone from another party, and it was therefore useless for him to make a formal tender of the stone to it. The law does not require the doing of a useless act.

Upon the whole case no substantial error was committed against appellant, and the judgment is therefore affirmed.[79]

[79] See, also, Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378 (1890). In Cockburn v. Trusts & G. Co., 38 Ont. L. R. 396, 33 D. L. R. 159 (1917), it was held that an employee must deduct profits made in a business that he could not have carried on but for the discharge.

SECTION 5.—PREVENTION OF PERFORMANCE AND WAIVER OF CONDITIONS

(a) Prevention of Performance

(Including Prevention, by the Plaintiff, of Performance by the Defendant, and Prevention, by the Defendant, of the Fulfillment of Conditions by the Plaintiff)

ANONYMOUS.

(13 Hen. VII, Kellway, 34, pl. 2.)

In an action of covenant upon a deed, to the effect that the defendant had covenanted for the collection of rents in a certain town, and had not performed, so that action lay against him. To this the defendant replied that he was prevented by the plaintiff himself from collecting the rents. The plaintiff moved for judgment that the plea was not good; because if the facts were as alleged, the defendant would have a good action of trespass against the plaintiff and could recover damages, and so he has no defense in this action. The Court replied that the plea was good,[80] to avoid circuity of action, for if the defendant should bring trespass and get damages, then the plaintiff could recover in a writ of covenant against the defendant, a circuity of action which the law will not suffer.

[80] In accord: Anon. 2 Rolle, Rep. 238 (1622), semble; United States v. Peck, 102 U. S. 64, 26 L. Ed. 46 (1880); Ferber v. Cona, 89 N. Y. Law, 135, 97 Atl. 720 (1916); Village of Argyle v. Plunkett, 175 App. Div. 751, 162 N. Y. Supp. 242 (1916); Famous Players Film Co. of New England v. Salomon (N. H.) 106 Atl. 282 (1918).

In Porto Rico v. Title Guaranty & Surety Co., 227 U. S. 382, 389, 33 Sup. Ct. 362, 57 L. Ed. 561 (1913), Mr. Justice Holmes said: "If, within the time allowed for performance the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform. 2 Bl. Comm. 340, 341; U. S. v. Arredondo, 6 Pet. 691, 745, 746, 8 L. Ed. 547 (1832)."

Where delay in construction is caused by the default of the owner, a provision for liquidated damages for delay cannot be enforced; but it may be made a condition precedent to the contractor's privilege of not paying damages that he shall make his claim that the owner has caused the delay in writing and within a fixed period: Wait v. Stanton, 104 Ark. 9, 147 S. W. 446 (1912); Chapman Decorative Co. v. Security Mut. Life Ins. Co., 79 C. C. A. 137, 149 Fed. 189 (1906); Equitable Real Estate Co. v. National Surety Co., 133 La. 448, 63 South. 104 (1913); Cramp & Co. v. Boyertown Burial Casket Co., 241 Pa. 15, 88 Atl. 69 (1913), notice was here given. This condition of notice can be waived. Jobst v. Hayden Bros., 84 Neb. 735, 121 N. W. 957, 50 L. R. A. (N. S.) 501 (1909); Walsh v. North American Cold Storage Co., 260 Ill. 322, 103 N. E. 185 (1913).

BLANDFORD v. ANDREWS.

(In the Queen's Bench, 1599. Cro. Eliz. 694.)

Debt on an obligation of £80, conditioned, that if the defendant procured a marriage to be had between the plaintiff and one Bridget Palmer, at or before the Feast of St. Bartholomew then next following; that then, &c. The defendant pleaded, that the plaintiff, before that feast, came to the said Bridget Palmer, and called her whore; and told her, that if he married her, he would tie her to a post; and used other opprobrious words unto her; by reason whereof the defendant could not procure the said marriage before the said feast. Whereupon the plaintiff demurred.—Williams, Serjeant, moved that this was not any plea; for he hath not shewn that he used his endeavour to procure the marriage; for it may be that, notwithstanding these words, they would have intermarried.—And of that opinion was all THE COURT; for the defendant ought to shew that there was not any default in him, and that he did as much as in him lay to procure it; otherwise he doth not save his obligation: and these words spoken before the day, at one time only, are not such an impediment but that the marriage might have taken effect. Wherefore it was adjudged for the plaintiff.

BRACKETT v. KNOWLTON.

(Supreme Judicial Court of Maine, 1912. 109 Me. 43, 82 Atl. 436.)

Action by James W. Brackett against Sarah A. Knowlton. On report. Judgment for plaintiff.

Assumpsit to recover the sum of $453.95. Plea, the general issue. An agreed statement of facts was filed, and the case reported to the law court for determination.

Mr. Justice BIRD, who prepared the opinion, states the case as follows:

The defendant's testator, Jeremiah B. Knowlton, was the owner of certain springs, and prior to the date of the contract set forth below had advertised them as for sale in certain newspapers owned or controlled by plaintiff. On the day of its date the plaintiff and the testator executed the following agreement:

"Phillips, Maine, Nov. 5, 1900.

"Memorandum of advertising contract between J. B. Knowlton, of Strong, Maine, and the Phillips Phonograph and Maine Woods, Phillips, Maine, for advertising said Knowlton's soda and sulphur springs to such an amount as in the judgment of J. W. Brackett seems best, but not to exceed the sum of ($1,000) one thousand dollars a year for two years' time under this agreement, the regular price for said

advertising to be paid when said springs are sold, or upon sale of one of them. If the property named herein is sold within two years, the amount to be paid by said Knowlton is simply the amount that will have been earned by the advertising up to that time. It is also agreed that J. W. Brackett's bill of ($317.83) three hundred and seventeen dollars and eighty-three cents, for advertising said springs previous to this date, is also to be paid when said springs, or either of them, is sold.

"There shall be no demand made for advertising until said springs, or one of them, are sold or in some way change owners. This is to be interpreted to mean that the heirs, in case of said Knowlton's death, shall be no more liable than he, unless there is business sufficient to pay it as managed by said heirs. J. W. Brackett. [Seal.]
"J. B. Knowlton. [Seal.]

"Witness: W. D. Grant."

The plaintiff, in accordance with the contract, continued to advertise the springs in the years 1901 and 1902.

On the 18th of April, 1906, the testator conveyed the springs, described in the contract, as a gift to his grandchildren, who were the testator's legal heirs. The testator died on the 12th day of March, 1907. By his will, he left all his estate to his widow, the executrix. Since the conveyance to them, his grandchildren have neither sold nor leased the springs, nor received any income therefrom. The plaintiff claims that his charges for advertising are due, and brings this action to recover the same.

Bird, J. The items for which this suit is brought are of two classes, one for advertising before the making of the contract between plaintiff and defendant's testator, and the other for advertising done subsequent to and under the terms of the contract. The former constituted an absolute debt, payment of which was to be contingent upon the happening of a future event, while the latter was to become an obligation of the testator, or his heirs, upon the occurrence of the same event. Whether the items of the first class were done within a reasonable time after the services performed it is unnecessary to determine. See Sears v. Wright, 24 Me. 278, 280; De Wolfe v. French, 51 Me. 420. By the terms of the contract the items of both classes were to be payable "when said springs, or either of them, is sold." The happening of this event is explained or modified by the second paragraph of the contract, which we interpret to mean that payment of the sums properly chargeable for advertising shall not be enforceable until one, at least, of the springs is sold by the testator, or in the event of his death, until his heirs shall either sell one of the springs, or, under their management, there is sufficient business to pay them. By the conveyance to his grandchildren by way of gift, the testator made impossible the occurrence of either of the contingencies, and his liability at once accrued. Crooker v. Holmes, 65 Me. 195, 199, 20 Am.

Rep. 687; Wright v. Haskell, 45 Me. 489; Poland v. Brick Co., 100 Me. 133, 135, 60 Atl. 795.

Judgment for plaintiff for the sum of $453.95, with interest from the date of the writ.[81]

CLARK v. HOVEY.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 485, 105 N. E. 222.)

Action by Ewen A. Clark against Freeland E. Hovey. Verdict for plaintiff, and defendant excepts. Judgment for defendant.

RUGG, C. J. This is an action to recover for services as a real estate broker. The plaintiff was employed by the defendant to sell certain real estate, and he procured a purchaser who executed a contract for sale of it with the defendant. Simultaneously with this contract the following agreement was entered into between the plaintiff and the defendant:

"It is agreed by and between Ewen A. Clark, broker, and Freeland E. Hovey, owner, that concerning the agreement for sale of property #2 and #6 Cambridge street, Boston, from Hovey to Jeremiah Green, for the sum of $60,000, that said Clark agrees to accept the sum of $500 in full payment of commission and for his full compensation in the matter, and said Hovey agrees to pay said sum.

"It is further agreed by both parties that this $500 shall not be paid from the first $5,000 paid Hovey, of which $500 has been paid to-day, but shall be paid by Hovey to Clark from the first $500 received by Hovey from Green after the $5,000 has been paid. In other words, Clark will not make any claim for commission unless Hovey receives more than $5,000 in cash from the sale."

The contract for sale was never carried out because the defendant could not give a good title by reason of certain restrictions. The question is whether, under these circumstances, the plaintiff is entitled to his commission.

The rights of the parties depend upon the terms of their agreement, which is in writing and not ambiguous. It fixes the price which the plaintiff was to receive. It stipulates in unequivocal words that the

[81] In accord: Camden v. Jarrett, 83 C. C. A. 492, 154 Fed. 788 (1907), defendant promised to pay after getting a judgment, and then compromised the suit; Pneumatic Signal Co. v. Texas & P. R. Co., 200 N. Y. 125, 93 N. E. 471 (1910), express condition of approval by Railway Commission prevented by the defendant's failure to obey orders of the Commission; Schauffelee v. Greenberg, 83 N. J. Law, 737, 85 Atl. 178 (1912); Suter v. Farmers' Fertilizer Co., 100 Ohio St. 403, 126 N. E. 304 (1919), broker's commission payable after receipt of price, seller and buyer then rescind the sale.

Where the condition precedent to the plaintiff's enforceable right is some voluntary act of the defendant, such as a certificate of approval by him, the condition is nullified if the defendant refuses to investigate and decide. Hotham v. East India Co., 1 T. R. 638 (1787); Argus Co. v. Breslin, 107 Misc. Rep. 40, 175 N. Y. Supp. 853 (1919).

compensation shall not be paid by the defendant until after he has received $5,000 on account of the sale. As matter of construction, this means that it is a condition to his being able to recover any commission that the defendant shall have received $5,000 in cash from the sale. Its effect is not, as in some of the cases relied on by the plaintiff, to fix a time beyond which the broker shall not be called upon to wait for his pay, but it establishes a moment before the arrival of which he cannot ask for his compensation. There is nothing in the record to indicate that the employer of the broker has failed through any volition of his own to carry out the contract.

The written agreement between the parties supersedes the ordinary rule that the broker has earned his commission when he has procured the execution of a valid agreement for sale. It follows that the judgment of the lower court was wrong. In accordance with St. 1913, c. 716, § 2, the entry may be:

Judgment for the defendant.

FAY v. MOORE.

(Supreme Court of Pennsylvania, 1918. 261 Pa. 437, 104 Atl. 686.)

Action by Ella M. Fay, administratrix of the estate of Edward Fay, against James S. Moore. Judgment for plaintiff, and defendant appeals. Affirmed.

FRAZER, J.[82] Plaintiff, a contractor, sues to recover from the owner a balance alleged to be due under a contract for the erection of a building. The defense is that plaintiff failed to complete the work in accordance with the specifications, whereby defendant was obliged to take possession of the building and finish it at an expense beyond the contract price. Plaintiff having died while the action was pending, his wife was substituted on the record as administratrix of his estate. The case has been tried three times the result of the last trial being a verdict and judgment for plaintiff from which defendant appealed.

The first two assignments of error are to the refusal of the court below to give binding instructions and subsequently to enter judgment for defendant non obstante veredicto. The contract required payments to be made only upon the certificate of the architect. When the building was practically completed, and a certificate for final payment requested, the architect notified plaintiff in writing that the work was not performed in accordance with the contract in certain specified particulars. Plaintiff contends the defects enumerated by the architect were rectified by him, while defendant avers such was not the case, but, on the contrary, he was obliged to employ another contractor to complete the work.

The first objection is that corner beading was omitted. The speci-

[82] Part of the opinion is omitted.

fications call for "wood corner beads on all exposed angles," but failed to set forth the particular kind of beading to be used. Plaintiff's son, who had charge of the construction work, testified beads were put on at exposed corners, and this does not seem to be denied; the contention being a different style of beading should have been supplied, as appears in a subsequent letter from the architect, in which he states the owner "has instructed me to put on beads in accordance with his desire, although I have never seen that kind of bead which he desires, at the same time he states that nothing else [will] be accepted by him; so there is no other alternative, and therefore I am compelled to instruct you to make them different from what I would personally select."

In another letter, written a few days later, the architect says: "I am perfectly aware that the bead Mr. Moore desires is impractical, as well as impossible; but as Mr. Moore gave me no other alternative in the matter, and the best I could do was to give his instructions verbatim to you."

And in a third letter says he had again taken the matter up with the owner "and asked him to give me instructions for the regular old-fashioned wood corner bead put on, which is the only thing that can be accomplished outside of the covered bead, which you have at present, and which Mr. Moore does not want."

Under these circumstances the jury were warranted in finding the architect, in condemning the bead used by plaintiff, was not acting upon his own impartial judgment as to the sufficiency of the work, but at the dictation and to satisfy the whim of the owner.

Another objection is the window sashes were of chestnut instead of white pine lumber, as called for in the contract. With respect to this item, the testimony on behalf of plaintiff is to the effect the architect instructed him to use chestnut instead of pine, so as to conform to the interior finish of the house. The owner visited the work almost daily, and with the architect made up lists of matters to be attended to or corrected, among which appears a memorandum to the effect that the owner would consider the matter of using chestnut instead of white pine sash. While it is true the contract provides that no alterations should be made, except on the written order of the architect, the parties had the right to waive the provision. Raff v. Isman, 235 Pa. 347, 84 Atl. 352. And this the verdict indicates they did. Furthermore, there is no attempt in this case to charge for extra work.

As to the various items of which complaint is made, the testimony on behalf of plaintiff is to the effect that portions of the work, the details of which were not mentioned in the specifications, were done under the direction of the architect, and that other variations and defects were remedied after complaint was received. The architect having persisted in refusing a certificate of completion, giving as an excuse for his action the owner's dissatisfaction with the work, and the contractor continuing to claim a completion of the contract, the owner pro-

cured a bid and entered into a contract for the additional work on the house he deemed necessary to complete the contract according to specifications, paying therefor the sum of $819, and for other items the sum of $220, which amounts were deducted from the contract price, and the architect signed a certificate to the effect that, after deducting such items, a balance of $1,100 remained due the contractor.

While the testimony on behalf of plaintiff was contradicted by the architect and other witnesses for defendant, the case was necessarily for the jury, to whom it was submitted by the trial judge with instructions to consider the decision of the architect conclusive, unless they found from the circumstances in the case his decision was the result of collusion with the owner, and not a fair and impartial one. The court also left to the jury to say whether the contractor faithfully, honestly, and substantially complied with the provisions of his contract, and further charged, if they so found, and minor defects or deficiencies existed, such defects would not prevent a recovery for the amount due under the contract, less a reasonable allowance for the cost of remedying the imperfections.

The provision in the contract requiring the production of the certificate of the architect, showing completion of the work, is intended as a protection to the owner against unjust claims by the contractor and to see that the latter properly carries out his agreement, and in cases where the evidence establishes refusal of the architect to be capricious, fraudulent, or based on collusion with the owner, his withholding the certificate will not prevent the contractor from recovering the amount due him. Pittsburg, etc., Lumber Co. v. Sharp, 190 Pa. 256, 42 Atl. 685. There also being evidence in the case to support the conclusion of the jury of there being no willful or intentional departure from the terms of the contract, the doctrine of substantial performance was applicable, and was properly stated by the trial judge in accordance with the principles laid down in Morgan v. Gamble, 230 Pa. 165, 79 Atl. 410. * * *

The assignments of error are overruled, and the judgment affirmed.[88]

UNITED STATES v. UNITED ENGINEERING & CONSTRUCTING CO.

(Supreme Court of the United States, 1914. 234 U. S. 236, 34 Sup. Ct. 843, 58 L. Ed. 1294.)

Appeal from the Court of Claims to review a judgment against the United States in a suit upon a contract for public work. Affirmed.

Mr. Justice DAY delivered the opinion of the court:

Suit was brought in the court of claims by the United Engineering & Contracting Company to recover of the United States upon a con-

[88] In accord: Batterbury v. Vyse, 2 H. & C. 42 (1863). Cf. Milner v. Field, 5 Exch. 829 (1850).

tract, dated the 15th of September, 1900, for the construction within seven calendar months from the date of the contract, namely, by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yards, the work to be done in accordance with certain plans and specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct. Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the court of claims which permitted the claimant to recover $6,000, which the government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the rate of $25 per day. To understand this question the terms of the contract and certain facts found by the court of claims, upon which the case is to be considered here, must be had in view.

[The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done, the plans and specifications furnished by the government were found defective. The government then made changes in the work to be done, and at times caused entire cessation of the work. Three supplemental agreements were made, not containing any provision for liquidated damages. Further delay was caused by the government's use of the docks for docking vessels. The work was completed and accepted finally by the government on April 5, 1905.][84]

Notwithstanding the delays of the government, the court of claims found that the claimant, with reasonable diligence, could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of $25 per day, the deduction would be $750 less than the government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted.

In the original contract the specifications provided, paragraph 12, for liquidated damages for delay, as follows:

"12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 11 of this specification, it is distinctly understood and agreed that deductions at the rate of $25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the com-

[84] The court's statement of the facts has been abbreviated and part of the opinion is omitted.

pletion of the work; and the contractor shall agree and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

Under the provisions of this paragraph, if there had been nothing subsequently changing the rights of the parties, and the delay had resulted from the failure of the claimant to complete the work within the time specified, the deduction at the rate of $25 per day might have been made by the United States as liquidated damages. This was the sum estimated and agreed upon between the parties as the damages which might be regarded as sustained by the government in event of the breach of the claimant's obligation to complete the work within the stipulated time. Such contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. See Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, in which the matter is fully discussed.

The precise question here is whether, when the work was delayed solely because of the government's fault beyond the time fixed for its completion, and afterwards the work was completed without any definite time being fixed in which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract, stipulating liquidated damages, or was that stipulation waived by the conduct of the government, and was it obligatory upon it, in order to recover for the subsequent delays, to show the actual damages sustained. We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date; to do this would permit it to recover damages for delay caused by its own conduct.

It may be that damages were sustained by the failure to carry out the subsequent agreement. But the government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the government required no

stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.[85]

Judgment affirmed.

PATTERSON v. MEYERHOFER.

(Court of Appeals of New York, 1912. 204 N. Y. 96, 97 N. E. 472.)

Action by Benjamin Patterson against Anna Meyerhofer. From a judgment of the Appellate Division (138 App. Div. 891, 122 N. Y. Supp. 1140), affirming a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

WILLARD BARTLETT, J.[86] The parties to this action entered into a written contract whereby the plaintiff agreed to sell, and the defendant agreed to buy, four several parcels of land with the houses thereon for the sum of $23,000, to be partly in cash and partly by taking title subject to certain mortgages upon the property. When she executed this contract, the defendant knew that the plaintiff was not then the owner of the premises which he agreed to sell to her, but that he expected and intended to acquire title thereto by purchasing the same at a foreclosure sale. Before this foreclosure sale took place, the defendant stated to the plaintiff that she would not perform the contract on her part, but intended to buy the premises for her own account without in any way recognizing the said contract as binding upon her, and this she did, buying the four parcels for $5,595 each. The plaintiff attended the foreclosure sale, able, ready, and willing to purchase the premises, and he bid for the same, but in every instance of a bid made by him the defendant bid a higher sum. The result was that she acquired each lot for $155 less than she had obligated herself to pay the plaintiff therefor under the contract or $620 less in all. * * *

[85] In accord: Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N. Y. 479, 93 N. E. 81, 37 L. R. A. (N. S.) 363 (1910).

Performance on time is no longer a condition precedent when it has been prevented by the defendant's own defaults or unjustifiable conduct or by changing the character and amount of the work. Ittner v. U. S., 43 Ct. Cl. 336 (1908); Callahan Const. Co. v. U. S., 47 Ct. Cl. 229 (1912); Humphrey v. Flaherty, 98 Kan. 634, 158 Pac. 1112 (1916); Virginia & K. R. Co. v. Heninger, 110 Va. 301, 67 S. E. 185 (1909); Corse v. Linke, 147 Wis. 410, 421, 133 N. W. 598 (1911); Kress House Moving Co. v. George Hogg Co., 263 Pa. 191, 106 Atl. 351 (1919); Mansfield v. Hodgdon, 147 Mass. 304, 17 N. E. 544 (1888); French Civ. Code, § 1178; Roman Law, Dig. 50, 17, 161.

The agreed price can be recovered for seed produced when its defects are due to defective seed supplied by the defendant for planting. Burrell v. Masters, 65 Colo. 310, 176 Pac. 316 (1918).

[86] Part of the court's opinion and an entire dissenting opinion are omitted. The dissenting judge said: "It may be assumed that the defendant is precluded by her acts from sustaining any action against the plaintiff for his nonperformance of the contract."

Upon these facts the plaintiff brought the present action, demanding judgment that he has a lien upon the premises purchased by her at the foreclosure sale, and that she holds the same in trust for the plaintiff subject to the contract. The complaint also prays that the plaintiff be awarded the sum of $620 damages, being the difference between the price which the defendant paid at the foreclosure sale for the four houses mentioned in the contract and the price which she would have had to pay the plaintiff thereunder. The learned judge who tried the case at Special Term rendered judgment in favor of the defendant, holding that, under the contract of sale, there was no relation of confidence between the vendor and vendee. "In the present case," he said, "each party was free to act for his own interest, restricted only by the stipulations of the contract." He was, therefore, of the opinion that "the defendant had a right to buy in at the auction, and that she is entitled to hold exactly as though she had been a stranger, and that the plaintiff is not entitled to recover the difference between the price paid at the auction and the contract price."

I am inclined to agree with the trial court that no relation of trust can be spelled out of the transactions between the parties. * * * There is no need of judicially declaring any trust in the defendant, however, to secure to the plaintiff the profit which he would have made if the defendant had not intervened as purchaser at the foreclosure sale, and had fulfilled the written contract on her part. This is represented by his claim for $620 damages. That amount, under the facts as found, I think the plaintiff was entitled to recover. He has demanded it in his complaint, and he should not be thrown out of court because he has also prayed for too much equitable relief.

In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its nonperformance or from interposing it as a defense to an action upon the contract. Young v. Hunter, 6 N. Y. 203; Barton v. Gray, 57 Mich. 622, 24 N. W. 638, and cases there cited. "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing." Gay v. Blanchard, 32 La. Ann. 497.

By entering into the contract to purchase from the plaintiff property which she knew he would have to buy at the foreclosure sale in order to convey it to her, the defendant impliedly agreed that she would do nothing to prevent him from acquiring the property at such sale. The defendant violated the agreement thus implied on her part by bidding for and buying the premises herself. Although the plaintiff bid therefor, she uniformly outbid him. Presumably, if she had

not interfered, he could have bought the property for the same price which she paid for it. He would then have been able to sell it to her for the price specified in the contract (assuming that she fulfilled the contract), which was $620 more. This sum, therefore, represents the loss which he has suffered. It is the measure of the plaintiff's damages for the defendant's breach of contract. * * *

For these reasons, the judgments of the Appellate Division and the Special Term should be reversed and a new trial granted, with costs to abide the event.

E. I. DU PONT DE NEMOURS POWDER CO. v. SCHLOTTMAN.

(Circuit Court of Appeals of the United States, Second Circuit, 1914. 218 Fed. 353, 134 C. C. A. 161.)

WARD, Circuit Judge.[87] In July, 1908, one Grubb was negotiating with T. C. Du Pont, president of the Du Pont Powder Company, for the sale of the whole capital stock of the Pittsburgh Fuse Company to the Du Pont Company. July 20th Du Pont wrote to Grubb as follows:

"Mr. Chas. G. Grubb, Building—Dear Sir: Should the deal now under discussion for the Pittsburgh Fuse Mfg. Co. go through, and after we have had the property a year, it is understood that if in my judgment the property has for any reason been worth $175,000 to our company, and we manufactured double tape fuse at $2 per thousand with powder at $3.60 per keg, we are to pay you $25,000 in either bonds, preferred or common stock of our company as we may elect.

"Yours truly, T. C. Du Pont, President."

On July 24th the deal referred to in the letter went through in a formal agreement whereby the Du Pont Company agreed to pay Grubb $75,000 of its preferred and $75,000 of its common stock for the whole capital stock of the Pittsburgh Fuse Company. Grubb delivered the Fuse Company's stock and the Du Pont Company transferred to it its own stock, but, after operating the plant for about six months, sold it to other parties, who dismantled it.

Grubb, the plaintiff's assignor, died before suit brought, and Mr. T. C. Du Pont did not testify to the circumstances attending the writing of the letter of July 20th. At the conclusion of the case each party asked Judge Ray to direct a verdict in his favor, and he did direct a verdict in favor of the plaintiff for $25,000.

The complaint treats the letter and the formal agreement as one contract, alleges that the defendant by selling the plant of the Fuse Company wrongfully prevented the test agreed upon, and claims damages for the difference between the fair and reasonable value of the Fuse Company's capital stock alleged to be $175,000 and the mar-

[87] Part of the opinion is omitted.

ket value of the defendant's stock actually received, alleged to be $120,000.

The defendant contends that the letter of July 20th is a separate contract, and, as it is not to be performed within the year, is void under the statute of frauds, because it does not state any consideration. We think, however, that the two documents are to be considered together. The Du Pont Company was to pay $25,000 more in securities if in the judgment of T. C. Du Pont upon operating for one year, the plant was worth $175,000 to his company and was capable of making double tape fuse at $2 per thousand feet with powder at $3.60 a keg. This was to be additional compensation for additional value, so that the objection of the statute of frauds is unavailing.

The letter does not contain any express promise to operate the plant for one year, and the question is whether such a promise is to be implied. We think the court below rightly held that it was. The seller evidently thought the plant worth $175,000 in the defendant's securities, and the buyer was willing to pay the additional $25,000 if such value was demonstrated in the way provided. The letter implies a promise on the Du Pont Company's part to operate the plant for a year, and that promise must be taken as part of the consideration for which Grubb sold the capital stock. The authorities support this conclusion. * * *

The question of damages is the only other question we think needing consideration. If the plaintiff could now perform or secure a performance of the agreed test, he might be obliged to do so as a condition of recovering the contract price. But the defendant has made performance impossible by selling the plant within the period of one year to a purchaser who has dismantled it. No similar test can be substituted. It was personal in its nature, viz., the operation for a year by a wealthy and expert corporation actuated by self-interest to make tape fuse at $2 a thousand feet. Because the defendant has made the performance of this test impossible, the plaintiff should not be remediless. We think he had the right to show, if he could, in other ways, that the value of the plant was greater by $25,000 than the sum paid for it. As Judge Bartlett said in Hopedale Co. v. Electric Storage Battery Co., 184 N. Y. 356, 364, 77 N. E. 394, 397: "In other words, the performance of a condition for valuation having been prevented by the act of the vendee, the price of the thing sold was to be fixed by the jury on a quantum valebat." * * *

Judgment affirmed.[88]

[88] The recovery here seems to be quasi contractual in character. But, in cases where the plaintiff has fully performed the agreed consideration, the contract thus becoming unilateral, he should be able to maintain debt for the agreed price, even though some collateral condition precedent has not been fulfilled, provided its fulfillment has been prevented by the defendant and such prevention was not contemplated by the parties as a privileged act. See Colvin v. Post Mortgage & Land Co., 225 N. Y. 510, 122 N. E. 454 (1919); Brackett v. Knowlton, 109 Me. 43, 82 Atl. 436 (1912); Crooker v. Holmes,

TURNER v. SAWDON & CO.

(In the Court of Appeal. [1901] 2 K. B. 653.)

Application by the defendants for judgment or for a new trial in an action tried by Kennedy, J., with a jury.

The defendants carried on business as cotton-warp agents at Bradford, Yorkshire, and in March, 1898, an agreement was entered into by them with the plaintiff, who was in their employment, which contained the following clauses: "(1) The said G. E. Sawdon & Co. agree to continue to engage and employ the said Ernest Turner as their servant and representative salesman from the 1st day of March, 1898, for a period of four years ending February 28, 1902. * * * (2) The said G. E. Sawdon & Co. further agree to remunerate the said Ernest Turner for his services by a payment to him of a salary of £200 per annum, to be paid in monthly installments, for the space of two years, and £250 per annum for the remaining two years. * * * (3) The said Ernest Turner agrees to devote the whole of his time to the business of the said G. E. Sawdon & Co., to faithfully serve them as heretofore in soliciting orders and generally in aiding to conduct the business, and not to divulge to any competitor or other person any of the business secrets of the said G. E. Sawdon & Co. whilst in their service, and to carefully obey their directions from time to time, and will keep, protect, and promote the success of the said business as far as he can. * * *"

The plaintiff acted as salesman for some time; but on December 31, 1900, a letter was handed to him by the defendants, which was as follows: "We have decided that you shall take a month's holiday—that is to say, that although you will still be in the employ of the firm and at their disposal, you will not after to-day be required to perform any duties. You will please call for your salary on January 31, when any further instruction will be given you." The plaintiff came to the office of the firm on the following day but was requested to leave.

65 Me. 195, 20 Am. Rep. 687 (1875); Rumsey v. Livers, 112 Md. 546, 77 Atl. 295 (1910); Case v. Beyer, 142 Wis. 496, 125 N. W. 947 (1910); Wolf v. Marsh, 54 Cal. 228 (1880).

If the plaintiff has not fully performed the consideration, his remedy is express assumpsit for damages. In MacPherson v. Mackay, 91 N. J. Law, 473, 103 Atl. 36 (1918), the court says that the plaintiff's claim for the defendant's prevention of fulfillment by the plaintiff is "one of tort-feasance." But in Loehr v. Dickson, 141 Wis. 332, 124 N. W. 293, 30 L. R. A. (N. S.) 495 (1910), where the plaintiff strongly argued that his action was in tort, the court held that it was not in tort but was based upon an implied agreement not to prevent performance. In accord with this, see Simon v. Etgen, 213 N. Y. 589, 107 N. E. 1066 (1915); Brucker v. Manistee & G. R. Co., 166 Mich. 330, 130 N. W. 822 (1911); Gay v. Blanchard, 32 La. Ann. 497, 504 (1880); U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168 (1884); St. John v. St. John, 223 Mass. 137, 111 N. E. 719 (1916); Levy & Hipple Motor Co. v. City Motor Cab Co., 174 Ill. App. 20 (1912); Vynior's Case, 8 Co. Rep. 81b (1610); Warburton v. Storr. 4 B. & C. 102 (1825); Tuffly v. Houston Motor Car Co. (Tex. Civ. App.) 205 S. W. 832 (1918).

Immediately afterwards circulars were issued by the defendants to their customers stating that the plaintiff had no authority to transact any business on their behalf. The plaintiff then commenced business on his own account, and brought this action against the defendants for damages for breach of the agreement of March, 1898, on the ground that the defendants "after the 31st December, 1900, have neglected and refused, and still neglect and refuse, to continue to engage and employ the plaintiff as their servant and representative salesman, in accordance with the terms of the said agreement."

The learned judge left the following questions to the jury:

(1) Was the plaintiff ready and willing to perform the agreement according to its terms? Answer, Yes.

(2) Did the defendants' conduct on December 31, 1900, and January 1, 2, 3, and 4, 1901, constitute a breach of their obligations under their contract towards the plaintiff? Answer, Yes.

(3) Was it such a substantial breach as to justify the plaintiff in treating it as a refusal on the part of the defendants to perform and abide by the contract? Answer, Yes.

(4) If the above questions are answered in the affirmative, what damages is the plaintiff entitled to? Answer, £125.

On further consideration, the learned judge gave judgment for the plaintiff for the amount of the damages found by the jury.

The defendants appealed.

A. L. SMITH, M. R.[89] This is an action tried before my brother Kennedy with a special jury. The matter has given rise to some complication, chiefly, as it appears to me, because the learned judge left the construction of an agreement to the jury. There was no term of art and no question of custom the meaning or the existence of which might properly be left to the jury. It was for the judge at the trial to construe the written agreement and we have now to say what construction should be put upon it. I do not say that the meaning of the document is clear, but I have arrived at the conclusion that the result of the trial was not right. The action is by a man who was in the employment of the defendants, and it was not brought for wages, because it is clear that the defendants were always ready and willing to pay all that was due under the contract. The real question which plaintiff thought to raise, and which was raised, was whether beyond the question of remuneration there was a further obligation on the masters that, during the period over which the contract was to extend, they should find continuous, or at least some, employment for the plaintiff. In my opinion such an action is unique—that is an action in which it is shewn that the master is willing to pay the wages of his servant, but is sued for damages because the servant is not given employment. In Turner v. Goldsmith, [1891] 1 Q. B. 544, the

[89] The opinion of Stirling, L. J., and part of the opinion of Vaughan Williams, L. J., are omitted.

wages were to be paid in the form of commission, and that impliedly created a contract to find employment for the servant. This contract is different, being to employ for wages which are to be paid at a certain rate per year. I do not think this can be read otherwise than as a contract by the master to retain the servant, and during the time covered by the retainer to pay him wages under such a contract. It is within the province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work. The obligation suggested is said to arise out of the undertaking to engage and employ the plaintiff as their representative salesman. It is said that if the salesman is not given employment which allows him to go on the market his hand is not kept in practice, and he will not be so efficient a salesman at the end of the term. To read in an obligation of that sort would be to convert the retainer at fixed wages into a contract to keep the servant in the service of his employer in such a manner as to enable the former to become au fait at his work. In my opinion, no such obligation arose under this contract, and it is a mistake to stretch the words of the contract so as to include in what is a mere retainer an obligation to employ the plaintiff continuously for the term of his service. I asked whether the employment must be de die in diem and the answer was that this was not necessary, but I could not gather what, short of this, was the suggested obligation. It seems to me that the only argument open to the plaintiff was that his employment should be continuous, and I cannot find that obligation in the contract.

I think, therefore, that the case should not have been left to the jury, and that we ought to direct that judgment be entered for the defendants.

VAUGHAN WILLIAMS, L. J. I entirely agree. In my opinion, if the facts are taken to be exactly in accordance with the plaintiff's evidence, there was no case to go to the jury. So far as the pleadings are concerned, the action is for breach of the terms contained in a written contract. It was put on behalf of the plaintiff that the action was based on a repudiation by the master of the contract with the plaintiff, and it was said that the plaintiff had a right to treat the case as if it were an action for wrongful dismissal, and is entitled to recover damages on that footing none the less because the master has been ready and willing to pay the wages agreed upon. For the purposes of my judgment I accept that suggested basis of action, but I still say that there was no case to go to the jury.[90] * * *

[90] Followed in Turpin v. Victoria Palace (K. B.) 119 L. T. 405 (1918), music hall artiste. Cf. In re an Arbitration between Rubel B. & M. Co. and Vos, [1918] 1 K. B. 315, compensation to include a share of profits.

(b) Waiver of Conditions

CRAIG v. LANE.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 195, 98 N. E. 685.)

Action by Frank H. Craig against John J. Lane. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of contract for the purchase of three cars of potatoes at 90 cents per bushel.

SHELDON, J. We see no ground on which the exceptions can be sustained. The ruling asked for by the defendant could not have been given; and that is the only question presented.

The defendant's contract was an entire one for the purchase of three cars of potatoes; and it was not severed by the fact that the plaintiff shipped them at different times and drew a separate draft for the alleged contents of each car at the agreed price. We assume without deciding that upon discovering the shortage which he claimed in the load of the first car he might have declined to accept it and rescinded his contract. But he chose not to do this. Instead of doing so he accepted that car load and sold it to a customer of his own, thus putting it beyond his power to return it to the plaintiff. He could not then rescind the contract by reason of the shortage. He must seek his remedy under the contract by way of set-off or recoupment, or by an independent action. Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; Obery v. Lander, 179 Mass. 125, 130, 60 N. E. 378; Fullam v. Wright & Colton Wire Cloth Co., 196 Mass. 474, 476, 82 N. E. 711.

Exceptions overruled.[91]

[91] "A part performance or a defective performance of a condition precedent is generally not sufficient. But after one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability." Fulton v. Miller, 254 Pa. 363, 98 Atl. 1065 (1916). See, also, Breen Stone Co. v. W. F. T. Bushnell Co., 117 Minn. 283, 135 N. W. 993 (1912), quality of building materials; Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126 (1910); Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751 (1912).

Where payment or other performance by a certain time is a condition precedent, this may be waived by any voluntary statement to that effect or by continuing to receive or to urge performance. Pressy v. McCornack, 235 Pa. 443, 84 Atl. 427 (1912); Amer. Mortg. Co. v. Williams, 103 Ark. 484, 145 S. W. 234 (1912), time limit for mortgage redemption; Ray v. Commonwealth Life Ins. Co., 184 Ky. 215, 211 S. W. 736 (1919); Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315 (1890); Deeves & Son v. Manhattan Life Ins. Co., 195 N. Y. 324, 88 N. E. 395 (1909); Morton v. Kane, 18 Ind. 191 (1862); Phillips & C. Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341 (1875); Van Stone v. Stilwell & B. Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961

McKENNA v. VERNON.

(Supreme Court of Pennsylvania, 1917. 258 Pa. 18, 101 Atl. 919.)

Assumpsit by Bernard J. McKenna, trading as John McKenna & Son, against William J. Vernon. From a judgment for plaintiff, defendant appeals. Affirmed.

STEWART, J. This was an action to recover a balance alleged to be due on a building contract. By written agreement under date of January 20, 1914, the plaintiff undertook the erection and completion of a moving picture theater at 1526–28 Cumberland street in the city of Philadelphia, agreeably to certain plans and specifications which accompanied and were made part of the agreement, he to receive therefor, in full compensation, the sum of $7,750, to be paid by the owner to the contractor wholly upon certificates of the architect as follows: Eighty per cent. of the work set in place as the work proceeds, the first payment within 30 days after the completion of the work; all payments to be due when certificates of the same shall have been issued by the architect; the building to be completed by April 20, 1914, and the work to be done under the direction of the architect. A supplemental agreement was entered into by the parties March 24, 1914, which provided for an enlargement of the theater building, for which the contractor was to receive an additional $1,000. The main provisions of this agreement were similar to those contained in the earlier. By the later agreement the work was to be completed on or before the 11th of May, 1914. From time to time, as the work progressed, the owner made several payments on account, amounting in all to $6,000. Suit was brought, August 28, 1914, to recover the balance of $2,750, with interest from June 30, 1914. Defense was made on several grounds: Failure of contractor to erect and complete the building in accordance with the plans and specifications, the substituting of inferior and cheaper materials, and inferior workmanship throughout, entailing, for the supply and correction of the same, if attempted, a large expenditure. Further, defendant claimed that the building was not completed within the time allowed by the contract, and demanded as a set-off a penalty of $283.35. The trial resulted in a verdict for the plaintiff for $2,500. At the conclusion of the evidence, the defendant asked for a compulsory nonsuit, which was refused.

(1891); Maryland Steel Co. of Baltimore County v. U. S., 235 U. S. 451, 35 Sup. Ct. 190, 59 L. Ed. 312 (1915).

Where proof of loss within a fixed time is made a condition by an insurance policy, the condition may be waived, even after the expiration of the period fixed. Johnson v. Bankers' Mut. Casualty Ins. Co., 129 Minn. 18, 151 N. W. 413, L. R. A. 1915D, 1199, Ann. Cas. 1916A, 154 (1915); Dezell v. Fidelity & Casualty Co., 176 Mo. 253, 75 S. W. 1102 (1903); Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698 (1896); Lebanon Mut. Ins. Co. v. Erb, 112 Pa. 149, 4 Atl. 8 (1886); Owen v. Farmers Joint Stock Ins. Co., 57 Barb. (N. Y.) 518 (1869).

The several assignments of error, in one form and another, relate directly or indirectly to this one feature of the case, and are all based on the theory that, in the absence of a certificate from the architect of the final completion of the building in accordance with plans and specifications, no right of action existed. Not only is there no express provision to this effect in the contract, but the contract itself shows that no distinction is there made between final payment and the payments on account of the 80 per cent. of work in place. All payments were to be made only on certificate of the architect, and yet with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for. With such constant and repeated disregard on the part of the owner to exact compliance with this provision in the contract, it is too late now for him to insist that failure on the part of the plaintiff to secure such certificate before suit defeats his right of action. Furthermore, on the trial, the architect, called as a witness, testified that the plaintiff had performed substantial compliance with all the requirements of the contract, that he had not given the certificate to this effect only because it had not been asked for, and that whatever variations there were from the specifications were authorized and directed by him. The provision in the contract for written certificates from the architect is for the benefit and protection of the owner. If he waived it repeatedly, as he did here, during the progress of the work, he cannot complain if he be held to have waived it when he seeks to defend against a final payment for work shown to have been honestly and substantially performed, especially when almost daily he has had the work under his own observation, without remonstrance or complaint at any time with respect to either the work done or materials employed. This being the situation, the court was entirely right in refusing the nonsuit.

For like reason, there was no error in refusing to give binding instructions for the defendant. If the court was right in these rulings, the other assignments of error necessarily fall.

The judgment is affirmed.[92]

[92] In accord: Mayer Bros. Const. Co. v. American Sterilizer Co., 258 Pa. 217, 101 Atl. 1002 (1917); Pennsylvania Rubber Co. v. Detroit Shipbuilding Co., 186 Mich. 305, 152 N. W. 1071 (1915); Douglass & Varnum v. Village of Morrisville, 89 Vt. 393, 425, 95 Atl. 810 (1913), written order as condition precedent for extra work; O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763 (1919), same.

A waiver may be conditional, and becomes operative on fulfillment of the condition. Thompson v. Postal Life Ins. Co., 226 N. Y. 363, 123 N. E. 750 (1919).

The term "waiver" is frequently used in cases where there is really a new substituted agreement, modifying and discharging pro tanto the original contract. See California Raisin Growers Assn. v. Abbott, 160 Cal. 601, 606, 117 Pac. 767 (1911); Mahoney v. Hartford Inv. Corp., 82 Conn. 280, 73 Atl. 766 (1909) new agreement for extras, but without the written order required originally. Distinguish sharply between substituted contract, estoppel, and voluntary waiver, both as to the operative facts themselves and as to their effect on the legal relations of the parties.

CLARK v. WEST.

(Court of Appeals of New York, 1908. 193 N. Y. 349, 86 N. E. 1.)

Action by William L. Clark against John B. West. From a judgment of the Appellate Division of the Supreme Court reversing an interlocutory judgment overruling a demurrer to the complaint and sustaining the demurrer (125 App. Div. 654, 110 N. Y. Supp. 110), plaintiff, by permission, appeals, and the Appellate Division certifies questions. Reversed, and interlocutory judgment affirmed.

On February 12, 1900, the plaintiff and defendant entered into a written contract, under which the former was to write and prepare for publication for the latter a series of law books, the compensation for which was provided in the contract. After the plaintiff had completed a three-volume work known as "Clark & Marshall on Corporations," the parties disagreed. The plaintiff claimed that the defendant had broken the contract by causing the book to be copyrighted in the name of a corporation which was not a party to the contract, and he brought this action to recover what he claims to be due him, for an accounting and other relief. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer, but upon appeal to the Appellate Division that decision was reversed, and the demurrer sustained.

Those portions of the contract which are germane to the present stage of the controversy are as follows: The plaintiff agreed to write a series of books relating to specified legal subjects. The manuscript furnished by him was to be satisfactory to the defendant. The plaintiff was not to write or edit anything that would interfere with the sale of books to be written by him under the contract, and he was not to write any other books unless requested so to do by the defendant, in which latter event he was to be paid $3,000 a year. The contract contained a clause which provided that "the first party (the plaintiff) agrees to totally abstain from the use of intoxicating liquors during the continuance of this contract, and that the payment to him in accordance with the terms of this contract of any money in excess of $2 per page is dependent on the faithful performance of this as well as the other conditions of this contract. * * *" In a later paragraph it further recited that, "in consideration of the above promises of the first party (the plaintiff), the second party, (the defendant) agrees to pay to the first party $2 per page, * * * on each book prepared by the first party under this contract and accepted by the second party, and if said first party abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional $4 per page in manner hereinbefore stated." This was followed by a specification of the method and times of payment. * * *

The plaintiff in his complaint alleges completion of the work on Corporations and publication thereof by the defendant, the sale of many copies thereof from which the defendant received large net receipts, the number of pages it contained (3,469), for which he had been paid at the rate of $2 per page, amounting to $6,938, and that defendant has refused to pay him any sum over and above that amount, or any sum in excess of $2 per page. Full performance of the agreement on plaintiff's part is alleged, except that he "did not totally abstain from the use of intoxicating liquor during the continuance of said contract; but such use by the plaintiff was not excessive and did not prevent or interfere with the due and full performance by the plaintiff of all the other stipulations in said contract." The complaint further alleges a waiver on the part of the defendant of the plaintiff's stipulation to totally abstain from the use of intoxicating liquors, as follows: "(12) That defendant waived plaintiff's breach of the stipulation to totally abstain from the use of intoxicating liquors during the continuance of said contract; that long prior to the completion of said manuscript on Corporations, and its delivery to and acceptance by the defendant, the defendant had full knowledge and well knew of plaintiff's said use of intoxicating liquor during the continuance of said contract, but nevertheless acquiesced in and failed to object thereto, and did not terminate the contract on account thereof; that with full knowledge of said breach by the plaintiff defendant continued to exact and require of the plaintiff performance of all the other stipulations and conditions of said contract, and treated the same as still in force, and continued to receive, and did receive, installments of manuscript under said contract, and continued to make and did make payments to plaintiff by way of advancements, and finally accepted and published said manuscript as aforesaid; that at no time during the performance of said contract by the plaintiff did the defendant notify or intimate to the plaintiff that defendant would insist upon strict compliance with said stipulation to totally abstain from the use of intoxicating liquor, or that defendant intended to take advantage of plaintiff's said breach, and on account and by reason thereof refuse to pay plaintiff the royalty stipulated in said contract; that, on the contrary, and with full knowledge of plaintiff's said use of intoxicating liquors, defendant repeatedly avowed and represented to the plaintiff that he was entitled to and would receive said royalty payment, and plaintiff believed and relied on said representation, and in reliance thereon continued in the performance of said contract until the time of the breach thereof by the defendant, as hereinafter specifically alleged, and at all times during the writing of said treatise on Corporations, and after as well as before publication thereof, as aforesaid; it was mutually understood, agreed, and intended by the parties hereto that, notwithstanding plaintiff's said use of intoxicating liquors, he was nevertheless entitled to receive and would receive said royalty as the same accrued under said contract." The defendant's breach of

the contract is then alleged, which is claimed to consist in his having taken out a copyright upon the plaintiff's work on Corporations in the name of a publishing company which had no relation to the contract, and the relief asked for is that the defendant be compelled to account, and that the copyright be transferred to the plaintiff, or that he recover its value.

The appeal is by permission of the Appellate Division, and the following questions have been certified to us: (1) Does the complaint herein state facts sufficient to constitute a cause of action? (2) Under the terms of the contract alleged in the complaint, is the plaintiff's total abstinence from the use of intoxicating liquors a condition precedent which can be waived so as to render defendant liable upon the contract notwithstanding plaintiff's use of intoxicating liquors? (3) Does the complaint herein allege facts constituting a valid and effective waiver of plaintiff's nonperformance of such condition precedent?

WERNER, J.[93] * * * Briefly stated, the defendant's position is that the stipulation as to plaintiff's total abstinence is the consideration for the payment of the difference between $2 and $6 per page, and therefore could not be waived except by a new agreement to that effect based upon a good consideration; that the so-called waiver alleged by the plaintiff is not a waiver, but a modification of the contract in respect of its consideration. The plaintiff, on the other hand, argues that the stipulation for his total abstinence was merely a condition precedent, intended to work a forfeiture of the additional compensation in case of a breach, and that it could be waived without any formal agreement to that effect based upon a new consideration.

The subject-matter of the contract was the writing of books by the plaintiff for the defendant. The duration of the contract was the time necessary to complete them all. The work was to be done to the satisfaction of the defendant, and the plaintiff was not to write any other books except those covered by the contract, unless requested so to do by the defendant, in which latter event he was to be paid for that particular work by the year. The compensation for the work specified in the contract was to be $6 per page, unless the plaintiff failed to totally abstain from the use of intoxicating liquors during the continuance of the contract, in which event he was to receive only $2 per page. That is the obvious import of the contract construed in the light of the purpose for which it was made, and in accordance with the ordinary meaning of plain language. It is not a contract to write books in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books. When we view the contract from this standpoint, it will readily be perceived that the particular stipulation is not the consideration for the contract, but simply one of its conditions which fits in with those relating to time and method of delivery of manu-

[93] The statement and the opinion have been somewhat abbreviated.

script, revision of proof, citation of cases, assignment of copyrights, keeping track of new cases and citations for new editions, and other details which might be waived by the defendant, if he saw fit to do so. This is made clear, it seems to us, by the provision that, "in consideration of the above promises," the defendant agrees to pay the plaintiff $2 per page on each book prepared by him, and if he "abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional $4 per page in manner hereinbefore stated." The compensation of $2 per page, not to exceed $250 per month, was an advance or partial payment of the whole price of $6 per page, and the payment of the two-thirds, which was to be withheld pending the performance of the contract, was simply made contingent upon the plaintiff's total abstention from the use of intoxicants during the life of the contract. * * *

It is obvious that the parties thought that the plaintiff's normal work was worth $6 per page. That was the sum to be paid for the work done by the plaintiff, and not for total abstinence. If the plaintiff did not keep to the condition as to total abstinence, he was to lose part of that sum. * * * This, we think, is the fair interpretation of the contract, and it follows that the stipulation as to the plaintiff's total abstinence was nothing more nor less than a condition precedent. If that conclusion is well founded, there can be no escape from the corollary that this condition could be waived; and, if it was waived, the defendant is clearly not in a position to insist upon the forfeiture which his waiver was intended to annihilate. The forfeiture must stand or fall with the condition. If the latter was waived, the former is no longer a part of the contract. Defendant still has the right to counterclaim for any damages which he may have sustained in consequence of the plaintiff's breach, but he cannot insist upon strict performance. Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315; Parke v. Franco-American Trading Co., 120 N. Y. 51, 56, 23 N. E. 996; Brady v. Cassidy, 145 N. Y. 171, 39 N. E. 814.

This whole discussion is predicated, of course, upon the theory of an express waiver. We assume that no waiver could be implied from the defendant's mere acceptance of the books and his payment of the sum of $2 per page without objection. It was the defendant's duty to pay that amount in any event after acceptance of the work. The plaintiff must stand upon his allegation of an express waiver, and if he fails to establish that he cannot maintain his action.

The theory upon which the defendant's attitude seems to be based is that, even if he has represented to the plaintiff that he would not insist upon the condition that the latter should observe total abstinence from intoxicants, he can still refuse to pay the full contract price for his work. The inequity of this position becomes apparent when we consider that this contract was to run for a period of years, during a large portion of which the plaintiff was to be entitled only to the advance payment of $2 per page; that balance being contingent,

among other things, upon publication of the books and returns from sales. Upon this theory the defendant might have waived the condition while the first book was in process of production, and yet, when the whole work was completed, he would still be in a position to insist upon the forfeiture because there had not been strict performance. Such a situation is possible in a case where the subject of the waiver is the very consideration of a contract (Organ v. Stewart, 60 N. Y. 413, 420), but not where the waiver relates to something that can be waived. In the case at bar, as we have seen, the waiver is not of the consideration or subject-matter, but of an incident to the method of performance. The consideration remains the same. The defendant has had the work he bargained for, and it is alleged that he has waived one of the conditions as to the manner in which it was to have been done. He might have insisted upon literal performance, and then he could have stood upon the letter of his contract. If, however, he has waived that incidental condition, he has created a situation to which the doctrine of waiver very precisely applies.

The cases which present the most familiar phases of the doctrine of waiver are those which have arisen out of litigation over insurance policies where the defendants have claimed a forfeiture because of the breach of some condition in the contract (Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Titus v. Glens Falls Ins. Co., 81 N. Y. 410; Kiernan v. Dutchess Co. Mut. Insurance Co., 150 N. Y. 190, 44 N. E. 698), but it is a doctrine of general application which is confined to no particular class of cases. A "waiver" has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon (Herman on Estoppel & Res Adjudicata, vol. 2, p. 954; Cowenhoven v. Ball, 118 N. Y. 234, 23 N. E. 470), and this definition is supported by many cases in this and other states. In the recent case of Draper v. Oswego Co. Fire R. Ass'n, 190 N. Y. 12, 16, 82 N. E. 755, Chief Judge Cullen, in speaking for the court upon this subject, said: "While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A 'waiver' is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my Brother Vann in the Kiernan Case, 150 N. Y. 190, 44 N. E. 698: 'The law of waiver seems to be a technical doctrine, introduced and applied by the court for the purpose of defeating forfeitures. * * * While the principle may not be easily classified, it is well established that, if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked.' The doctrine of equitable estoppel, or estoppel in pais, is that a party may be pre-

cluded by his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it. * * * As already said, the doctrine of waiver is to relieve against forfeiture. It requires no consideration for a waiver, nor any prejudice or injury to the other party." To the same effect, see Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740.

It remains to be determined whether the plaintiff has alleged facts which, if proven, will be sufficient to establish his claim of an express waiver by the defendant of the plaintiff's breach of the condition to observe total abstinence. In the 12th paragraph of the complaint, the plaintiff alleges facts and circumstances which we think, if established, would prove defendant's waiver of plaintiff's performance of that contract stipulation. * * *

The three questions certified should be answered in the affirmative, the order of the Appellate Division reversed, the interlocutory judgment of the Special Term affirmed, with costs in both courts, and the defendant be permitted to answer the complaint within 20 days upon payment of costs.

JOBST v. HAYDEN BROS. et al.

(Supreme Court of Nebraska, 1909. 84 Neb. 735, 121 N. W. 957, 50 L. R. A. [N. S.] 501.)

Mechanic's lien foreclosure by Bernhardt J. Jobst against Hayden Bros., impleaded with Joseph R. Lehmer and others. Judgment for plaintiff, and Hayden Bros. appeal. Reversed and remanded.

CALKINS, C.[94] This was an action by the plaintiff to foreclose a mechanic's lien upon a building which he had erected under a written contract with the defendant, Hayden Bros., a corporation, hereinafter called the "owner." A portion of his claim was for the balance of the contract price, to which were added, for extras, sundry items. The owner contested a portion of these claims for extras and demanded a large sum for defects in construction and damages for delay in the completion of the building. The district court allowed part of plaintiff's claim for extras and deducted from the plaintiff's contract price for defects in construction, $100 for the freezing of the west wall, and $500 on account of defective floor topping. It found that the owner agreed to and did release the plaintiff from any and all claims for damages on account of delay in completing the building and rendered judgment against it for the sum of $9,520.38. * * *

6. The contract provided that the plaintiff was to finish and deliver to the owner the subbasement and basement on or before the 1st day of June, 1905, and to complete and turn over the whole building on or before the 1st day of September in the same year, and it contained the

[94] Part of the opinion is omitted.

stipulation that if the contractor should fail to deliver said building complete in every respect on the 1st day of September, 1905, he should pay the owner as liquidated damages the sum of $25 per day for each day after the 1st day of September, 1905, until the building should be delivered by him, unless he was prevented from so doing by some of the causes which the contract provided should be a sufficient excuse for delay. The building was not in fact completed until the following June. The evidence shows that the rental value of the building complete exceeded the sum of $25 per day, and the owner claims that it should be allowed that amount under the provisions of this contract. The plaintiff claims that the delay in the completion of the work was caused by the failure to finish the excavation, and, further, that in July, 1905, the owner agreed to waive the time clause in the contract. The court below made no finding as to the cause of the delay, but found that the owner waived the time clause and agreed to and did release the plaintiff from any and all claims on account of delays in completing the building within the time limited in the contract. The owner argues that the evidence does not sustain this finding, but a careful reading of the testimony convinces us that this contention cannot be maintained, and that the finding of fact by the district court is fully sustained. Further, the owner insists that, if such a promise was made by it, it was without consideration and therefore invalid as a contract, and that it was not acted upon by the plaintiff so as to estop the owner from insisting upon its invalidity. We are of the opinion that the contention of the owner upon this point must be sustained, and that its promise to waive the time clause, being without consideration, is void as a contract, and that, the plaintiff not being shown to have acted upon the same, the owner is not estopped now to make a claim for such damages.

7. It does not, however, follow that the promise of the owner, though not amounting to a contract nor estopping it to claim damages for delay, had no effect whatever. The provision of the contract respecting delays which should extend the plaintiff's time for the completion of the building was as follows: "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner or architect or any other contractor employed by such owner upon the work, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid. But no such allowance shall be made unless a claim therefor is presented in writing to the architect within 24 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect." It does not appear that the plaintiff made a claim in writing to the architect for an extension of time in accordance with these provisions, and it is very strenuously insisted that, in the default of having taken such action, he is precluded now from showing that he was delayed by the fault of the owner or other contractors. If it be true, as the district

court found, and its finding as we have seen must be here sustained, that the owner made this agreement and the plaintiff, relying upon its promise, neglected to make his claim in writing, we think the owner should be and is estopped to insist upon the provisions of this clause. It would have been an idle act for the plaintiff to ask an extension when the owner had already promised not to insist upon the completion of the building at the time stipulated. Such a promise naturally lulled the contractor into a sense of security and was well calculated to prevent him from taking steps under the provisions of the contract quoted. We therefore conclude that the plaintiff was entitled to an extension of the time equal to the period of delay caused by the failure of the owner to have his property in condition for the erection of the building.[95] * * *

SHALLENBERGER v. STANDARD SANITARY MFG. CO.

(Supreme Court of Pennsylvania, 1909. 223 Pa. 220, 72 Atl. 500.)

Assumpsit for breach of contract by E. E. Shallenberger against the Standard Sanitary Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

STEWART, J. It is not correct to say that the contract here was incomplete and inoperative so long as the bond stipulated for had not been given by the contractor. With the sealing and delivery of the written agreement the contract at once became operative, and thereafter, for a breach by either of the parties in any of its terms, the other would have appropriate remedy. One of the terms required that the contractor should "furnish satisfactory trust company bond in the sum of twenty thousand dollars ($20,000) for the faithful performance of all and singular his covenants, and for the protection of the parties of the first part against mechanics' liens, and all damages, losses, delays, or other injury sustained by reason of the failure of the said party of the second part to keep and perform all his covenants."

[95] The waiver of a condition precedent to the defendant's duty must be sharply distinguished from a discharge (or "waiver") of the plaintiff's duty to perform as agreed. (For the latter, see post, Discharge of Contract.) Performance by the plaintiff as a condition precedent to the defendant's duty may be waived without discharging the defendant's right to damages for nonperformance by the plaintiff. Phillips & C. Const. Co. v. Seymour, 91 U. S. 646, 23 L. Ed. 341 (1875); Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, 90 Atl. 624 (1914); York v. York Rys. Co., 229 Pa. 236, 78 Atl. 128 (1910); MaGirl v. Hastings, 120 Ill. App. 276 (1905); Machinery & Electrical Co. v. Young Men's Christian Ass'n, 22 Cal. App. 416, 134 Pac. 724 (1913); Brooklyn Structural Steel Corp. v. Lechtman, 92 Misc. Rep. 164, 155 N. Y. Supp. 220 (1915); Frankfurt-Barnett Co. v. William Prym, 237 Fed. 21, 150 C. C. A. 223, L. R. A. 1918A. 602 (1916); Bast v. Byrne, 51 Wis. 531, 8 N. W. 494, 37 Am. Rep. 841 (1881).

The right to damages may also be discharged for a consideration or by estoppel. O'Loughlin v. Poli, 82 Conn. 427, 435, 74 Atl. 763 (1909); Maryland Steel Co. of Baltimore County v. U. S., 235 U. S. 451, 35 Sup. Ct. 190, 59 L. Ed. 312 (1915).

By the contract, executed April 27, 1905, plaintiff undertook, for a consideration of $64,692, to remove from a certain lot in the city of Allegheny owned by defendant company the buildings then standing and occupied by the defendant company, and erect thereon a pattern shop and storage warehouse and a warehouse building, and complete the same by September 1st following. Without having given the bond required plaintiff was allowed to enter at once upon the work. He proceeded without delay to tear down and remove the old buildings, and prepare the ground for constructive work. The defendant would have been entirely within its rights had it denied possession of the premises until bond had been given, and, for a failure of the plaintiff to furnish the bond within a reasonable time, it would have been justified in rescinding the contract. But possession having been given, and the work having been entered upon, while the defendant's right to demand the bond thereafter continued, as well as its rights to rescind for default by the plaintiff, yet rescission could only be justified as proper regard was paid to the rights of the plaintiff under conditions existing at the time.

In a communication addressed to plaintiff, under date of May 19th, Mr. Reed, general manager for the defendant company, requested that the latter file his bond with either the secretary of the company or its architect. The day following the receipt of this letter the plaintiff testified that he called on Mr. Reed, and told him that he had made application to a trust company in West Virginia for a surety bond, but, because of the absence of a party whom he wished to see in connection with it, he was delayed; that he would get it as soon as possible, and would not ask any money on the contract until the bond had been delivered to the company. To this representation Mr. Reed replied, "All right." The plaintiff thereafter continued his work under the contract. By June 5th he had the ground cleared, had 8 or 10 car loads of lumber on the ground, and was ready to proceed with the erection of the buildings. On that day defendant gave the plaintiff a written notice, which reads as follows: "Under the terms of the agreement dated April 27, 1905, prepared for construction of buildings in Allegheny city for S. S. M. Co., it is provided that you shall give a satisfactory bond in the sum of $20,000 for the faithful performance of the work. As the contract cannot be closed till this is done, you are hereby notified that unless the bond is delivered by Thursday, June 8, 1905, by twelve o'clock noon, we shall let the work to another contractor."

If, as here asserted, the contract had not been closed, the defendant was under no obligation to the plaintiff with respect to it; it was nothing but an open negotiation from which either could withdraw at pleasure. This was a strange theory to adopt, and may explain in a measure the summary process attempted by the defendant. As we have said, the contract was an executed one, binding upon both parties, which neither could rescind except for justifying reasons. Treating

the communication, however, as a notice that the company would rescind the contract, unless the bond were furnished by noon of June 8th—and the plaintiff so understood it—the one question is, Was the time allowed under the notice reasonable, in view of all the circumstances of the case?

The plaintiff testified that at the time the notice was received his application for a surety bond of the Citizens' Trust & Guarantee Company of Parkersburg, W. Va., had been approved by the company. Under date of June 8th—though it must have been the 9th—he wrote to the defendant advising that this bond had been executed by the trust company the day previous, June 8th, and would arrive by due course of mail. On either the next day or that following plaintiff tendered this bond to the defendant's general manager, Mr. Dawes, who replied, "Well, it is all right; but, as we have made the change now, we intend to do the work ourselves, and don't wish to make the change again." Thereupon, plaintiff was denied permission to proceed with his work on the premises. It is complained that the court submitted to the jury the question of reasonable notice to plaintiff of the intention to rescind, instead of deciding it as a matter of law. This assumes that there was no dispute as to the facts on which plaintiff relied to justify or excuse his delay in furnishing the bond. It would unduly extend this opinion if we were to refer in detail to the many and marked contradictions which appear in the testimony. Let a single instance suffice.

In determining whether a three-day limit for the filing of the bond was affording the plaintiff a reasonable time, what preceded the giving of the notice was as much for consideration as what followed. That the reasonableness of the time depended on the situation and circumstances of the parties at the time is true, but whatever in the conduct of either had contributed to the situation so far as concerned the other was proper matter of inquiry. The plaintiff, immediately after the first written request for a bond, had told the defendant's general manager that application had been made to the trust company in Parkersburg for a surety bond in the stipulated sum. If in that conversation the manager told plaintiff what the latter says he did, a waiver of the right to require prompt delivery of a bond, in consideration of plaintiff making no pressing demand for money or any payment on his contract before delivery of the bond, might well be inferred. If there were such waiver, then when the notice of June 5th was given, plaintiff could not be said to be in default. A three days' notice to one who in open disregard of his covenants, and in spite of repeated demands for compliance, was in default might well be regarded as reasonable; while such a requirement would be wholly unreasonable with respect to another whose delay had been with the acquiescence of the party having a right to the bond. Did the conversation occur as plaintiff says, or was it as the general manager testified? Certainly what passed between these parties was relevant, and it was

wholly for the jury to determine what the conversation was, and its effect. So, too, in regard to other relevant facts. The facts being undetermined, a submission to the jury was unavoidable.

From what we have said as to the real and only issue in the case it results that no error was committed in rejecting defendant's offer to show plaintiff's financial condition. Whatever that condition was, it did not prevent plaintiff from procuring the required bond and tendering it to defendant on the day following defendant's rescission. The question was whether that was a reasonable compliance with defendant's demand. Nor was it error to refuse consideration of the fact that the bond tendered by plaintiff was a bond of a foreign corporation. Defendant did not put its refusal of acceptance on any such ground, but solely on the ground that the bond had not been tendered in time. Not only so, but when defendant, weeks before, was advised that plaintiff had applied to this company for a surety bond to meet the requirements of his contract, no such objection was made. This fact may not have required the company to accept such bond; but, if rejected finally for any such reason, the plaintiff would have been entitled to further time to procure another.[96]

The measure of damages the jury were instructed to observe was a correct one. Plaintiff had made subcontracts for two-thirds of the material required for the construction of the building, and offered testimony to show what additional expenditure would be required to complete the buildings in accordance with the contract. The appropriation of these subcontracts by the defendant company is conclusive as to the cost of the material embraced, and the testimony as to the additional cost required was convincing to the jury. They were instructed by the court to estimate from these data the value of plaintiff's contract, first ascertaining from the evidence what the entire cost of the building would be to the plaintiff, and deducting this sum

[96] In List & Son Co. v. Chase, 80 Ohio St. 42, 88 N. E. 120, 17 Ann. Cas. 61 (1909), the court said: "We do not deny that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead the seller and prevent him from protecting himself; in other words, where the conduct of the buyer would raise an estoppel against him. But when the buyer has absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of nonperformance on those grounds. The reason which underlies this proposition is that a waiver must be voluntary—that is, intentional, with knowledge of the facts and of the party's rights—or it must be implied from conduct which amounts to estoppel."

For cases holding that a waiver or an estoppel existed on this ground, see Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810 (1899); Ginn v. W. C. Clark Coal Co., 143 Mich. 84, 106 N. W. 867, 107 N. W. 904 (1906); Bonney v. Blaisdell, 105 Me. 121, 73 Atl. 811 (1909); Sutton v. Risser, 104 Iowa, 631, 74 N. W. 23 (1898), shortage in amount waived where seller offered to make it up; Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35 (1906), architect's certificate; Goodman v. Purnell, 187 Fed. 90, 109 C. C. A. 408 (1911).

from the contract price. If the defendant had no right to rescind the contract, plaintiff was entitled to compensation; and the measure of damages adopted was the only one, depending upon the sufficiency of the evidence, by which this could be determined.

The assignments of error are overruled.

Judgment affirmed.[97]

POTTER, J. (dissenting). I am unable to agree with the view of the majority of the court in this case. An essential requirement of the proposed contract was that the contractor should furnish bond in the sum of $20,000, to insure the faithful performance of the work. This was not one of the things to be done or furnished as the work progressed, but it was a prerequisite, something required in advance of the performance of the work which it was to guarantee. Some six weeks passed after the signing of the agreement, and no such bond was furnished by the contractor. The defendant company might well have refused permission to the contractor to enter upon the premises until he had given the security he had agreed to furnish. But instead of standing sharply upon its rights in this respect, it indulged the plaintiff further by allowing him to make a start upon the work, at the same time warning him to file the bond within three days. This would have been ample time in which to procure and file the bond, if the financial condition of the plaintiff was sound or his credit good.

But instead of procuring a bond with satisfactory sureties, as required by the agreement, the plaintiff finally offered, as a compliance with his obligation, the bond of a foreign corporation not authorized to do business in the state of Pennsylvania. Such a bond was of course unsatisfactory to the defendant company, and it refused to accept it, or to allow plaintiff to proceed further with the work. In so doing the defendant was acting clearly within its rights under the contract. Surely it was not obliged to run the risk of placing a large and important contract in the hands of an irresponsible contractor, who had failed to furnish the bond agreed upon. Under the admitted facts of the case I can see nothing which should properly have been submitted to a jury. The result was to give to the plaintiff the profits of a contract which he never carried out in accordance with its terms,

[97] Where performance on time or in a certain manner has ceased to be a condition precedent by reason of a waiver, it can generally again be made a condition by express notice to that effect. In the absence of such notice it will no longer operate as a condition. The notice operates to end assent and also to prevent further estoppel by reliance on the previous waiver. See Lawson v. Hogan, 93 N. Y. 39 (1883); Schmidt v. Reed, 132 N. Y. 108, 30 N. E. 373 (1892); Taylor v. Goelet, 208 N. Y. 253, 101 N. E. 867, Ann. Cas. 1914D, 284 (1913); Monson v. Bragdon, 159 Ill. 61, 66, 42 N. E. 383 (1895); Jakes v. North American Union, 186 Ill. App. 1 (1914); Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126 (1910); Stevinson v. Joy, 164 Cal. 279, 128 Pac. 751 (1912); Standard Brewing Co. v. Anderson, 121 La. 935, 46 South. 926, 15 Ann. Cas. 251 (1908); Wilt v. Hammond Bros., 179 Mo. App. 406, 165 S. W. 362 (1914); Walker v. McMurchie, 61 Wash. 489, 112 Pac. 500 (1911).

and for work which he never performed, and which he had no right to even attempt to perform until he had furnished the bond.

I would reverse the judgment.

BROWN and ELKIN, JJ., concur in this dissent.

CATHOLIC FOREIGN MISSION SOC. OF AMERICA, Inc., v. OUSSANI et al.

(Court of Appeals of New York, 1915. 215 N. Y. 1, 109 N. E. 80, Ann. Cas. 1917A, 479.)

Action by the Catholic Foreign Mission Society of America, Incorporated, against Joseph Oussani, impleaded with others. Judgment for plaintiff was modified and affirmed by the Appellate Division (157 App. Div. 893, 142 N. Y. Supp. 1111), and defendant Oussani appeals. Reversed, and new trial granted.

CARDOZO, J. The action is for specific performance. The defendant Oussani is the owner of a tract of land in Westchester county. He undertook to sell it to the plaintiff, a membership corporation. The plaintiff was represented by its president, Father Walsh. A memorandum of the terms of the agreement was put in writing, and signed. It is dated July 12, 1912. It calls for a conveyance of the land free from all incumbrances. In particular, it provides that a road known as the Longwood road, which ran through the land, shall be closed. Unless this change can be made within one week, the plaintiff is to be "in no way obliged." The price is to be $45,000, of which $15,000 is to be paid in cash, and $30,000 by a purchase-money mortgage.

Longwood road was a public highway, and the local authorities refused to close it. Father Walsh went to view the land on July 18th, and again on the day following. His purpose was to ascertain whether the road would interfere with the construction of a building. He then stated to Oussani that he would waive the condition of the contract to the effect that the road must be closed. There is evidence from which the inference may be drawn that Oussani requested the waiver and approved of it. That the buyer's purpose might not be doubtful, a letter was mailed on July 19th, in which Oussani was again informed that there had been a waiver of the condition. On the following day he gave notice that he would not carry out the sale. He had sold the property, it appears, at a larger price to some one else. There was a tender of the money and of a purchase-money mortgage. The tender was rejected, and this action was begun. * * *

If the directors are found on a new trial to have authorized the purchase, we think the plaintiff's right to a decree of specific performance will follow. The argument is made that, even though there was a contract, it lacks the mutuality essential to relief in eq-

uity. If the public easement or right of way is not extinguished, the buyer, by the terms of the contract, has the right to rescind. We think the reservation of that right does not involve a failure of the equitable remedy. Levin v. Dietz, 194 N. Y. 376, 87 N. E. 454, 20 L. R. A. (N. S.) 251. The Longwood road was an incumbrance. Like any other incumbrance, it gave the buyer the right to rescind the contract and reject the title. But a buyer in such circumstances is not bound to rescind. He may waive the condition, and accept the title though defective. If he does, the seller may not refuse to convey because the buyer could not have been compelled to waive. Bostwick v. Beach, 103 N. Y. 414, 422, 9 N. E. 41. In this case the plaintiff did waive the condition. It announced its waiver while the contract was still in force. There had been no attempt by the seller up to that time to recede from his bargain.[98]

We think the waiver to be effective did not call for the seller's approval. There is evidence, however, that he not only approved of it, but induced it. The condition which was the subject-matter of the waiver was for the benefit of the buyer solely. From the moment that the waiver was announced, the remedy was mutual. Fry on Spec. Perf. (5th Ed.) p. 238; Dyas v. Cruise, 2 Jo. & Lat. 460, 487; Beatson v. Nicholson, 6 Jur. 620; Hawksley v. Outram, [1892] 3 Ch. 359; Barker v. Cox, L. R. 4 Ch. Div. 464, 469. There may be an exception here to the general rule that mutuality must be judged of as at the date of the contract, but, if so, it is as well established as the rule itself. Palmer v. Gould, 144 N. Y. 671, 39 N. E. 378, holds nothing to the contrary. The opinion of Judge Gray in that case was not adopted by the court (144 N. Y. 684, 39 N. E. 378), but, if we assume its correctness, it is inapplicable here. All that it suggests is that partial performance may sometimes be refused where a vendee, knowing of the defect, has taken the chance of its removal, and where conveyance of a part interest would work a hardship to the vendor. See 144 N. Y. 682, 39 N. E. 378; also Hexter v. Pearce, (1900) 1 Ch. 341, 345. There is no such hardship here. The vendee is not exacting compensation for the broken condition. It has waived the condition altogether. If the contract bound the plaintiff the defendant must perform. * * *

Judgment reversed, etc.[99]

[98] See, also, Cape May Real Estate Co. v. Henderson, 231 Pa. 82, 79 Atl. 982 (1911); Korman v. Trainer, 258 Pa. 362, 101 Atl. 1051 (1917).

[99] Reversed for reasons not here involved. Part of the opinion is omitted.

A. D. GRANGER CO. v. BROWN-KETCHAM IRON WORKS.

(Court of Appeals of New York, 1912. 204 N. Y. 218, 97 N. E. 523.)

Action by the A. D. Granger Company against the Brown-Ketcham Iron Works. From a judgment of the Appellate Division (138 App. Div. 909, 123 N. Y. Supp. 1104) affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

WILLARD BARTLETT, J.[1] This suit was brought to recover a balance alleged to be due under a contract in writing whereby the plaintiff corporation agreed to sell and deliver, and the defendant corporation agreed to purchase and receive, certain vault linings to be placed in the Essex county courthouse at Newark, N. J. There is some dispute as to whether the contract was embodied in a single letter or in a series of letters; but, whichever be the fact, it is clear that it contained this provision: "Terms, net cash. Immediate payment after written acceptance by the architect." The architect thus referred to was Mr. Cass Gilbert, who was employed by Essex county to supervise the erection of the courthouse. The complaint made no mention of the provision respecting payment which I have quoted. It alleged that the plaintiff delivered the vault linings therein specified, and that they were accepted by the defendant and were used and incorporated in the work. The answer denied that they were accepted or were used or incorporated in the work, except after being repaired and altered; and there was a counterclaim for the expense of repair and alteration.

The plaintiff utterly failed to prove any written acceptance of any of the vault linings by the architect prior to the commencement of the action. Over the objection and exception of the defendant it was allowed to introduce in evidence a certificate by Mr. Cass Gilbert, dated August 16, 1906, 18 months after the suit was brought, stating that the contractors for the construction of the Essex county courthouse were entitled to the forty-fourth payment on their contract. There was nothing on the face of this paper to show that it covered the vault linings which were the subject of the contract between the parties to this action. "As I understand the law," said the learned trial judge in charging the jury, "that certificate, although issued after the action was commenced but also after the work was completed, is competent evidence, and I therefore overruled the objections of the defendant and allowed it in evidence." To this instruction the defendant duly excepted. Although there was no allegation or suggestion of waiver in the complaint, the court also left it to the jury to say whether the proof did not establish a waiver of the requirement of the contract that a written acceptance or certificate by the architect should be necessary to entitle

[1] Part of the opinion is omitted.

the plaintiff to payment. The point that a written acceptance by the architect was a condition precedent to the right to any payment under the contract, and that a waiver of this condition was not provable because it had not been pleaded, was further brought distinctly to the attention of the trial judge by appropriate requests to charge and exceptions to his refusal to charge as requested.

It requires but little discussion to show that this point was well taken and should have been deemed fatal to any recovery by the plaintiff in the present form of the pleadings. The contract prescribed a condition precedent, to wit, a written acceptance of the vault linings by the architect of the Essex county courthouse, to entitle the plaintiff to payment therefor. No such written acceptance had been given up to the time of the commencement of the action. When the suit was begun, therefore, the plaintiff's case was fatally defective in an element essential to make out a cause of action under the contract. The contract did not obligate the defendant to pay until the written acceptance had been obtained; consequently there was no obligation to pay when the action was commenced.[2]

[2] An excuse is not the same thing as performance. It is a legally operative fact, and the legal relations consequent thereon may approach an identity with those that would follow exact performance; but in an action upon an express contract it is generally held that an allegation of full performance is not supported by proof of a part performance and a waiver. In such case there is said to be a variance. Eureka Fire & Marine Ins. Co. v. Baldwin, 62 Ohio St. 368, 57 N. E. 57 (1900), condition in insurance policy; List & Son Co. v. Chase, 80 Ohio St. 42, 88 N. E. 120, 17 Ann. Cas. 61 (1909), condition in sale of goods; Mehurin v. Stone, 37 Ohio St. 49 (1881), building contract; In re Warner's Estate, 158 Cal. 441, 111 Pac. 352 (1910); Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834 (1912), prevention by defendant; Thompson v. St. Charles County, 227 Mo. 220, 126 S. W. 1044 (1910), building contract; Walsh v. North American Cold Storage Co., 260 Ill. 322, 103 N. E. 185 (1913); Herdal v. Sheehy, 173 Cal. 163, 159 Pac. 422 (1916); Flickinger v. Wrenn Investment Co., 172 Cal. 132, 155 Pac. 627 (1916), an amendment may be allowed; Symms-Powers Co. v. Kennedy, 33 S. D. 355, 146 N. W. 570 (1914), the giving of surety bond by a builder; Neuberger v. Robbins, 37 Utah, 197, 106 Pac. 933 (1910), full delivery in sale of goods; Northwestern Nat. Life Ins. Co. v. Ward, 56 Okl. 188, 155 Pac. 524 (1916), where defendant pleads denial, it is a departure for the plaintiffs to reply by alleging a waiver or an estoppel.

It has even been held that an allegation of full performance is not sustained by proof of substantial performance and a waiver. Allen v. Burns, 201 Mass. 74, 87 N. E. 194 (1909); Hennessey v. Preston, 219 Mass. 61, 106 N. E. 570 (1914); Long v. Addix, 184 Ala. 236, 63 South. 982 (1913). But where substantial performance is the only condition precedent and this has been fulfilled, no waiver is necessary and an allegation of full performance of conditions is sustained by the proof. Smith v. Mathews Const. Co., 179 Cal. 797, 179 Pac. 205 (1919); Blakely v. Neils Lumber Co., 121 Minn. 280, 141 N. W. 179 (1913).

The problem is quite different where the plaintiff pleads an express repudiation as his cause of action, as it is also when he sues for a quasi-contractual recovery. See Chicago Title & Trust Co. v. Sagola Lumber Co., 242 Ill. 468, 92 N. E. 282 (1909); Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189 (1914); West v. Norwich Union Fire Ins. Soc., 10 Utah, 442, 37 Pac. 687 (1894).

In actions on negotiable instruments, proof of waiver of notice has been allowed even though the declaration alleged the giving of notice. President

The subsequent acceptance or certificate, issued many months afterward, could not relate back so as to place the defendant in default. It was wholly irrelevant, and the court erred in receiving it and in instructing the jury that they might treat it as timely. In an action at law, the status of the parties is to be considered as it existed when the suit was begun, unless changed conditions have been brought before the court by means of supplemental pleadings, which was not the case here. * * *

Judgment reversed, etc.

SECTION 6.—IMPOSSIBILITY [3]

McCORMICK et al. v. TAPPENDORF et al.

(Supreme Court of Washington, 1909. 51 Wash. 312, 99 Pac. 2.)

Action by Charles R. McCormick and another, partners as Charles R. McCormick & Co., against Paul F. Tappendorf and another, partners as the Vancouver Lumber Company. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

HADLEY, C. J.[4] This is an action to recover damages for an alleged breach of contract to deliver a quantity of railroad ties. The terms of the contract are set forth in the following copy of a part of the correspondence between the parties: "Portland, Oregon, January 23, 1906. Vancouver Lumber Company, Vancouver, Wash.—Gentlemen: We hereby confirm our order for 50,000 pieces of 7x8–8' merchantable Oregon pine ties. These ties not to run over 20 per cent. No. 2 merchantable. Any excess No. 2 to be $2.00 per thousand feet less. Inspection and tally at loading point by inspector from Pacific Lum-

etc. of Taunton Bank v. Richardson, 5 Pick. (Mass.) 436 (1827); Camp v. Bates, 11 Conn. 487 (1836); Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595 (1827); Lundie v. Robertson, 7 East, 231 (1806).

[3] The subject matter of this section is arranged in substantially the following order:

I. Prospective impossibility of performance by the plaintiff, where actual performance by him is not a condition precedent; its effect upon the defendant's duty.

II. Prospective impossibility of performance by the defendant; its effect upon performance by the plaintiff as a condition precedent to the defendant's duty.

III. Impossibility of performance by plaintiff where such performance is a condition precedent; its effect upon the defendant's duty. This impossibility (a) may exist at the time of acceptance, or (b) may arise subsequently.

IV. Impossibility of performance by the defendant as a termination of his duty (and herein of increased difficulty and expense). Here, too, the impossibility (a) may exist at the time of acceptance, or (b) may arise subsequently.

[4] A small part of the opinion is omitted.

ber Manufacturers' Association, or an inspector to be mutually agreed upon. Price $9.00 per thousand feet, less two per cent. Delivered to ship's tackle along the Columbia river where vessel drawing 20 feet can safely lie afloat. Terms cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland. Delivery of the entire lot to be not later than June 1, 1906. You agree to notify us thirty days before wanting vessel. Vessel to receive the ties not less than 60,000 feet per day. Yours truly, Charles R. McCormick & Co., Accepted: Vancouver Lumber Co., By W. Tenney, Manager."

The complaint alleged that the defendants refused to deliver the ties, and recovery for resulting damages was demanded. The defendants answered that they were prepared to carry out their contract, and for that purpose had the ties sawed and delivered at the Columbia river, that they were ready and willing to deliver the ties according to the contract, but the plaintiffs refused to pay for the same or to make provision for payment as provided by the contract. The cause came on for trial before a jury and resulted in a verdict for the plaintiffs in the sum of $2,325.83. Judgment for that sum was entered against the defendants, and they have appealed.

The court in its instructions did not submit to the jury any questions of fact except the amount of damages to be recovered. The appellants excepted to the action of the court in taking from the jury all questions relative to the contract and the breach thereof. It is contended that failure on the respondents' part to make preparations to pay cash for the ties on delivery to the ship for loading would be such a breach of their contract as would excuse appellants from actually turning the ties over to them. It is also urged that there was such evidence tending to prove that the respondents made no preparations to pay cash as required the submission to the jury of the question of breach of the contract on the part of appellants. It will be noted that the terms of the contract called for delivery of the ties "to ship's tackle along the Columbia river," and the terms of payment are "cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland."

It is the respondents' contention that the appellants were required to deliver the ties to the ship and receive a certificate of inspection and an invoice after which they were required to present these to the bank in Portland; that without this they cannot maintain that they are excused from liability. It is true that the appellants could have had no right of action for breach of the contract until they had actually made delivery and payment had been refused; but the respondents brought this action, claiming a breach by appellants for failure to deliver the ties. We think they are not entitled to recover, and that appellants are excused if the evidence shows that at the time the respondents were not in position to make payment as the contract required. One party need not perform a condition precedent if it

appears that the other party cannot or will not perform. "One of two parties should not be required to tender performance when the other has, by act or word, indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised. Nor will the courts hold him any longer bound." 9 Cyc. 641.

There was evidence to the effect that, after a vessel was ready to take the ties in the Columbia river, the appellants ordered a tug to tow the ties out to the ship, and then telegraphed the specified bank in Portland to know if arrangements for payment for the ties had been made, and received a negative reply. Appellants then went in person to the Bank of California in Portland, and also to the United States National Bank of Portland, of which latter bank some mention had been made as the place of payment, by reason of the suspension of business by the Bank of California in San Francisco on account of the recent fire and earthquake. They were informed that no arrangements had been made for payment through either bank. It was testified that appellants then telegraphed respondents that the ties would not be delivered until arrangements for cash payment were made as required by the contract, that the respondents replied by telegram and proposed that the ties be loaded, and that the appellants accept a 10-days sight draft. All this is proper evidence for the jury, as it has a tendency to show that the respondents were not prepared to, and could not, pay cash upon delivery of the ties, and comply with their contract. It is for the jury to say what was the fact in that regard. If they should find from the evidence that respondents had not made preparation to comply with the terms of their contract in regard to payment, and that for that reason they could not do so, then appellants were excused for refusing to actually deliver possession of the ties to respondents. * * *

Judgment reversed.

CAPORALE v. RUBINE.

(Court of Errors and Appeals of New Jersey, 1918. 92 N. J. Law, 463, 105 Atl. 226.)

Action by Louis Caporale against Samuel H. Rubine. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

KALISCH, J. The legal question presented on this appeal is whether the plaintiff made out a case legally sufficient to warrant its submission, by the trial judge, to a jury for its decision.

The plaintiff below was permitted to recover a verdict for $925 and costs against the defendant below, as damages, for an alleged breach of contract, and to enter judgment on the verdict from which judgment the defendant appeals.

The legal question as to the sufficiency of the proof is raised by a

motion for a nonsuit, which was denied, and by a motion to direct a verdict for defendant, which was also refused.

The case shows that the present litigants entered into a written agreement, whereby the defendant agreed to convey to the plaintiff property in Woodcliffe on Hudson, at a purchase price of $14,850, subject to a mortgage of $10,000. The plaintiff agreed to convey to defendant, in exchange and payment for the property to be conveyed to him, certain lots in Woodcliffe, valued at $10,000, subject to a mortgage of $6,900, and to give defendant a purchase-money mortgage for $1,750, on the property conveyed by the latter to the plaintiff. The plaintiff declared in the agreement that the property to be conveyed by him to the defendant was absolutely free and clear of all incumbrances, excepting a balance of $6,900 due the Woodcliffe Land Improvement Company, represented by the mortgage above referred to. The title to the respective property was to be passed on before May 1, 1917, at Mr. Halpin's office.

The agreement was entered into on the 6th day of April, 1917. It appears that the plaintiff never had the legal title to the property which he contracted to convey to defendant, but that the legal title thereto was and remained in the Woodcliffe Land Improvement Company. This company in July, 1913, entered into an agreement with the plaintiff's wife to convey the property to her upon certain conditions to be performed by her and upon her compliance therewith, to make, execute, and deliver to her a deed in fee simple subject to the various restrictions, mentioned in the agreement, and which limit the use of the property by the owner in many material respects.

The plaintiff's wife died in February, 1916, and by her will she devised to her husband the equity in the property arising out of the agreement made by her with the land company. Therefore, when the plaintiff entered into the agreement with the defendant to convey the property to him, the former had simply an equitable title thereto, and, as appears from the agreement made with the land company, the property was subject to servitudes.

It is, however, of no importance that the plaintiff, at the time when he entered into the contract, to convey the property to the defendant, was not invested with title to the property, provided he could establish that he was in a position to perform his undertaking in conformity with the agreement, in that he was able to procure the title or control it and have it conveyed to the purchaser and offers to do so. 39 Cyc. 1983.

It is obvious from the agreement between the parties that there was to be a concurrent performance by both, since the performance of the one was the consideration of the performance of the other. Neither was required to make a tender first.

The legal rule is well stated by Ewing, Chief Justice, in Ackley v. Richman, 10 N. J. Law, at page 306, where he says: "The parties to a contract for the sale of land, unless there is something peculiar in its

structure, expect and intend the performance on each part at the same time. The delivery of the deed and the payment of the money are to be simultaneous. Each supposes he is to perform upon a corresponding performance on the other part. Neither supposes he is bound to perform if the other neglects or refuses, and is to resort after performance to a remedy on the covenants. Neither supposes he is liable to an action by the other, when the other has not performed or offered to perform."

Counsel of respondent claims that the plaintiff was not legally obligated to be in a position to convey a good title at the time fixed in the contract, but only that he should be able to convey a good title at the time of performance; and, as it appeared that the defendant had divested himself of the title to the property which he had agreed to convey to the plaintiff, the plaintiff was relieved from carrying out his part of the agreement, and was therefore entitled to bring his action for damages.

The latter part of this contention is obviously unsound.

The defendant's act in conveying the title to his property to a third person had no other legal effect than to relieve the plaintiff from making a tender of a deed of his property to the defendant.

But the plaintiff was not relieved from establishing, in order to recover damages for a breach of contract, that he was able and ready to perform his part of the undertaking. Ackley v. Richman, supra; Conover v. Tindall, 20 N. J. Law, 513, at pages 515 and 516; Bigler v. Morgan, 77 N. Y. 312; 39 Cyc. 1983; Wells Fargo & Co. v. Page, 48 Or. 74, 82 Pac. 856, 3 L. R. A. (N. S.) page 103.

The measure of the plaintiff's legal obligation in the present case was to establish by competent proof that he was able and ready to convey a title such as would comply with the requirements of the agreement. This he clearly failed to do.

It is manifest from the terms of the agreement made by the plaintiff's wife with the land company that the plaintiff could not have conveyed the title free from the restrictions imposed upon the property, and that the land company was under no legal duty to make any such conveyance until the year 1926. Furthermore, there was no evidence that the land company was ready and willing to make a conveyance of the title to the defendant at the present time; nor was there any proof that the land company could lawfully release the property from the restrictions imposed upon it; or that the company was able and ready to convey the title to defendant, "absolutely free and clear of encumbrances."

The defendant was therefore entitled to prevail on his motion for a nonsuit and on his motion for a direction of a verdict for defendant.

The judgment is reversed, and a new trial ordered.[5]

[5] **No action lies against the defendant for a repudiation unless there existed a possibility of performance by the plaintiff. Repudiation or impossibility on the part of the defendant would justify the plaintiff in refusing to per-**

PARDEE v. KANADY et al.

(Court of Appeals of New York, 1885. 100 N. Y. 121, 2 N. E. 885.)

RAPALLO, J. We think that the conclusions of the learned referee as to the construction and effect of the agreement of August 28, 1875, were correct. This agreement was not a modification of the previous agreement of February, 1875, nor a substitute therefor, nor did it operate to extend the time for the delivery of any part of the lumber agreed to be delivered during the season of 1875, but was an independent contract to deliver 400,000 feet of lumber during the season of 1876, regardless of the question whether or not the 400,000 feet agreed to be delivered in 1875 were or were not delivered in full. It evidently contemplated the possibility of a breach by the defendants of the contract of February, 1875, and provided that such breach should be excused to the extent of 150,000 feet, if the defendants should deliver the 400,000 feet in 1876. Still it left the first contract in full force. If the defendants had delivered or tendered the whole 400,000 feet under the first contract, as they might have done, there being more than 30 days of their time unexpired when the second contract was made, Pardee would have been bound to accept and pay for them, and to take the 400,000 feet in 1876 in addition, and if he had not become insolvent he could have required the defendants to deliver them. Such an arrangement cannot be construed as an extension of time under the first contract as to any part of the lumber deliverable under it. Each contract stood by itself, with the stipulation, for the benefit of the defendants, that to the extent of 150,000 feet they should not be held for damages for a breach of the first, if they fully performed the second.

The first contract was in fact broken. At the close of the season of 1875 the defendants were short in their deliveries 153,495 feet. If they fully performed the second contract they would be relieved from liability for damages upon 150,000 feet of this shortage. Consequently, as things stood at the close of the season of 1875, the right of action of M. F. Pardee was complete only as to 3,495 feet, and was suspended as to 150,000 feet until it should be seen whether the defendants performed their second contract during the season of 1876.

About the opening of the season of navigation of 1876, M. F. Pardee, on April 22d, assigned his property, including his claims under the above contracts, to his father, Myron Pardee, the present plaintiff, and then became insolvent. The plaintiff continued the business through the agency of M. F. Pardee. The defendants treated this in-

form, but they do not cause possibility of performance by the plaintiff to cease to be a condition precedent to his enforceable right. Schucking & Co. v. Young, 78 Or. 483, 153 Pac. 803 (1915); Dosch v. Andrus, 111 Minn. 287, 126 N. W. 1071 (1910); Ward v. Albertson, 165 N. C. 218, 81 S. E. 168 (1914) semble; Longfellow v. Huffman, 49 Or. 486, 90 Pac. 907 (1907); Drlensky v. Skonieczny, 209 Ill. App. 188 (1917).

solvency as an abrogation of the contract of August 28, 1875, and, without giving any notice of their intention not to perform it, sold their lumber on hand to other parties and ceased to buy more; and when applied to by M. F. Pardee and by the plaintiff to furnish the lumber, refused to do so, and announced their intention not to furnish any, assigning as reasons the failure of M. F. Pardee; that on learning it they had ceased buying, and had but little, and denying the right of M. F. Pardee to assign the contract. There was no consent on the part either of M. F. Pardee or of the plaintiff to a rescission of the contract; on the contrary, they insisted on its performance, M. F. Pardee offering guaranty of the payment of the price.

This action is not brought upon the contract for 1876, but for damages on the 153,495 feet shortage on the deliveries of 1875. As the sale for 1876 was on 30 and 60 days' credit, the insolvency of M. F. Pardee excused the defendants from delivering the lumber on credit, and entitled them to insist upon payment on or before delivery, but it did not abrogate the contract. On tender of the purchase price they would have been bound, notwithstanding the insolvency, to deliver the lumber to the vendee or his assignee. It is not necessary now to consider what effect the conduct of the defendants in disabling themselves from performing the contract, without giving any opportunity to the purchaser to tender the price, and their absolute repudiation of any liability to perform the contract, would have had in an action on the contract for 1876. But it is quite clear that without some action on their part to put the plaintiff or his assignee in default for not accepting and paying for the lumber to be delivered under that contract, the defendants cannot take the benefit of it as a defense to their liability under the previous contract for 1875. No such default was shown. On the contrary, the referee found as matter of fact that during the season of 1876 the plaintiff was at all times able, ready, and willing to receive and pay for the lumber according to the terms of the contract of August 28, 1875. The defendants now seek to avail themselves of the insolvency of M. F. Pardee, not only to exempt themselves from liability for not delivering that lumber, but also to receive the same advantage as though they had in fact delivered it. This, we think, is claiming too much. The mere insolvency of one of the parties to a contract of sale is not equivalent either to a rescission or a breach. It simply relieves the vendor from his agreement to give credit; and payment may be substituted. New England Iron Co. v. Gilbert, etc., R. Co., 91 N. Y. 153; Add. Cont. (Amer. Ed.) § 471; Bing. Sales, (3d Amer. Ed.) § 759; Freeth v. Burr, L. R. 9 C. P. 208; Bloomer v. Bernstein, Id. 588. But if the contract is rescinded, neither party can retain or claim any benefit under it.

The order of the general term should be reversed, and the judgment entered on the report of the referee affirmed, with costs.[6]

[6] In accord: Phenix Nat. Bank v. Waterbury, 197 N. Y. 166, 90 N. E. 435 (1910); Vandergrift v. Cowles Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48

ROSENTHAL PAPER CO. v. NATIONAL FOLDING BOX & PAPER CO.

(Court of Appeals of New York, 1919. 226 N. Y. 313, 123 N. E. 766.)

Action by the Rosenthal Paper Company against the National Folding Box & Paper Company.

COLLIN, J.[7] The action was for the recovery of royalties for the use of a patent. Originally brought in the City Court of New York City, the jury rendered a verdict for the plaintiff in the sum of $1,840.73. The judgment of the City Court set the verdict aside, upon the ground that it was contrary to law, and dismissed the complaint. The Appellate Term, upon the appeal of the plaintiff, reversed that judgment, reinstated the verdict, and upon it rendered judgment for the plaintiff. The Appellate Division, upon the appeal of the defendant, reversed the determination of the Appellate Term, and affirmed the judgment of the City Court. The Appellate Division permitted the appeal to this court.

The action is based upon a contract in writing of March, 1909, between Isse Seligstein and the defendant. January 22, 1912, Seligstein assigned to the plaintiff here the patent involved (and others), which Seligstein held, not as the inventor, but as the assignee of the inventor, and all of his "right, title, and interest in, to, and under" the contract of March, 1909. Plaintiff instituted this action in virtue of the assignment. The contents of the contract of March, 1909, may be adequately stated as follows:

The ownership of Seligstein of letters patent for the millinery or suit box and the desire of the defendant to acquire the exclusive right to manufacture and sell the box within a designated territory are recited. Seligstein sells to the company the exclusive right to manufacture and sell the boxes under said patent within the territory, "upon the following terms and conditions":

(1) The company "agrees to pay Seligstein a royalty of one dollar ($1.00) per thousand boxes up to an average daily sale of twenty (20) thousand boxes per day, per year of 300 days, and on all boxes sold in excess of said twenty (20) thousand boxes per day, per year of 300 days, the said the National Folding Box & Paper Company agrees to

L. R. A. 685 (1900); In re Morgantown Tin Plate Co. (D. C.) 184 Fed. 109 (1911).

The receiver of an insolvent buyer cannot enforce the contract without tendering payment in cash or ample security for payment at the times specified in the contract. Sprague, Warner & Co. v. Iowa Mercantile Co. (Iowa) 172 N. W. 637 (1919); Hanna v. Florence Iron Co. of Wisconsin, 222 N. Y. 290, 118 N. E. 629 (1918).

A voluntary assignment for the benefit of creditors may be accompanied by such other facts as to justify the other party to the contract in construing the whole as a repudiation. Hobbs v. Columbia Falls Brick Co., 157 Mass. 109, 31 N. E. 756 (1892); Ex parte Chalmers, L. R. 8 Ch. App. 289 (1873).

[7] Part of the opinion is omitted.

pay a royalty of seventy-five cents (75c.) per thousand boxes, but it is expressly understood that the payment by the said the National Folding Box & Paper Company to said Seligstein for the right to manufacture and sell boxes under said letters patent shall not be less than the sum of five hundred dollars ($500.00) for each and every year during the life of this contract.

"(2) The said Seligstein promises and agrees that he will faithfully protect said letters patent from any and all substantial infringements of said letters patent.

"(3) The said Seligstein further agrees that during the life of this contract he will not sell within the territory, above described, any box manufactured under said letters patent No. 906,138, nor any other clothing, millinery, or suit box, and further that he will not during the life of this contract sell any rights for any clothing, millinery, or suit box to any one for the territory hereinbefore described.

"(4) The term of this contract shall be five (5) years from and after the 1st day of March, A. D. 1909. * * *"

The defendant, through the period of five years, made and sold the boxes, and regularly paid, quarter-annually, to Seligstein the royalty of $1 per thousand boxes on all the boxes sold. Those paid royalties aggregated $917.79. The minimum aggregate royalty to be paid for the five years was $2,500; that is, not less than $500 each year. This action is to recover the sum of the difference between those aggregates, with interest.

The City Court set aside the verdict in favor of the plaintiff and dismissed the complaint upon the grounds: (a) Seligstein, by assigning the patent, put it out of his power to perform his agreement to protect the patent from any and all substantial infringements of the letters patent, and, in consequence thereof, the defendant was released from its agreement to pay the royalty; and (b) the defendant did not, by paying royalty throughout the period, waive its right to assert such release, because it did not know of the assignment of the patent until the five years and the contract had expired.

The Appellate Term reversed the order and judgment of the City Court, and reinstated and ordered judgment upon the verdict, upon the ground that the defendant had the full benefit of the contract for its entire period without molestation of any kind.

The Appellate Division reversed the determination of the Appellate Term and affirmed the order of the City Court, upon the grounds: (a) The agreement of the defendant to pay the minimum royalty and the agreement of Seligstein to protect the patent were concurrent and dependent. When Seligstein assigned the patent, he put it out of his power to protect the patent (because the owner of the patent alone had a standing to sue on account of an infringement), and therein and thereby committed a breach of the contract which relieved the defendant from the obligation of full performance on its part. (b) Defend-

ant did not waive this breach, because, in the first place, it was ignorant of it, and, in the second place, plaintiff's complaint alleges full performance by Seligstein of this agreement; and (c) the contract was personal to Seligstein and unassignable.

We take up first the question whether or not the agreement of the defendant to pay the minimum royalty and the agreements of Seligstein to protect the letters patent from substantial infringement, and to refrain from selling, within the designated territory, any box manufactured under the patent, or any rights for any clothing, millinery, or suit box to any one for the territory were dependent or independent of each other. In Kingston v. Preston, cited at the bar in Jones v. Barkley, 2 Douglas, 684, Lord Mansfield expressed himself to the following effect:

"There are three kinds of covenants: (1) Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. (2) There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant. (3) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act."

The complexities of modern industrial and commercial transactions have not rendered the classification inaccurate or inadequate. By a long series of decisions, the rule has been established that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication. Stavers v. Curling, 3 Bingham's N. C. 355; Tipton v. Feitner, 20 N. Y. 423; Pollak v. Brush Electric Association, 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474; Loud v. Pomona Land & Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; Griggs v. Moors, 168 Mass. 354, 47 N. E. 128; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382. The efforts put forth in judicial opinions and by text-writers to define or formulate the distinctions of dependence and independence of promises or covenants have revealed their comparative futility and served, in the main, to strengthen the rule. Parties have the right to contract as they will for any lawful purpose, and the problem for the courts is to ascertain, in accordance with established rules of interpretation, the

real contract or agreement. If they make their promises dependent or independent throughout, or dependent in part and independent in part, it is not for the courts to thwart them. Their expressed intention and meaning, ascertained from the whole instrument, rather than from technical or conventional expressions, are the guides in determining the character and force of their respective covenants.

In the contract under consideration the intention of the parties is not obscure. They contemplated that the letters patent prohibited to all persons except Seligstein, in the absence of his authorization, the manufacture and sale or the manufacture or sale of any box incorporating the patented invention or inventions and that the contract secured to the defendant the exclusive right, as against the whole world, to manufacture and sell, within the prescribed territory, the box. This exclusive right the defendant sought and Seligstein sold to it. The continued exclusiveness of the right throughout the period of five years was the root of the transaction. The defendant, presumably, could not, in the intention of the parties, pay Seligstein for the right to manufacture and sell a product which others, without price, were manufacturing and selling. It was essential to the purpose of the contract that the protection to and the exclusiveness of the right sold the defendant should be coexistent or concurrent with its ownership of it, and they were so created. The promises of Seligstein were to be kept and performed concurrently with those of the defendant. They were to be performed at all times during the licensed period. The promises of the defendant were dependent or conditional upon those of Seligstein. It is not reasonable to presume that the defendant intended to pay for the exclusive right through the five years without having it throughout the period. They intended that if it did not have the right it should not pay for it. Performance by the defendant was conditioned upon and subject to performance by Seligstein. The reciprocal promises were therefore concurrent and dependent. * * *

The general rule exists that a covenant which goes to only a part and not to the whole consideration of the contract is not a dependent and is an independent covenant. Graves v. Legg, 9 Exch. R. 709. It expresses one of the weighty considerations by which to determine whether covenants were intended as dependent or independent. It is inferior, and submissive, however, to the rule that the expressed intention of the parties is controlling.

When the promises of the parties are concurrent and dependent, either party defaulting in performance cannot, in the course of performance, sustain an action against the other because he has also defaulted. Neither party can maintain the action until he has performed or tendered performance of his part of the agreement. A plaintiff must aver and prove performance, or a tender or waiver of performance, or a fact excusing nonperformance. Dunham v. Pettee, 8 N. Y. 508; Morris v. Sliter, 1 Denio, 59; Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49.

The instant case is, however, presented to us in such a condition and form that those rules are not invocable to the defendant, as a further statement of the facts will disclose. The five-year period of the license contract expired on the last day of February, 1914. Throughout it, the defendant continued to manufacture and sell the boxes under the license and pay the prescribed royalty of $1 per thousand boxes. The defendant had not notice or knowledge of the assignment of January 22, 1912, of Seligstein to the plaintiff, until after the expiration of the license and the last payment of royalty, or until after March 1, 1914. This action was commenced February 4, 1915. Upon the trial the assignment of Seligstein to the plaintiff was received in evidence, and the making of it and its legal effect were the grounds of the decision of the City Court. There was not, for the purpose of, or within, our consideration, an actual infringement of the patent, or molestation or interference by infringers or infringements, or by Seligstein or his assignee, of the patent, or of the defendant's exclusive licensed right. The defendant had and enjoyed the whole interest or right Seligstein sold him.

We are to determine, under those facts, whether or not the sale and assignment by Seligstein to the plaintiff, on January 22, 1912, of his entire right, title, and interest in, to, and under the letters patent and the contract between Seligstein and the defendant in and of itself is a bar to this action. The sale and assignment by Seligstein put it out of his power to perform his covenants. In virtue of them he became a stranger to the patent and the contract. He conveyed to the plaintiff the entire and unqualified monopoly which he held. As to infringers and infringements of the patent, he became a person without interest and remediless. Pope Manufacturing Co. v. Gormully & I. Manufacturing Co., 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423; Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577. The defendant, nevertheless, cannot have the aid of the doctrine that, where a party to an executory contract puts it out of his power to perform, as did Seligstein, the other party may regard the contract as terminated and demand whatever damages he has sustained. Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423. The license contract ceased, by its terms and execution, to be executory on the last day of February, 1914. While the inexcusable breach of the contract by Seligstein conferred upon the defendant the right to terminate it while executory, the defendant did not exercise the right. It used the license to the contracted termination. The object of the agreement became fully performed.

Manifestly, the defendant could not, after the purpose and object of the contract were accomplished, regard it as executory; it could not rescind it; it could not deem itself deprived of the results accruing through the continuance of the contract and performance upon its part; it could only claim such damages, if any, as had been caused by the breach. Where a party to an executory contract con-

taining mutual obligations, disables himself from performing it during its performance, the other party has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach, or to wait until there was to be final performance. Ga Nun v. Palmer, 202 N. Y. 483, 96 N. E. 99, 36 L. R. A. (N. S.) 922; Central Trust Co. of Ill. v. Chicago Auditorium Ass'n, 240 U. S. 581, 589, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580. The opinions in those cases state that the rule has its exceptions. The other party may, however, decline to deem the contract terminated and may insist that it shall continue in force up to the time fixed for its final performance. A contract thus kept alive exists for the benefit of both parties. The party who refuses to regard it as terminated by the breach remains liable to all his obligations and liabilities under it. Frost v. Knight, L. R. 7 Exch. 111; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255; Johnstone v. Milling, L. R. 16 Q. B. D. 460; Lake Shore & Michigan Southern Railway Co. v. Richards, 152 Ill. 59, 80, 38 N. E. 773, 30 L. R. A. 33; Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

This doctrine also has its exceptions, none of which is relevant here. The action of Seligstein left the defendant free to continue as it did in the performance of the contract. The absence of notice to or knowledge of the defendant that Seligstein had assigned the contract does not affect the rights of the parties as presented to us. Seligstein did not violate a legal obligation or duty in keeping it unknown to the defendant.

By the terms of the contract the right of the defendant to manufacture and sell the boxes and its obligation to pay the rated or minimum royalty were conditioned upon the agreements of Seligstein and his performance of them. Seligstein's action gave it the option to cease performance and recover damages. It did not give it the option to manufacture and sell, and not pay the royalties. It manufactured and sold, and thus nullified the conditional quality of Seligstein's promises. Having kept alive the contract and secured the results, it cannot maintain that it is not subject to its obligations and liabilities, for the reason that Seligstein had renounced it. Its remedy is the recovery, in counterclaim or action, of the damages, if any, Seligstein's action or nonperformance caused it.

[The court then held that the assignment by Seligstein to the plaintiff of his rights against the defendant was a valid assignment, in spite of the fact that he had personal duties that were not assignable.]

Judgment reversed.

FARGO et al. v. WADE.

(Supreme Court of Oregon, 1914. 72 Or. 477, 142 Pac. 830, L. R. A. 1915A, 271.)

Action by George K. Fargo and another against W. T. Wade. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action to recover money. The facts as far as material herein are that on January 3, 1910, a written agreement was entered into whereby Fred Ewing, who was then the owner in fee of 917.24 acres of land in Wallowa county, Or., gave the defendant the right at any time, within five years, to purchase the premises, in consideration for which $150 was paid in advance, and Wade also stipulated to pay a like sum for the years 1911 and 1912 and $250 per annum for the remaining years, unless the election to pay for the real property was sooner exercised. At the time the agreement was concluded the land was leased to G. W. Harvey for a term extending beyond the limit of the option. In referring to such demise the contract contained a clause which reads: "This agreement is subject to the terms and conditions of said lease, but it is further understood and agreed that said party of the first part [Ewing] shall faithfully perform all the conditions of said lease upon his part to be performed."

The installments on account of the option were paid to January 3, 1912. Prior thereto, however, Ewing sold and conveyed the land to the plaintiffs, to whom he also assigned all his interest in the option. Insisting that such conveyance constituted a breach of the terms of the written agreement, Wade refused to pay the installment of $150, which matured January 3, 1913, whereupon this action was instituted. The complaint sets forth the substance of the contract, alleges the conveyance of the land, the assignment of the written agreement, and the default in the payment of the installment. The answer denies some of the material averments of the complaint. For a further defense and as a counterclaim it is averred, in effect, that the defendant had at all times been ready, able, and willing to pay the installments as they matured, but that Ewing had failed and refused to carry out the terms of the lease executed to Harvey, and neglected to make the improvements provided for in that demise. A copy of the option contract is made a part of the separate answer. A motion to strike out the latter defense was sustained, and the cause, being tried on the remaining issues, resulted in a judgment for the plaintiffs in the sum of $150, and the defendant appeals.

MOORE, J.[8] (after stating the facts as above). The important question to be considered is whether the conveyance of the land to the plaintiffs constituted such a breach of Ewing's agreement as to prevent a recovery of any of the remaining installments. The contract is a mere option whereby the defendant, for a valuable consideration secured the right to elect whether he would, within the time limited,

[8] One paragraph of the opinion is omitted.

pay for the real property the price stated. 21 Am. & Eng. Ency. Law (2d Ed.) 924; 39 Cyc. 1232; Friendly v. Elwert, 57 Or. 599, 105 Pac. 404, 111 Pac. 690, 112 Pac. 1085, Ann. Cas. 1913A, 357. In Ide v. Leiser, 10 Mont. 5, 11, 24 Pac. 695, 24 Am. St. Rep. 17, in referring to an option to buy real property, it is said: "The owner parts with his right to sell his lands (except to the second party) for a limited period." In that case the only question involved was whether or not a consideration had been given for extending the time within which the election could be exercised. What was said in the opinion in respect to the owner of real property, who had parted with his right to sell the land "except to the second party," must be regarded as a mere observation.

In Elliott v. Delaney, 217 Mo. 14, 116 S. W. 494, however, it was held that the owners of real property who, for a valuable consideration, had given an option to convey the land, had the right, prior to the expiration of the limit specified, to execute a deed of the premises to a third party who took the title subject to the incumbrance. * * *

Another case cited in support of the dictum in the case of Ide v. Leiser, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17, is Krebs Hop Co. v. Livesley, 51 Or. 527, 533, 92 Pac. 1084, where it was held that if, before the time for performance of an executory contract had arrived, one of the parties to the agreement made it impossible for him to comply with his part of the engagement, the other might treat the contract as terminated and proceed accordingly; but in order to justify such a course there must have been a failure in some substantial particular going to the essence of the agreement, thereby rendering the defaulting party incapable of discharging his undertaking and making it impossible to carry out the contract. In that case the plaintiff had engaged to grow on a particular tract of land hops which were to be delivered to the defendant, but prior to the times for performance the plaintiff conveyed the real property and assigned the sums of money to become due under the contract to a creditor as security, and it was determined that notwithstanding such transfers it was possible for the plaintiff to perform.

It is believed that the decisions rendered in these cases are not determinative of the question here involved. The principle contended for by defendant's counsel, if upheld, might result in defeating every option for the purchase of real property the value of which had increased after the right to buy the premises had been given. In this state there is no statute prohibiting the alienation of land, and when an option to purchase any real property has been given, the owner of the premises has an estate therein which he can transfer, and the party accepting the title, if he has notice or knowledge of the privilege conferred by the writing, necessarily takes the premises cum onere. An option given by the owner of land for a valuable consideration, agreeing to sell it to another at a fixed price if accepted within a specified time, is binding upon the owner and all his successors in interest with knowl-

edge thereof. Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538, 96 Am. St. Rep. 997. At any time prior to the expiration of the time limited, Wade could have relinquished his right to purchase the land, and, had he done so, no recovery of any sum of money subsequently accruing could have been had against him. He cannot, however, insist upon a continuation of the validity of the option without being liable for the installments maturing thereon. If the real property was thus obtained burdened with the option, all the advantages accruing to the vendor from the contract, including the right to receive and collect the installments maturing on account thereof, should also be transferred, particularly so when they were expressly assigned for that purpose.

It appears from the evidence that during the greater part of the year 1912, when the installment accrued for which the judgment herein was given Ewing remained the owner of the land. It will be remembered that he covenanted in the option contract faithfully to perform all the conditions that he had undertaken in the lease of the premises to Harvey. It will also be kept in mind that the part of the answer which was stricken out averred that Ewing had failed and refused to make upon the land the improvements specified in the lease. The plaintiffs by an assignment of the installments took choses in action subject to all existing equities, and any defense available against Ewing, had he commenced an action therefor, might have been interposed herein. That part of the answer referred to does not allege that Ewing's refusal to make upon the land the improvements specified in the lease to Harvey would have augmented the defendant's interest in the premises or inured to his advantage, nor is it averred that in consequence of such failure he sustained any damage. The further answer, therefore, did not state facts sufficient to constitute a defense, and no error was committed in striking it out, though possibly a demurrer thereto, based on that ground, would have been better practice.

Other errors are assigned, but, deeming them immaterial, the judgment is affirmed.[9]

[9] Cf. James v. Burchell, 82 N. Y. 108 (1880).

In the case of a contract for the future conveyance or delivery of land or goods, the buyer's duty to pay is not nullified by the fact that the seller owned neither land nor goods at the time the contract was made. Such absence of ownership is not impossibility. Hibblewhite v. McMorine, 5 M. & W. 462 (1839); Shales v. Seignoret, 1 Ld. Raym. 440 (1699); Thompson v. Hoppert, 120 Ill. App. 588, 593 (1905).

But a conveyance of the subject-matter by the vendor to an innocent purchaser for value operates both to excuse tender by the vendee as a condition precedent and as an immediate breach of contract by the vendor. See Bell v. Shields, 18 Idaho, 649, 111 Pac. 1076 (1910).

In Coonan v. City of Cape Girardeau, 149 Mo. App. 609, 620, 129 S. W. 745 (1910), the court said: "Plaintiff believed, and perhaps had reasonable cause to believe, the city would be unable to carry out its part of the contract; that is to say, would be unable promptly to furnish a right of way for the sewer system and in consequence he might sustain loss; but this was by no means

MARY SHORT v. STONE.

(In the Queen's Bench, 1846. 8 Q. B. 358.)

Assumpsit. The declaration stated that heretofore, to wit, on, etc., "in consideration that the plaintiff, being then unmarried, at the request of the defendant, had then promised the defendant to marry him, the defendant, he, the defendant, then promised the plaintiff to marry her within a reasonable time next after he should be thereunto requested by the plaintiff so to do; and the plaintiff avers that she, confiding in the said promise of the defendant, hath always hitherto remained and continued, and still is, sole and unmarried, and was always, from the time of the making of her said promise until the marriage of the said defendant as hereinafter mentioned, ready and willing to marry the defendant, whereof the defendant hath always had notice; yet the defendant, disregarding his said promise, after the making thereof and before the commencement of this suit, to wit, on," etc., "wrongfully and injuriously married a certain other person, to wit, one Edith Collins, contrary to his said promise: to the damage," etc.

Plea 2. "Defendant says that he was not at any time before the commencement of this suit requested by the plaintiff to marry her according to his said promise in that behalf." Verification.

Demurrer, assigning for causes, among others, that the plea confesses, but does not sufficiently avoid, and defendant has therein alleged a fact wholly immaterial to the merits; "for, inasmuch as it appears by the declaration that the defendant, before the commencement of this suit, had married another person, the plaintiff need not nor ought not to have requested the defendant to marry her." Also, that the plea "tenders too large and an insufficient issue, to wit, whether a request were made before the commencement of this suit; whereas, if the request be material at all, it should have been alleged not to have been made before the marriage of the defendant; for if the plaintiff were to traverse the allegation as it now stands in the said plea, and the same should be found for her, still it would not show conclusively that she was and is entitled to maintain her action, as it would be consistent with the said issue, and verdict thereon, that the request found to have been made by the plaintiff was after the said marriage, and between it and the commencement of this suit." Also that the plea should have concluded to the country.

Joinder in demurrer.

certain, and the law does not relieve a man from a contractual obligation because he believes with good cause the person with whom he has contracted will not be able to perform." In accord: Gooch v. Coleman, 22 N. M. 45, 159 Pac. 945 (1916); Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 376 (1911).

Lord DENMAN, C. J.[10] We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract; and the intention clearly is, to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state, he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered; and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me the true construction of the contract, the plaintiff shows a good right of action, and is entitled to judgment.

Judgment for plaintiff.[11]

BURK et al. v. SCHREIBER.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 35, 66 N. E. 411.)

Action by Burk and others against Schreiber. There was a verdict for plaintiffs, and, the case was reported. Judgment on the verdict.

KNOWLTON, C. J. There is no dispute that, by the terms of her contract, the defendant was bound to give the plaintiffs a deed which would convey a good title. The time for the delivery of the deed and the payment of the balance of the price was extended three times, for a period of 12 days in all, and on the last day appointed it appeared that there was an attachment upon the property which was outstanding and undischarged. The defendant's attorney submitted a paper of recent date which purported to release the attachment, signed by the attorney of record of the attaching creditor. The at-

[10] The argument of counsel and the concurring opinions of Patteson, Coleridge, and Wightman, JJ., are omitted.

[11] Where, prior to the time set for performance or after such time has arrived, the defendant makes performance by himself impossible, this operates as a repudiation by the defendant; the plaintiff has an immediate right to damages without performance on his own part and is himself freed from further duty. Sir Anthony Mayne's Case, 5 Co. Rep. 20 b (1596); Lovelock v. Franklyn, 8 Q. B. 371 (1846); Caines v. Smith, 15 M. & W. 189 (1846); Ogdens Ltd. v. Nelson, [1905] A. C. 109; Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580 (1916), bankruptcy; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539 (1917), same; Lang v. Hedenberg, 277 Ill. 368, 115 N. E. 566 (1917); Wm. Cramp & Sons Ship & Engine Building Co. v. U. S., 50 Ct. Cl. 179 (1915); Meyers v. Markham, 90 Minn. 230, 96 N. W. 335, 787 (1903); James v. Burchell, 82 N. Y. 108 (1880); Delamater v. Miller, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512 (1823); In re Swift, 112 Fed. 315, 50 C. C. A. 264 (1901).

The prospective inability of one party to perform on time does not excuse the other from performing, in case time is not of the essence. Holt v. United Security Life Ins. Co., 76 N. J. Law, 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691 (1908).

taching creditor had deceased nearly four months before, and no administrator had been appointed. The plaintiffs then declined to accept the deed tendered by the defendant, and declined the defendant's offer to procure a discharge of the attachment as soon as possible. They bring this action, not to recover damages for the breach of the defendant's contract, but to recover back a part of the purchase money previously advanced at the time of the auction sale.

The plaintiffs were not bound either to accept the deed while there was an incumbrance on the property, or to wait to see whether the defendant would procure a release of the attachment after the appointment of an administrator, or give a bond, with sureties, to dissolve the attachment. The defendant was unable to perform her contract according to its terms, and the plaintiffs, insisting on a performance, had a right to rescind it and recover back their payment, as money had and received to their use. They were not obliged to tender performance, or to make a formal offer of performance. The inability of the defendant to perform gave them a right to rescind. Swan v. Drury, 22 Pick. 485; Pickman v. Trinity Church, 123 Mass. 1-6, 25 Am. Rep. 1; Mead v. Fox, 6 Cush. 199; Callaghan v. O'Brien, 136 Mass. 378; Gormley v. Kyle, 137 Mass. 189; Richmond v. Gray, 3 Allen, 25; Jeffries v. Jeffries, 117 Mass. 187. The plaintiffs may recover their advance payment on the ground that the contract has ceased to be in effect, and that the money is held without consideration.

Judgment on the verdict.

ZIEHEN v. SMITH.

(Court of Appeals of New York, 1896. 148 N. Y. 558, 42 N. E. 1080.)

Action by William Ziehen against David J. Smith and John H. Smith for breach of contract. The complaint was dismissed on the trial, as to John H. Smith. From a judgment of the general term (73 Hun, 571, 26 N. Y. Supp. 419) affirming a judgment entered on a verdict for plaintiff, and an order denying a new trial (2 Misc. Rep. 487, 24 N. Y. Supp. 922), defendant appeals. Reversed.

O'BRIEN, J. The plaintiff, as vendee, under an executory contract for the sale of real estate, has recovered of the defendant, the vendor, damages for a breach of the contract to convey, to the extent of that part of the purchase money paid at the execution of the contract, and for certain expenses in the examination of the title. The question presented by the record is whether the plaintiff established at the trial such a breach of the contract as entitled him to recover. By the contract, which bears date August 10, 1892, the defendant agreed to convey to the plaintiff, by good and sufficient deed, the lands described therein, being a country hotel with some adjacent land. The plaintiff was to pay for the same the sum of $3,500, as follows: $500 down, which was

paid at the time of the execution of the contract; $300 more on the 15th day of September, 1892. He was to assume an existing mortgage on the property of $1,000, and the balance, of $1,700, he was to secure by his bond and mortgage on the property, payable, with interest, one year after date. The courts below have assumed that the payment of the $300 by the plaintiff, the execution of the bond and mortgage, and the delivery of the conveyance by the defendant, were intended to be concurrent acts, and therefore the day designated by the contract for mutual performance was the 15th of September, 1892.

Since no other day is mentioned in the contract for the payment of the money or the exchange of the papers, we think that this construction was just and reasonable, and in fact the only legal inference of which the language of the instrument was capable. It is not alleged or claimed that the plaintiff on that day, or at any other time, offered to perform on his part, or demanded performance on the part of the defendant; and this presents the serious question in the case, and the only obstacle to the plaintiff's recovery. It is, no doubt, the general rule that, in order to entitle a party to recover damages for the breach of an executory contract of this character, he must show performance, or tender of performance, on his part. He must show in some way that the other party is in default, in order to maintain the action, or that performance or tender has been waived. But a tender of performance on the part of the vendee is dispensed with in a case where it appears that the vendor has disabled himself from performance, or that he is on the day fixed by the contract for that purpose, for any reason, unable to perform. The judgment in this case must stand, if at all, upon the ground that on the 15th day of September, 1892, the defendant was unable to give to the plaintiff any title to the property embraced in the contract; and hence any tender of performance on the part of the plaintiff, or demand of performance on his part, was unnecessary, because, upon the facts appearing, it would be an idle or useless ceremony.

It appeared upon the trial that at the time of the execution of the contract there was another mortgage upon the premises of $1,500, which fact was not disclosed to the plaintiff, and of the existence of which he was then ignorant. That on or prior to the 21st of July, 1892, some 20 days before the contract was entered into, an action was commenced to foreclose this mortgage, and notice of the pendency of the action filed in the county clerk's office; that on the 30th of September, following, judgment of foreclosure was granted, and entered on the 31st of October, thereafter, and on the 28th of December the property was sold to a third party by virtue of the judgment, and duly conveyed by deed from the referee. It appears that the defendant was not the maker of this mortgage, and was not aware of its existence, but it was made by a former owner, and the defendant's title was subject to it when he contracted to sell the property to the plaintiff. The decisions on the point involved do not seem to be entirely harmonious.

In some of them it is said that the existence, at the date fixed for performance, of liens or incumbrances upon the property, is sufficient to sustain an action by the vendee to recover the part of the purchase money paid upon the contract. Morange v. Morris, *42 N. Y. 48; Ingalls v. Hahn, 47 Hun, 104.

The general rule, however, to be deduced from an examination of the leading authorities, seems to be that in cases where, by the terms of the contract, the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the nonperformance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party. The qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged, as by his express refusal in advance to comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. If the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract, or for damages. Hudson v. Swift, 20 Johns. 24; Fuller v. Hubbard, 6 Cow. 13, 16 Am. Dec. 423; Green v. Green, 9 Cow. 47; Hartley v. James, 50 N. Y. 38; Bigler v. Morgan, 77 N. Y. 312; Burwell v. Jackson, 9 N. Y. 547; Bogardus v. Insurance Co., 101 N. Y. 328, 4 N. E. 522; Tamsen v. Schaefer, 108 N. Y. 604, 15 N. E. 731.

In this case there was no proof that the defendant waived tender or demand, either by words or conduct. The only difficulty in the way of the performance on his part was the existence of the mortgage, which the proof tends to show was given by a former owner, and its existence on the day of performance was not known to either party. In order to sustain the judgment, we must hold that the defendant, on the day of performance, was unable to convey to the plaintiff the title which the contract required, simply because of the existence of the incumbrance. We do not think that it can be said, upon the facts of this case, that the defendant had placed himself in such a position that he was unable to perform the contract on his part, and that his title was destroyed, or that it was impossible for him to convey, within the meaning of the rule which dispenses with the necessity of tender and demand in order to work a breach of an executory contract for the sale of land. It cannot be affirmed, under the circumstances, that, if the plaintiff had made the tender and demand on the day provided in the contract, he would not have received the title which the defendant had contracted to convey. The contract is not broken by the mere fact of the existence on the day of performance of some lien or in-

cumbrance which it is in the power of the vendee to remove. That is all that was shown in this case, and hence the judgment was recovered in violation of an important principle of the law governing contracts. For this reason the judgment should be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.[12]

JINNINGS v. AMEND et al.

(Supreme Court of Kansas, 1917. 101 Kan. 130, 165 Pac. 845, L. R. A. 1917F, 626.)

Action of forcible entry and detainer by T. M. Jinnings against W. A. Amend and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded.

MASON, J. W. A. and E. R. Amend, residents of Great Bend, were the owners of 960 acres of land in Gray county. In February, 1915, they entered into a written agreement with T. M. Jinnings, providing that he was to occupy and farm it for three years, one-third of the crop (wheat) to go to the owners. The contract also provided for his breaking out 500 acres of new land the first year and raising a wheat crop thereon for the benefit of the owners, to be paid in cash for his services in this connection. By September 28, 1915, Jinnings had broken the 500 acres of sod and plowed 400 acres of cultivated land, but had not sowed any wheat. On that day he was arrested, charged with a felony. He was held in custody until the October term of the district court, when he was convicted and sentenced to serve six months in the county jail. He appears not to have attempted to make any arrangement for the carrying on of the work, and to have been out of funds and credit. He remained in jail until about March 1, 1916, when he was paroled. Within a day or two after the arrest the Amends took possession of the land, which they have ever since retained. Upon the parole of Jinnings they told him that they would not permit him to return to the premises. On April 11, 1916, he brought an action of forcible entry and detainer against them, joining as a defendant John Ratzloff, to whom they had given a lease. By the consent of the parties the case was transferred to the district court under an agreement that all the matters in controversy should be determined in one action. A referee heard the evidence and made detailed findings covering all transactions connected with the land contract. Judgment was rendered, awarding the plaintiff possession of the land, and requiring him to pay $1,859.-10, the amount found due the Amends on an accounting. The defendants appeal.

[12] In accord: Brickles v. Snell, [1916] 2 A. C. 599; Ward v. James, 84 Or. 375, 164 Pac. 370 (1917); Smith v. Howard, 32 Ky. Law Rep. 211, 105 S. W. 411 (1907); Whitney v. Crouch, 105 Misc. Rep. 268, 172 N. Y. Supp. 729 (1918).

The plaintiff invokes the rule that, in the absence of an express provision on the subject in the lease, a lessor cannot terminate the tenancy on account of a breach of covenants by the lessee. 18 A. & E. Encyc. of L. 369, 370; 24 Cyc. 1349; 24 Cyc. 1392; 16 R. C. L. 969; 16 R. C. L. 1115. He contends that the written contract was a lease, creating the ordinary relation of landlord and tenant, and that, inasmuch as it contained no provision for a forfeiture no failure to perform the agreements on his part could give the defendants a right of re-entry. The defendants maintain that, if the contract was a lease at all, it was not an ordinary one; that it was more in the nature of a "cropper's" agreement for the cultivation of land on shares, and that an essential part of it was the plaintiff's undertaking to perform personal services; that when, by his own misconduct, he was disabled from carrying out a material part of the agreement he had undertaken, they were at liberty to rescind the contract, settling with him on an equitable basis for what he had already done.

The contract used language appropriate to a lease; it purported to create a tenancy for three years. That consideration, however, is not necessarily controlling, as the effect of the instrument is to be determined from its real intent, as gathered from its entire contents, regardless of the technical words used. 16 R. C. L. 584. It included clauses reserving a right to the owners to go upon the place at all times, requiring the plaintiff to pay the defendants one-third of any receipts for pasturing cattle on the wheat, and providing for a delivery of possession in case of a sale, compensation to be made for the growing crop. We do not consider it necessary to decide what expression most fitly describes the relationship into which the parties entered. There is nothing peculiar about a lease that takes it out of the operation of the rules of fair dealing that govern in other contractual relations. Here the essence of the arrangement was that the defendants were to furnish the land and certain implements, material, and money, and the plaintiff was to furnish his care, skill, and labor, and the proceeds were to be divided. Although the contract may be said to have created an estate in the land, it was essentially executory; its provisions were mutually dependent. The plaintiff was not in control of the land, to use it at his pleasure. He was bound to handle it in a stated way, and to perform certain acts with regard to it, and these obligations were as important as any other part of the contract. His personal services were engaged; his skill as a farmer was involved; he had no power of substitution or subletting. See, in this connection, Randall v. Chubb, 46 Mich. 311, 9 N. W. 429, 41 Am. Rep. 165 and Myer v. Roberts, 50 Or. 81, 89 Pac. 1051, 12 L. R. A. (N. S.) 194, 126 Am. St. Rep. 733, 15 Ann. Cas. 1031. Notwithstanding the absence of any reference in the contract to a right of re-entry, it cannot be doubted that if he had completely abandoned the place, or had utterly refused compliance with the agreement, the owners would not have been required to permit

the land to remain idle for several years. A clause of the agreement gave them a right to furnish additional help in the management of the farm, at the charge of the plaintiff, if thought by them to be necessary. But this cannot be regarded as an exclusive remedy. It is not adapted to such a situation as that suggested; nor were the defendants bound to pursue it.

The matter to be determined is the effect upon the relations of the parties of the plaintiff having been arrested, convicted, and confined. There seems to be a dearth of cases bearing upon that question. In Leopold v. Salkey, 89 Ill. 412, annotated in 31 Am. Rep. 100, an employer was held to have the right to discharge an employé who had been hired for a fixed period, because of his being arrested and held in custody for two weeks. That contract was perhaps not closely analogous to the one now under consideration. Moreover, the loss of time was treated as one for which the person arrested was not to blame, so that the principle applied would not be particularly helpful here. The gravity of the charge of which the plaintiff was convicted indicates that it implied moral turpitude. While the doctrine of res judicata has no application, we must act upon the theory that the conviction was rightful. It cannot be assumed that a miscarriage of justice occurred, nor could an inquiry into that matter be permitted, where it is collaterally involved in civil litigation. Burt v. Union Central Life Insurance Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216. This situation is therefore presented: The plaintiff, having obtained possession of the land under a three-year contract, a material part of the consideration being that he should put in a wheat crop in the fall of 1915, was disabled to perform his agreement in that respect (as well as in some others) by reason of his having committed a crime. The disability was self-imposed. He was entitled to no more favorable treatment than if he had purposely interposed an insurmountable obstacle to the carrying out of the contract, or had abandoned or repudiated it.[13] * * *

The right of the plaintiff to occupy the land for three years was expressly granted in consideration of his personal occupancy and services. By fair implication it was conditioned upon his being able

[13] The court here quoted as follows: "Where one of the parties to a contract, before the time for performance arrives, has placed himself, by his voluntary act or conduct, in such a situation that he is unable to fulfill his part of the agreement, it may be treated as an anticipatory breach of the contract, or as a case of impossibility of performance subsequently arising; and in either view the other party to the contract may thereupon rescind it, and recover whatever consideration he may have given under it, or treat it as abandoned, and sue at once for such damages as he may have sustained. The inability to perform need not relate to the whole and every part of the contract, but it must exist with reference to some substantial particular, going to the very essence of the contract and defeating its main purpose and object, or to a part so essential to the residue of the contract that it cannot reasonably be supposed that the other party would have made the contract without it." 1 Black on Rescission and Cancellation, § 210.

to comply with that requirement—at least upon his not voluntarily divesting himself of such ability. His enforced withdrawal from active life was not within the contemplation of the parties to the contract. There was practically a destruction of an important part of the subject-matter of the contract. The fact that the defendants were willing to agree that the plaintiff should have the right to occupy the farm for three years, assuming that he was to remain a free agent, affords no presumption that they would have been willing to grant him that privilege if he was to be imprisoned for a considerable part of the time. No question of forfeiture, strictly so called, is involved. We think the defendants were entitled to rescind the contract by reason of the plaintiff having disabled himself from performing a material part of his agreement—a part going to the very foundation of the contract, without which it presumably would not have been entered into, that their conduct amounted to an enforcement of this right, that they should be allowed to retain possession of the land, and that the plaintiff should be compensated on an equitable basis for the services performed and expenditures incurred by him prior to his arrest.

The findings of fact, made by the referee and approved by the court, need not be disturbed; but, as the accounting was made upon the theory that the plaintiff would be restored to possession, a readjustment will be necessary.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.[14]

NEW YORK LIFE INS. CO. v. STATHAM et al.

SAME v. SEYMS.

MANHATTAN LIFE INS. CO. v. BUCK.

(Supreme Court of the United States, 1876. 93 U. S. 24, 23 L. Ed. 789.)

The first of these cases is here on appeal from, and the second and third on writs of errors to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war,

[14] Service is a condition precedent to wages, and is not excused by the fact that the employee, a sailor, was captured and imprisoned by Germany. See Horlock v. Beal, [1916] 1 A. C. 486.

but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. Justice BRADLEY,[15] after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. * * *

[15] Parts of the opinion are omitted.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and corelated to the cases of all

others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, than an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? [16] * * *

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.[17]

WAITE, C. J. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment ad diem of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think

[16] The court then held that the company must pay back the equitable or cash surrender value of the policy.

[17] In accord: See Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372, 19 Am. Rep. 495 (1874), drawing clearly the distinction between the nonfulfillment of a condition precedent to the plaintiff's right and the nonperformance of his contractual duty by the defendant. Impossibility excuses the latter.

the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds: but they hold at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender: and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice HUNT, dissenting.

When the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues: and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.[18]

REED v. LOYAL PROTECTIVE ASS'N.

(Supreme Court of Michigan, 1908. 154 Mich. 161, 117 N. W. 600.)

Action by Watson Reed against the Loyal Protective Association on an accident policy. From a judgment of the circuit court for plaintiff on appeal from justice court, defendant brings error. Reversed, and new trial ordered.

HOOKER, J.[19] The plaintiff, a policy holder, sued the defendant for sick benefits claimed thereunder, in justice court, where he recovered a judgment for $170. On appeal the learned circuit judge restricted the jury to a verdict for $60, and, from a judgment for that sum, the defendant has appealed.

We infer that the plaintiff was hurt through a fall in his barn, and the testimony indicates that his recovery from the effects of the fall

[18] In regard to the influence of war on life insurance policies, see Abell v. Penn. Mutual Life Ins. Co., 18 W. Va. 400, 423–435 (1881); New York Life Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290 (1869).

In Semmes v. Hartford Ins. Co., 13 Wall. 158, 20 L. Ed. 490 (1871), the action was upon a policy of fire insurance containing the express stipulation that no suit should be sustainable thereunder unless brought within twelve months after the loss or damage occurred. The Civil War broke out during the twelve months within which the suit should have been brought. Because of the impossibility supposed to exist, the court sustained an action brought several years later, thus nullifying the express condition. See Conditions Subsequent.

[19] The court's statement of the facts has been shortened.

was not complete for some months. The accident happened on October 24th or 26th. A physician was at once called, and his last visit at the home of plaintiff was on October 31st. The policy was made "in consideration of the payment of the membership fee, and of the agreements and statements contained in the application for membership, and of the conditions and agreements contained herein and on the back hereof, all of which are hereby made a part of this certificate." It promised that "it is further agreed that if said member shall be afflicted with sickness or receive an injury as aforesaid (other than an injury received while riding as a passenger on said public conveyance), which sickness or injury shall independently of all other causes immediately, wholly, and continuously disable and prevent him from the prosecution of any and every kind of business or labor, then said member in case of sickness and subject to the conditions herein and on the back hereof shall be indemnified in the sum of 5.00 dollars for the first week and 10.00 dollars a week thereafter. * * *

"Unless notice of any injury or of the beginning of any sickness is received in writing at the home office of this association in Boston, Massachusetts, on or before the expiration of fourteen days from the commencement of such disability, together with particulars of the injury or sickness, including a statement of the time, place and cause of injury, or date of beginning, and an accurate description of the sickness, signed by the claimant or attending physician or surgeon, the claim shall be valid only for the period dating from the actual time the notification is received at the home office. The claimant shall also furnish within thirty days after the termination of the disability period a sworn statement of the time he was totally or partially disabled, and actual time attended by the physician or surgeon and chairman of the visiting committee of the lodge of which he is a member or of the lodge whose care he is under on and in accordance with blanks provided by this association, and shall furnish such further proof as may be deemed necessary. Failure to comply with the above conditions renders all claims against the association null and void." * * *

On December 1st the notice required to be served within 14 days after the accident was received by the company. It was made—i. e., filled out—by the physician and dated December 5th, and it was claimed by the defendant that this noncompliance with the terms of the contract was fatal to plaintiff's action, but the trial judge held that this would be true, unless the jury should find that the plaintiff was insane at the time of the accident "to the extent that his mind was so deranged that he was unable to furnish defendant notice of such accident within 14 days from the happening of the accident, which derangement of mind was the result of such accident. If you so find, then such failure on the part of plaintiff to give such notice within the 14 days as provided for in said policy of insurance would not operate as a forfeiture of plaintiff's right to recover under the policy, but that

plaintiff would be entitled to a reasonable time in which to furnish defendant with such notice after his mind had attained its normal condition." Counsel for defendant assign error upon this instruction on two grounds: (1) That the contract is an unconditional agreement as to notice, and not subject to a construction, which does violence to its plain terms. (2) If this construction were a proper one, the plaintiff has not proved such derangement, and the proof conclusively shows the opposite.

[The court here reviewed the testimony at length and found none sufficient to show insanity or mental incapacity.]

In view of a possible new trial, we consider another question, viz.: Would such an impediment to the serving of notice within the prescribed period relieve the plaintiff from the forfeiture? We assume that no one will contend that a court of justice has authority to change the obligations of a contract which the parties have seen fit to make. The case is resolved, then, into a question of construction of the language used. After providing for indemnity, the contract provides: "Unless notice of any injury or of the beginning of any sickness is received in writing at the home office of this association in Boston, Massachusetts, on or before the expiration of fourteen days from the commencement of such disability together with particulars of the injury or sickness, including a statement of the time, place and cause of injury, or date of beginning and an accurate description of the sickness, signed by the claimant or attending physician or surgeon, the claim shall be valid only for the period dating from the actual time the notification is received at the home office. * * * Failure to comply with the above conditions renders all claims against the association null and void." We all know that a failure to perform any ordinary contract is not excused by inability to perform an unqualified promise. See Pollock on Contracts, 408 et seq. Certainly this is true, unless the failure is due to the act of God, and in such cases, while it may sometimes excuse the promissor from performance, it is not so certain that it will permit his enforcing the contract which he has been unable to fully perform against the other party, which is what is sought here. It is urged that the authorities are overwhelmingly against the contention of the plaintiff in this case and many are cited. But we are committed to the doctrine in insurance cases, that a provision requiring a notice on pain of forfeiture will not be construed to require strict performance, when by a plain act of God it is made impossible of performance.

In the case of Phillips v. Ben. Society, 120 Mich. 142, 79 N. W. 1, the certificate provided that: "In all cases of accident or sickness, immediate notice was required to be given in writing, addressed to the secretary, with full particulars thereof. Failure to give such notice within five days from the happening of such accident or beginning of illness renders the claim invalid, and it cannot be recognized or paid." We said: "It is claimed that the plaintiff did not give timely notice

of his injury, in accordance with the provisions of the charter and by-laws. Notice was served upon the company with promptness after he had been informed by one of his physicians that his illness did not result from disease, but from an accident. We do not think that the first notice that he was suffering with neuralgia was binding upon him. It would be a hard rule, and one which the rules of the company must place beyond doubt, which would deprive a member of his benefits through the mistake of his physician. The notice was served as soon as he ascertained that the accident with which he had met was the occasion of his trouble. We think this a sufficient compliance with the by-law." This case was decided in 1899, and we see no means of distinguishing the question now under consideration from the one then decided. See, also, the later cases of Woodmen's Acc. Ass'n v. Pratt, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777, and Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 25, and Munz v. Standard Co., 26 Utah, 69, 72 Pac. 182, 62 L. R. A. 485, 99 Am. St. Rep. 830, and cases cited. These cases seem to proceed on the theory that it cannot be supposed that the parties contemplated that the assured should be required to do an impossible thing or suffer a forfeiture of existing rights.

There are other questions in the case, but they may not arise on another trial, and we do not discuss them.

The judgment is reversed, and a new trial ordered.[20]

[20] See, directly contra, Whiteside v. North American Acc. Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696 (1911), two judges dissent. Cf. Trippe v. Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529 (1893); Comstock v. Fraternal Acc. Ass'n, 116 Wis. 382, 93 N. W. 25 (1903).

In Evans v. Supreme Council of Royal Arcanum, 223 N. Y. 497, 120 N. E. 93, 1 A. L. R. 163 (1918) payment of certain assessments was an express condition precedent to the duty of payment by insurer. The New York Court of Appeals having held that certain assessments were invalid, the insured tendered only such amounts as were held by that court to be due. The insurer refused the tender. The United States Supreme Court later reversed the decision of the Court of Appeals. The insured was thus left in the position of not having fulfilled the express condition because of his reliance on the decision of the highest court of New York. That court then held that the policy had been made void by the nonpayment.

Observe that insurance contracts are aleatory in character, and that the condition is express. See Vance, Insurance, §§ 184–189; Richards on Insurance, §§ 296–301, 391.

DE LONG v. ZETO et al.

(Supreme Court of New York, Appellate Division, 1909. 135 App. Div. 79, 119 N. Y. Supp. 765.)

Action by Albert W. De Long against John Zeto and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

LAUGHLIN, J. This action was brought to recover the balance alleged to be due on a contract between the parties, by which the plaintiff agreed to furnish and deliver to the defendants certain building materials, in part specially manufactured and framed, to be used in the construction of four three-story frame houses, which the defendants were erecting on Decatur avenue, in the city of Greater New York, for the Cosmos Realty Company. The agreement between the parties is contained in a letter from the plaintiff, in the name in which he was doing business, to the defendants, under date of September 18, 1907, which was accepted in writing by them. The plaintiff was merely to furnish and deliver the material, but was not to put any of it in place in the building. The plaintiff was to receive for the material the sum of $3,300, and the payments were to be made, $1,000 "when standing trim is up," $1,000 "when buildings are complete," and $1,300, the balance, "30 days thereafter." The evidence shows that the plaintiff delivered all of the material on the premises on which the buildings were being erected, and that it was accepted by the defendants. The first installment was paid; but the other two installments have not been paid, and the action is to recover the amount thereof.

The last of the material was delivered in the month of December, 1907. The evidence tends to show that in the month of January thereafter work was suspended on the buildings, that the defendants filed a mechanic's lien, that a mortgage on the premises was foreclosed, and that the premises were sold under the judgment in that action, in which the defendants and the Cosmos Realty Company were made parties defendant. The evidence indicates that the buildings were never completed by the defendants; but it would seem that that fact might have been more clearly shown. However, this action was not commenced until the 2d day of November, 1908, nearly one year after the plaintiff completed the delivery of the material. If the buildings were then completed, there was no defense to the action; and if they were not completed, it would seem, as matter of law, on the facts disclosed by this record, that the defendants had failed to complete the same within a reasonable time, and that the plaintiff was entitled to recover, notwithstanding the express provision of his contract which postponed the payment of these two installments until the completion of the buildings.

If the failure of the defendants to complete the buildings was owing to a foreclosure of a mortgage, that is no defense to this action. The plaintiff was not responsible for the foreclosure action, and the consequences of it cannot be visited upon him. The defendants and the

Cosmos Realty Company, with which they contracted and which may be liable to them, had it in their power to protect their rights by paying the indebtedness secured by the mortgage and taking an assignment or discharge thereof, as the case might be. The plaintiff was not a party to the foreclosure action, nor was he concerned therewith.

It follows that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.[21]

JOHN SOLEY & SONS, Inc., v. JONES et al.

(Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 561, 95 N. E. 94.)

Action by John Soley & Sons, Incorporated, against J. Edwin Jones and another, copartners doing business under the name of Jones & Meehan. There was a verdict for plaintiff, and defendants bring exceptions. Overruled.

Defendants, having a contract with the Boston Transit Commission for the construction of section 3 of the Washington street tunnel, Boston, contracted with plaintiff to do part of the work.

BRALEY, J. It is a general rule that parties cannot be relieved from their contracts fairly made with full knowledge of the facts, although they may have mistaken their rights, or failed to have restricted sufficiently their liabilities. Hawkes v. Kehoe, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125, 9 Ann. Cas. 1053. The defendants knew that by its terms their contract with the transit commissioners could be canceled and discharged, if the engineer gave a certificate that they were not making such progress in the execution of the work as to indicate that it would be completed within the period fixed for performance. It was with this knowledge that they entered into the agreement with the plaintiff as a subordinate contractor to perform part of the work. The impossibility of the defendants' performance of the plaintiff's contract if the contingency arose could have been foreseen and provided for in the instrument.[22] A provision that the promise should be dependent upon the continued existence of the principal contract would have been sufficient to protect the defendants if the plaintiff was compelled to abandon the work, because the contract with the commissioners was terminated. New Haven & Northampton Co. v. Hayden, 107 Mass. 525, 531. It is their contention that, when

[21] Where an award of arbitrators is an express condition, and the appointed arbitrators refuse to agree, the insured can maintain suit on the policy without obtaining any award. Headley v. Ætna Ins. Co., 202 Ala. 384, 80 South. 466 (1918). Contra: Grady v. Home Fire & Marine Ins. Co., 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 288 (1906), on ground that plaintiff should have tried again; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428 (1901). Cf. Milnes v. Gery, 14 Ves. 400 (1807), where the contract was as yet wholly unperformed.

[22] Observe that it was performance by the plaintiff that became impossible, not performance of the acts promised by the defendant.

construed in connection with the circumstances, such a condition appears by implication, or is an unexpressed term of the agreement. Hebb v. Welsh, 185 Mass. 335, 336, 70 N. E. 440. The plaintiff's contract contained a clause that the work should be performed subject to the directions and to the satisfaction of the commissioners, or of their authorized engineer, and the plaintiff concedes that the amount and character of the work could be ascertained only by resort to the specifications of the main contract. If the principal contract in its entirety had been referred to by appropriate language it would have been incorporated, but it cannot be read into the agreement by implication, where only that part which is germane to the plaintiff's performance may be implied, and the language is unambiguous. De Friest v. Bradley, 192 Mass. 346, 355, 78 N. E. 467; Lipsky v. Heller, 199 Mass. 310, 315, 85 N. E. 453. The auditor, whose finding is not questioned, reports that the plaintiff at the time of execution knew not only of the specifications under which its work must be done, but of the article of cancellation. It apparently acted upon this information, when it ceased work upon having been informed that the right of termination had been exercised. The act of the commissioners, and its decisive effect upon the plaintiff's right to go forward under the contract, having been known to each party, further notice from one to the other of their several rights or demands would have been a vain formality. Cumberland Glass Mfg. Co. v. Wheaton, 208 Mass. 425, 94 N. E. 803.

It is urged that, the possible disability which would prevent performance by the defendants having been known to the plaintiff at the inception of the contract, it was mutually understood that they did not intend to perform, and the plaintiff had no expectation of performance, unless the principal contract remained in force. But while we can construe the contract in writing which the parties made, we cannot make a contract for them. It is only where an unanticipated event happens, which was not in the contemplation of the parties at its inception, and upon which the continued existence of the contract must depend, that upon the happening of the event the contract is dissolved, and the promisor relieved from further performance. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Hawkes v. Kehoe, 193 Mass. 419, 423, 79 N. E. 766, 10 L. R. A. (N. S.) 125, 9 Ann. Cas. 1053; Vickery v. Ritchie, 202 Mass. 247, 251, 88 N. E. 835, 26 L. R. A. (N. S.) 810; Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604; Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; Baily v. De Crespigny, L. R. 4 Q. B. 180, 185. If the plaintiff and defendants contracted with knowledge of the clause of termination, the defendants of course knew that when the principal contract came to an end, either with or without their fault, further performance by the plaintiff would be impossible. Instead of providing for a contingency reasonably to be anticipated, the defendants gave an absolute promise to pay the contract price on the basis that there should be no interference with the work

of construction if the plaintiff's conduct was satisfactory to the commissioners as it appears to have been. Having made themselves responsible for the existence of the subject-matter of the contract until without fault on the plaintiff's part it had been performed, they are not within the exception or principle of construction recognized and followed in Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, Young v. Chicopee, 186 Mass. 518, 72 N. E. 63, Angus v. Scully, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318, and Hawkes v. Kehoe, 193 Mass. 419, 79 N. E. 766, 10 L. R. A. (N. S.) 125, 9 Ann. Cas. 1053; where the occurrence which discharged the contract was of such a character that the parties were held not to have had it in contemplation at the making of the agreement. See Hebert v. Dewey, 191 Mass. 403, 411, 77 N. E. 822; Vickery v. Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810. The rulings on the question of liability upon which the measure of damages under the first count of the declaration must rest, that the causes for the termination of the principal contract were immaterial as the commissioners had reserved that right, and that there had been a breach, were in accordance with our construction of the rights of the parties. The contract not having been dissolved, the plaintiff was not remitted to compensation for the fair value of the work done with a reasonable profit for such work, and also upon the work remaining to be performed, or restricted to a sum which would be proportionate to the contract price the defendants were to receive from the commissioners. But it was entitled to the benefit of the contract after deducting from the contract price the reasonable cost of completing the work. Olds v. Mapes-Reeve Construction Co., 177 Mass. 41, 58 N. E. 478; Norcross Brothers Co. v. Vose, 199 Mass. 81, 85 N. E. 468; Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547, 92 N. E. 761. The rulings requested were rightly refused, and the instructions given were correct.

Exceptions overruled.[23]

Y. B. 15 HEN. VII, 13, 24.

One Blike executed an obligation to another upon condition that if J. S. should come to London on or before the Festival of St. Michael next ensuing and bring with him sufficient sureties, and there enter into an obligation to the plaintiff in the sum of £20 to pay in four years thereafter, then this obligation should be void, etc. Later, J. S. died before the said Festival. And all THE COURT held clearly that the condition is discharged and the obligation void, for it has become im-

[23] In accord: Guerini Stone Co. v. J. P. Carlin Const. Co., 240 U. S. 264, 36 Sup. Ct. 300, 60 L. Ed. 636 (1915). And see Grimsdick v. Sweetman, [1909] 2 K. B. 740.

possible by act of God, for he had all the time prior to the Festival within which to come, at his pleasure, and so there is no default in J. S., and his sureties are not bound to come and execute an obligation for no particular person was named who was to become surety. Inasmuch as the condition is that he and his sureties come and execute an obligation it is a joint act and cannot be performed because of the act of God. But FROWIKE said that if the condition were that J. S. and J. N. should come to London and be bound, then if one die the other is nevertheless bound to come.

PARADINE v. JANE.

(In the King's Bench, 1647. Aleyn, 26.)

In debt the plaintiff declares upon a lease for years rendering rent at the four usual feasts; and for rent behind for three years, ending at the Feast of the Annunciation, 21 Car. brings his action; the defendant pleads, that a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July 18 Car. till the Feast of the Annunciation, 21 Car. whereby he could not take the profits; whereupon the plaintiff demurred, and the plea was resolved insufficient.[24] * * *

3. It was resolved, that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. Dyer, 33. a. Inst. 53. d. 283. a. 12 H. 4. 6. so of an escape. Co. 4. 84. b. 33 H. 6. 1. So in 9 E. 3.16. a supersedeas was awarded to the justices, that they should not proceed in a cessavit upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer 33. a; 40 E. III. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations; this reserva-

[24] Part of the report is omitted.

tion then being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said) it is all one as if there had been an actual covenant. Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor; and Dyer 56.6. was cited for this purpose, that though the land be surrounded, or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent: and judgment was given for the plaintiff.

YERRINGTON v. GREENE et al.

(Supreme Court of Rhode Island, 1863. 7 R. I. 589, 84 Am. Dec. 578.)

Assumpsit against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March term of this court, 1863, before the chief justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufacturing jeweller, in Providence, that on the 19th day of March, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff, as a clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from the first day of April, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of twelve hundred dollars, for the first year, of thirteen hundred dollars, for the second year, and of fifteen hundred dollars, for the third year; that on the sixteenth day of April, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it until the first day of April, 1861, when the said Keach died; that the defendants, as administrators of said Keach, continued to employ the plaintiff, at the stipulated salary, until the sixteenth day of June, 1861, when, having discontinued the office in New York, and removed what goods were there to Providence, where Keach had another place of sale, they declined longer to employ the plaintiff, or to pay him his salary, though from that time to the date of the writ, he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his, at Providence, and had been allowed by the court of probate, for their services as administrators, the sum of three thousand dollars. Upon this state of facts, the

chief justice instructed the jury, that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterwards; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

AMES, C. J. It is, in general, true, that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated, out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, de certo corpore, as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are, the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for the delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indenture. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. Hall v. Wright, 1 El., Bl. & El. 746; Stewart v. Loring, 5 Allen (Mass.) 306, 81 Am. Dec. 747. The cases in support of these and other illustrations of the exception to the general rule are set down in the defendants' brief, and it is unnecessary to repeat them.

Both at the civil and the common law, it is necessary, that the party who would avail himself of this excuse for non-performance of the contract, should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case, upon this subject, so far as the discussion of the principle of decision is concerned, is that of Taylor v. Caldwell, decided by the queen's bench, in May last, 8 Law T. Rep. 356. In that case it was held, that the parties were discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental de-

struction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the prior cases and of the principle upon which they have been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule, or within the exception we have been considering? This must depend upon the nature of the contract, whether one, requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was, to employ the plaintiff as clerk and agent of the intestate, in his business, in New York and Philadelphia; and it seems to us undoubted, that the continued existence of both parties to the contract for the whole stipulated term, was the basis upon which the contract proceeded, and if called to their attention at the time of the contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Shep. Touch. 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged, and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal,—the law had revoked his agency, and stopped the business to which alone his contract bound him,—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion, that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or, that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers,

and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.[25]

MOORE & BAKER v. MORECOMB.

(In the Common Pleas, 1601. Cro. Eliz. 864.)

Debt upon an obligation, conditioned to deliver to the plaintiff before such a feast such a ship, and all the tackling thereto, or in default thereof to pay at the same feast such a sum as John Norris and J. S. shall value them to be worth. The defendant pleaded, that before the said feast the said J. Norris and J. S. did not make any valuation of them. It was thereupon demurred: and resolved by all the Court for the plaintiff; for although he hath election to do the one or the other, yet the condition being for his benefit, he ought to provide that the value should be assessed, otherwise he is to deliver the goods themselves; for if one be obliged to make such an assurance of such land as the counsel of the obligee before such a day shall advise, or to pay there and then £100 if the counsel devise not any assurance, he

[25] In the case of a contract for strictly personal service the death, insanity, or incapacitating illness of the employee prevents his nonperformance from operating as a breach. Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7 (1877), service as singer; Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.) 914, 17 Ann. Cas. 179 (1909), service as dentist; Browne v. Fairhall, 213 Mass. 290, 100 N. E. 556, 45 L. R. A. (N. S.) 349 (1913), contract to give personal note; Stubbs v. Holywell Ry. Co., L. R. 2 Exch. 311 (1867); Robinson v. Davison, L. R. 6 Exch. 269 (1871).

The death of the employer or master has the same effect where the service is to be strictly personal to him. Kenny v. Doherty, 230 N. Y. 44, 129 N. E. 201 (1920); Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806 (1890); Farrow v. Wilson, L. R. 4 C. P. 744 (1869); Homan v. Redick, 97 Neb. 299, 149 N. W. 782, L. R. A. 1915C, 601 (1914). It is otherwise where the service is not to be under the employer's personal supervision: Dumont v. Heighton, 14 Ariz. 25, 123 Pac. 306, 39 L. R. A. (N. S.) 1187 (1912); Phillips v. Alhambra Palace Co., [1901] 1 K. B. 63, death of one partner.

It has been held that the involuntary dissolution of a corporation by the state prevents its further nonperformance from operating as a breach. People v. Globe Mut. Life Ins. Co., 91 N. Y. 174 (1883); Assets Realization Co. v. Roth, 226 N. Y. 370, 123 N. E. 743 (1919). But it is generally held that involuntary bankruptcy or insolvency and appointment of a receiver will operate as a breach of contract, unless the receiver himself is able to comply with the contract and does so. Central Trust Co. of Illinois v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580 (1915); Wm. Filene's Sons Co. v. Weed, 245 U. S. 597, 38 Sup. Ct. 211, 62 L. Ed. 497 (1918); Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 7, 16 Sup. Ct 439, 40 L. Ed. 595 (1895); Isaac McLean Sons Co. v. William S. Buttles & Son (D. C.) 227 Fed. 325 (1914); Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378 (1890); Ogdens, Limited, v. Nelson, [1905] A. C. 109, 112; Reigate v. Union Mfg. Co., [1918] 1 K. B. 592; Yelland's Case, L. R. 4 Eq. 350 (1867).

ought to pay the £100 for it being to his advantage when it is performed, he ought to provide that he performs the one.—And Walmsley said, If one be obliged to pay £20 before the first day of May, or to marry A. S. before the first day of August next ensuing, if he doth not pay the £20 before the first day of May, and A. S. dies before the first day of August, so as the condition is become impossible by the act of God in this part, yet the obligation is forfeited, because he hath undertaken to perform the one of them; and it was his folly that he did not perform it when it was in his power and election to have done it. Wherefore, &c.—And afterwards it was adjudged for the plaintiff.[26]

VIRGINIA IRON, COAL & COKE CO. v. GRAHAM et al.

(Supreme Court of Appeals of Virginia, 1919. 124 Va. 692, 98 S. E. 659.)

Suit by the Virginia Iron, Coal & Coke Company against Nannie M. Graham and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

PRENTIS, J.[27] * * * The facts here to be considered are: That by indenture of December 31, 1897, David P. Graham and wife demised unto Carter Coal & Iron Company for 40 years from January 1, 1898, that certain iron ore property in Wythe county, Va., known as "Cedar Run," theretofore granted to Graham by Franklin Carter and wife, said to contain about 3,600 acres, with the right during the term to mine and remove all the iron ore which the lessee might or could mine on these lands, with certain easements and privileges fully set forth in the instrument. By deed of January 27, 1899, Carter Coal & Iron Company conveyed unto Virginia Iron, Coal & Coke Company (appellant, hereinafter called the lessee), together with other property, the rights and privileges granted by the said lease. * * *

The original lease fixed a royalty of 50 cents per long ton for each ton of good merchantable ore mined and shipped from the leased premises, to be paid to the lessor on or about the 25th days of April, July, October and January of each year for the ore shipped the preceding three months, with the following provisions as to minimum: "Not less than twenty thousand tons to be shipped each year. If less is shipped, royalty is to be paid on twenty thousand tons, and if more than twenty thousand tons are shipped in one year, and less than that quantity in the next preceding or succeeding year, the surplus of the one year, and the royalty paid thereon, may be carried to the credit of the other year, either preceding or succeeding, to make

[26] It is always possible to contract as an insurer that a certain performance will take place; the duty is then in the alternative, to cause specific performance or to pay losses caused by nonperformance. See Hills v. Sughrue, 15 M. & W. 252 (1846).

[27] Parts of the opinion are omitted.

the required minimum. If the minimum quantity is not shipped in any year or paid for in sixty days after the expiration of the year, or if the ore shipped is not paid for in sixty days after the rent therefor is due, the said David P. Graham, his heirs, representatives, or assigns, may terminate this lease on ten days' notice of intention so to do." * * *

The Carter Coal & Iron Company took possession and continued to operate the mine until it conveyed its rights to the Virginia Iron, Coal & Coke Company, and thereafter the last-named company continued to operate it until July 25, 1916, upon which date it gave written notice to Nannie M. Graham and others, the lessors, of the cancellation or surrender of the original lease of December 31, 1897, to become effective as of September 1, 1916. The reason therefor stated in the notice was that iron ores could no longer be found on the leased premises, either of the quality or in the quantity that could be profitably mined; the cost of such tonnage as could be gotten out being altogether prohibitive. The lessors replied to this notice August 29, 1916, advising that they intended to hold the lessee strictly to the terms of the contract, and conceded no authority to cancel it.

The lessee, in accordance with such notice, ceased operations upon the leased premises, has abandoned possession thereof for all the purposes of the lease, though it has not removed its property therefrom, has paid all royalties accrued up to the date designated for the cancellation and surrender to become effective, and has not since that time occupied the property or exercised any of the privileges granted by the lease. After the attempted cancellation and surrender, the lessee undertook to remove from the leased premises the machinery, rails, and equipment placed thereon by its predecessor, which under the terms of the lease it had the right to remove upon its termination, but, under threat of proceedings by the lessors to secure an injunction, has for the present abandoned its claim of right to remove such property. It seems that this allegation of threatened injunction proceedings is made in an amendment to the bill, and that this threat was made after the institution of this suit. The cancellation and surrender of the lease has been ratified by the board of directors of the lessee, and the deed of release tendered to the lessors with the bill and amended bill.

The lessee, on January 30, 1917, filed its original bill, and thereafter filed an amended bill against Nannie M. Graham and others, successors in title to the original lessor, and the trustees in the deeds of trust referred to, setting forth these facts, and praying for a decree canceling the lease, permitting it to remove its personal property from the premises, enjoining the lessors from prosecuting any actions for the recovery of royalties under the lease, and for general relief. The lessors, defendants, filed their demurrer and answer, and the trial court sustained the demurrer and dismissed the bill. Of this action the lessee is here complaining.

Fairly stated, the demurrer is based upon two grounds:

(1) That the bill and exhibits filed show that the contract between the parties is a contract of hazard, that the risk as to the quantity and quality of ore was assumed by the lessee, and that this appears from the lease itself; that it also appears therefrom that it is a definite contract, under seal, for the rental of the property for 40 years, including the right to the lessee to mine ore and do certain other things on the land; that the consideration of the lease is a sum certain as rent reserved; and that there is no warranty on the part of the lessors that the ore will be found of any particular quantity or quality, and hence that the existence or nonexistence of such ore in any quantity or of any quality is immaterial.

(2) That even if the lessee is entitled to be relieved from paying the royalty on account of exhaustion of the ore in the premises, a court of equity has no jurisdiction to grant such relief, upon the ground that the complainant has a complete and adequate remedy at law.

The trial court sustained the demurrer upon the ground last stated.

(a) Taking up these grounds in the order in which we have just stated them, we come to consider whether the bill is demurrable upon the ground that the contract was one of hazard as to the lessee.

The question is quite an interesting one, and we have been greatly enlightened by the exhaustive briefs of the learned counsel on both sides. While no precisely similar question has ever been decided in Virginia, we have been referred to many cases in other jurisdictions, and the principles involved seem to be fairly well established.[28] * * *

If one makes a contract to do a thing which is in itself possible, he will be liable for a breach of the contract, notwithstanding it is beyond his power to perform it. But where, from the nature of the contract itself it is apparent that the parties contracted on the basis of the continued existence of the substance to which the contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will and should excuse such performance. Walker v. Tucker, 70 Ill. 527.

The case of Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144, is strikingly like this case. There was a 5-year lease in which the lessees covenanted to pay 35 cents a ton for every ton of merchantable ore mined, and to mine at least 1,500 tons annually during the term, or, in default thereof, to pay a royalty of $525 annually; and that the lease should be forfeited at the option of the lessors, if at the end of each year at least $525 as rent or royalty had not been paid. In an action to recover unpaid royalty for two years, an affidavit of defense was filed, averring that, though the defendants had operated the mines in a workmanlike and skillful manner for about

[28] The court here quoted at length from 13 C. J. 376, 27 Cyc. 718, Krell v. Henry, [1903] 2 K. B. 740, and referred to an "instructive note" in L. R. A. 1916F, 10.

nine months, yet, on account of the nonexistence of sufficient ore and its inferior and unmerchantable quality, they were unable to continue. It was held that the affidavit exhibited a good defense to the action, and the court there distinguished such a lease from those involved in the cases which were there and are here relied upon to support a contrary view, notably Jervis v. Tomkinson, 1 Exch. (H. & N.) 195, and Marquis of Bute v. Thompson, 13 M. & W. 486, in both of which cases the contracts were construed to import an absolute covenant to pay the rent whether the mines could be made to produce the mineral or not.

In Williston on Sales, § 661, it is said: "It is probable that the tendency of the law is towards an enlargement of the defense of impossibility, and in any case where it may fairly be said that both parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition of affairs will be an excuse."[29] * * *

Ridgley v. Conewago Iron Co. (C. C.) 53 Fed. 988, construes a mining lease which required the lessee to mine at least 4,000 tons annually, and to pay therefor a fixed sum per ton, or, in case he fails to take out such quantity, to pay therefor. It was held that the lease imposed no obligation to pay the minimum royalty after the ore in the premises had become exhausted. There Dallas, Circuit Judge, said:

"Mining leases commonly include, in addition to the usual undertaking to pay for what may be actually mined, a covenant that some fixed or ascertainable sum, at least, shall be annually paid. These covenants are not all the same, or to the same effect. They may be divided into two classes: First, those which require the payment of rent irrespective of product; second, those which require that, upon failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid. Where the covenant is of the first class the tenant is liable for the rent, even if nothing could be gotten by mining. * * * Where the covenant is of the second class his obligation is to pay for the stipulated quantity, whether mined or not; not whether it exists or not. He contracts for promptitude and thoroughness in mining; not for the productiveness of the mine. Lord Clifford v. Watts, L. R. 5 C. P. 577; Muhlenberg v. Henning, 116 Pa. St. 138, 9 Atl. 144. This covenant is of the second class."

The general rule, substantially as stated by Judge Dallas, is recognized in the following cases:[30] * * *

[29] There were further quotations from Bishop on Contracts (2d Ed.) § 588, Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1 (1916), and Boyer v. Fulmer, 176 Pa. 282, 35 Atl. 235 (1896).

[30] The court here cited eighteen cases. See original report. See, also, in accord: Lord Clifford v. Watts, L. R. 5 C. P. 577 (1870).

There are other cases which cannot be reconciled with this view, though some of them may be distinguished. There is a line of cases in which the lessee has been required to pay the minimum royalty, notwithstanding the exhaustion of the mine, if he continues in possession of the leased premises claiming under the lease.[31] * * *

Then in Lehigh Zinc Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215, it is held that where the right to mine ore in the premises was not the substantial inducement for the lease, and the covenant to pay a fixed royalty as rent per year is not qualified, the lessor is not released even if the mineral is exhausted. Then there are cases where it is said that the amount of mineral was known to the parties at the time the lease was entered into, and the contract was for the sale and purchase of such mineral. Timlin v. Brown, 158 Pa. 606, 28 Atl. 236; Bute v. Thompson, 13 M. & W. 487, 153 Eng. Rep. 202; Jervis v. Tomkinson, 4 Week. Rep. 683.[32]

Applying these principles to the bill and lease here involved, it appears clear that the main purpose of the contract was to mine iron ore, the existence of which in quantities great enough to justify the continuance of mining operations for 40 years was assumed as a fact by both parties, and by its express language the lessor was to receive 50 cents per long ton as compensation, "for each ton of good merchantable ore mined and shipped." The subject and substance of the contract is merchantable iron ore, to be mined and shipped, and the obligation is to pay therefor, or to pay such royalty on the minimum quantity which both parties assumed could be so produced. This language in the lease confirms this view:

"Not less than twenty thousand tons to be shipped each year. If less is shipped, royalty is to be paid on twenty thousand tons, and if more than twenty thousand tons are shipped in one year, and less than that quantity in the next preceding or succeeding year, the surplus of the one year and the royalty paid thereon may be carried to the credit of the other year, either preceding or succeeding to make the required minimum."

How is it possible for the lessee to receive the benefit of these credits unless the ore exists? The contingency provided against was the failure to mine and not the exhaustion of the ore which both parties assumed to exist. It is manifest then that if the facts alleged in the bill can be proved, and the ore does not exist, the lessee should be relieved of its obligation to pay the royalty provided for in the lease, because the paramount consideration of the contract has failed, and performance thereof by the lessee has become

[31] The court here cited 4 cases.

[32] A contract may be clearly in the alternative, and the promisor must perform even though one alternative is impossible. Bute v. Thompson (1844) supra, coal vein exhausted, but rent due; Henderson v. Stone, 1 Mart. N. S. (La.) 639 (1823), contract to run horse race or to pay $500; horse died, but money held due.

impossible. Cases relating to the general subject could be added, but those referred to which construe the contracts involved as we have construed the contract under review are so convincing, so securely rest upon right reason and justice, that additional citations are unnecessary. This, as we understand, is the view which the trial judge entertained, but he sustained the demurrer because of opinion that the defense could and should be made at law.[33] * * *

We are convinced that the trial court erred in sustaining the demurrer. A decree will therefore be entered here overruling it, and the cause will be remanded for trial upon the issues of fact tendered by the answer.

Reversed and remanded.

TAYLOR v. CALDWELL.

(In the Queen's Bench, 1863. 3 Best & S. 826.)[34]

BLACKBURN, J. In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night fêtes, at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

The parties inaccurately call this a "letting," and the money to be paid, a "rent;" but the whole agreement is such as to show that the defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts

[33] The court then held that, while the lessee had a good defense at law, the remedy at law was not adequate, and that equity had jurisdiction to decree rescission for mistake and failure of consideration.

[34] Also reported in 32 L. J. Q. B. 164, 8 L. T. 356, 11 W. R. 726. Part of the report is omitted.

could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to Walton v. Waterhouse (2 Wms. Saund. 421a, 6th Ed.) and is recognized as the general rule by all the judges in the much discussed case of Hall v. Wright (E. B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.[85]

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e. g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; Hyde v. The Dean of Windsor (Cro. Eliz. 552, 553). See 2 Wms. Exors. 1560 (5th Ed.), where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are

[85] The learned judge here indicated that the Roman law was in harmony with the common law on this point, citing Dig. 45, 1, 33.

discharged from this contract; for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord Lyndhurst in Marshall v. Broadhurst (1 Tyr. 348, 349) and a case mentioned by Patteson, J., in Wentworth v. Cock (10 A. & E. 42, 45–46). In Hall v. Wright (E. B. & E. 746, 749), Crompton, J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter, of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370 [7th Ed.] by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of Rugg v. Minett (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not

delivered; and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule of the civil law, and it is worth noticing that Pothier, in his celebrated Traité du Contrat de Vente (see part 4, § 307, etc.; and part 2, ch. 1, sec. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation de certo corpore is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.

The same principle seems to be involved in the decision of Sparrow v. Sowgate (W. Jones, 29), where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to Williams v. Lloyd (W. Jones, 179). In that case the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed that notwithstanding the promise no action would have lain had there been no neglect or default on his part.

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of Coggs v. Bernard (1 Smith's L. C. 171 [5th Ed.] 2 L. Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the civil law that it might

perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the case of bailments; but the case of Williams v. Lloyd (W. Jones, 179), above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.[36]

HAWKES v. KEHOE et al.

(Supreme Judicial Court of Massachusetts, 1907. 193 Mass. 419, 79 N. E. 766, 10 L. R. A. [N. S.] 125, 9 Ann. Cas. 1053.)

Action by Frank E. Hawkes against Annie Kehoe and others. A judgment was rendered in favor of plaintiff, and defendants bring exceptions, and also appeal from an order overruling a demurrer to the declaration. Order affirmed, and exceptions sustained.

Action for breach of a written contract dated May 12, 1905. by which plaintiff was to convey certain land in Dorchester to defendants

[36] In accord: Martin Emerich Outfitting Co. v. Siegel Cooper & Co., 237 Ill. 610, 86 N. E. 1104, 20 L. R. A. (N. S.) 1114 (1909); Jones-Gray Const. Co. v. Stephens, 167 Ky. 765, 181 S. W. 659 (1916); W. W. Robinson Co. v. McClaine, 98 Wash. 322, 167 Pac. 912 (1917); Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415 (1871); Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215 (1891); Thomas v. Knowles, 128 Mass. 22 (1879); Appleby v. Myers, L. R. 2 C. P. 651 (1867); Nickoll v. Ashton, [1901] 2 K. B. 126.

Where the destruction of buildings does not render performance impossible, the contract duty is not discharged, even though it was expected that goods were to be made or services were to be rendered in those buildings. Hefernan v. Neumond, 198 Mo. App. 667, 201 S. W. 645 (1918); Field & Co. v. Haven, 36 Cal. App. 669, 173 Pac. 108 (1918); Levy v. Caledonian Ins. Co., 153 Cal. 527, 105 Pac. 598 (1909); Turner v. Goldsmith, [1891] 1 Q. B. 544.

and defendants were to convey certain land in Revere "and the buildings thereon" to plaintiff, said premises to be conveyed on or before June 12, 1905, "in the same condition" in which they were on May 12th, "reasonable use and wear of the buildings thereon alone excepted." On the night of June 3d the buildings on the land in Revere were destroyed by fire. The plaintiff, on June 10th and again on June 12th, demanded performance by the defendants, but the latter were unable to convey the land with the buildings thereon and refused to do anything other than convey the land alone upon receipt of the entire consideration. In the superior court a demurrer filed by defendants was overruled and defendants appealed. Other facts appear in the opinion.

SHELDON, J. One who has bound himself by a positive and absolute agreement for the performance of something not in itself unlawful is not released from his obligation by the mere fact that in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible; he must respond in damages for the breach of his agreement. Harvey v. Murray, 136 Mass. 377; Drake v. White, 117 Mass. 10. But it is equally well settled that where from the nature of the contract it appears that the parties must from the beginning have contemplated the continued existence of some particular specified thing as the foundation of what was to be done, then, in the absence of any warranty that the thing shall exist, the contract is to be construed not as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the accidental perishing of the thing without the fault of either party. Gray, J., in Wells v. Calnan, 107 Mass. 514, 516, 9 Am. Rep. 65; quoting Taylor v. Caldwell, 3 B. & S. 826. The same doctrine has been affirmed in other decisions of this court. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Young v. Chicopee, 186 Mass. 518, 72 N. E. 63; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370. See, also, The Tornado, 108 U. S. 342, 351, 352, 2 Sup. Ct. 746, 27 L. Ed. 747; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Krause v. Board of School Trustees (Ind. App.) 66 N. E. 1010; Dow v. State Bank, 88 Minn. 355, 93 N. W. 121; Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90; Krell v. Henry, [1903] 2 K. B. 740; Hull v. Meux, [1905] 1 K. B. 580. The misfortune which has occurred releases both parties from further performance of the contract and gives no right to either to claim damages from the other. Elliott v. Crutchley, [1903] 2 K. B. 476; s. c., [1904] 1 K. B. 565. We need not stop to consider the different rules which have been laid down in England and in this commonwealth as to the right of either party, in such event, to recover for payments made or services rendered or materials supplied to the other before further performance has become excused. See the cases cited supra.

The plaintiff contends, however, that the rule which we have now stated does not apply to cases like this. He claims that in this commonwealth, where a contract is made for the future conveyance of land with buildings standing thereon, with no provision as to the contingency of the buildings being destroyed by fire before the time appointed for the conveyance, the loss by such a fire falls wholly upon the vendor. Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Thompson v. Gould, 20 Pick. 134. From this he deduces the conclusion that the purchaser in such a case has a right either to require the vendor to make a conveyance of the land with compensation for the loss of the buildings, as in Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796, 50 L. R. A. 680, 78 Am. St. Rep. 207, or to hold the vendor in damages for failing, though by reason of his inability, to convey the estate, including both land and buildings, as he had agreed to do.

We need spend no time upon the numerous cases in England and in this country which the industry of counsel has brought to our notice as to the rights of parties to such agreements upon a total or partial destruction of the buildings by fire. See the cases collected in Am. & Eng. Encyc. of Law (2d Ed.) 712 et seq., and in 1 Ames, Cases on Eq. Jur. 228, note 2. We are of opinion that in this commonwealth, when as in this case, the conveyance is to be made of the whole estate, including both lands and buildings, for an entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that they constituted an important part of the subject-matter of the contract, it is now settled by the decision in Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, that the contract is to be construed as subject to the implied condition that it no longer shall be binding if before the time for the conveyance to be made the buildings are destroyed by fire. The loss by the fire falls upon the vendor, the owner; and if he has not protected himself by insurance, he can have no reimbursement of this loss; but the contract is no longer binding upon either party. If the purchaser has advanced any part of the price, he can recover it back. Thompson v. Gould, 20 Pick. 134, 138. If the change in the value of the estate is not so great, or if it appears that the buildings did not constitute so material a part of the estate to be conveyed as to result in an annulling of the contract, specific performance may be decreed, with compensation for any breach of agreement, or relief may be given in damages. Kares v. Covell, 180 Mass. 206, 62 N. E. 244, 91 Am. St. Rep. 271; Davis v. Parker, 14 Allen, 94.

It is true, however, that the principle just stated would not be applicable to an agreement which contemplated and provided for the event which has happened—if, that is, in such a case as this, the vendor has made himself answerable for the continued existence of the buildings. Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779. The agreement in this case provides that the defendants shall convey to the

plaintiff a certain parcel of land "and the buildings thereon," and that the premises at the time of delivering the deeds are to be "in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted." The plaintiff contends that these words were inserted for his protection (Tripp v. Smith, 180 Mass. 122, 126, 61 N. E. 804); that they constitute a part of the contract, and are not to be ignored; and that they are no less applicable when the buildings have been totally consumed than would be the case if they simply had been mutilated by tenants or charred by a small fire. And he claims that the exception of "reasonable use and wear of the buildings" furnishes an additional reason for holding that injury by inevitable accident is not excepted. Harvey v. Murray, 136 Mass. 377, 378.

Accordingly he contends that he has a right to hold the defendants in damages for their failure to convey to him the estate with the buildings in the same condition that they were in at the date of the contract. Combs v. Fisher, 3 Bibb (Ky.) 51; Green v. Kelly, 20 N. J. Law, 544; Goddard v. Bedout, 40 Ind. 114; Morgan v. Hymer (Ky.) 37 S. W. 576. But of these cases Combs v. Fisher simply decides that after the vendor has recovered a judgment at law against the purchaser upon bonds given for the price for the land and buildings, thus affirming the contract, the latter may in equity have his damages from the prior destruction of the buildings set off against such judgment. In Goddard v. Bedout, the defendant had put himself in the position of a lessee, and it is pointed out in Wells v. Calnan, 107 Mass. 514, 517, 518, 9 Am. Rep. 65, that cases in which a lessee is held to pay rent or make repairs notwithstanding the destruction of the buildings during the term are not applicable here. In Morgan v. Hymer there was an express covenant by the vendor to keep the house in good repair. Green v. Kelly, the only one of these cases which fully supports the plaintiff's position, was rested mainly upon the authority of cases as to tenants, which we have seen not to be applicable here. There is here no express agreement on the part of the vendors warranting the continued existence of the buildings on their land, and no provision relative to their destruction by fire, as there was in Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779. The agreement seems rather to have been based upon the assumption that its subject-matter, land and buildings, would continue in existence until the time should arrive for the making of the conveyance and to provide against any change in their condition while so existing being made or allowed by the vendors to the possible detriment of the purchaser. The parties contemplated this continued existence as the foundation of their agreement. It is as if in the case of Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415, there had been inserted in the agreement a stipulation that the seller would not allow the cotton therein mentioned to become wet by salt water or depreciated in quality from other causes, but would deliver it in sound condition. All the reasoning in the opinion of the court in that case would re-

main unaffected and the decision must have been the same. In Howell v. Coupland, 12 Q. B. D. 258, the contract was for the future sale of certain potatoes, "to be good and marketable ware"; and this contract was held to be subject to the implied condition that the parties should be excused if before breach performance became impossible from the perishing of the potatoes without default of the contractor. This case must stand in the same way as if a large and material part of the land had been swallowed up by an earthquake or some other convulsion of nature, perhaps leaving some of the buildings standing on what land was left; for Wells v. Calnan, ubi supra, has settled the rule in this commonwealth that the destruction of the buildings is not to be distinguished from the loss of a material part of the land. All the arguments based upon this stipulation of the contract would be as applicable then as now; evidently they could not then avail, and they cannot avail now.

We need not consider the question whether it appeared that the plaintiff, having made no actual tender of performance and having no other ability to pay the necessary money than stated in the auditor's report, had put himself in a condition to maintain the action. Apparently, if the defendants had adopted the plaintiff's view, and had offered to make a conveyance to him with compensation for the loss of the buildings, he could not have obtained the money upon the proposed mortgage, for his arrangement with the intended mortgagor was based upon the contingency of the defendant's premises being conveyed in the condition in which they were when the agreement was signed. See Foternick v. Watson, 184 Mass. 187, 68 N. E. 215; Lowe v. Harwood, 139 Mass. 133, 135, 29 N. E. 538; Gormley v. Kyle, 137 Mass. 189; Carpenter v. Holcomb, 105 Mass. 280, 285; Cook v. Doggett, 2 Allen, 439, 441; Butterick v. Holden, 8 Cush. 233; Howland v. Leach, 11 Pick. 151, 155.

The demurrer was rightly overruled. The first count simply sets out the agreement and avers that the plaintiff was ready and willing to carry it out and so notified the defendants, but they "flatly refused" to perform on their part. The second count avers in substance that the fire which destroyed the buildings was due to the defendants' negligence; and it also, like the first count, contains an averment that the defendants flatly refused to perform their agreement.

The order overruling the demurrer must be affirmed; and because of the failure to grant the first of the defendants' requests for instructions, the exceptions must be sustained.

So ordered.

C. G. DAVIS & CO. v. BISHOP.

(Supreme Court of Arkansas, 1919. 139 Ark. 273, 213 S. W. 744.)

Action by C. G. Davis & Co. against G. W. Bishop. From the judgment for defendant, plaintiff appeals. Affirmed.

HART, J. C. G. Davis & Co. sued G. W. Bishop to recover damages which they alleged they sustained by reason of the breach of a contract by Bishop to sell and deliver to them a certain number of bales of cotton.

At the conclusion of the evidence, the court directed the jury to return a verdict in favor of the defendant, and from the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

The only issue raised by the appeal is whether or not the trial court erred in directing a verdict for the defendant under the evidence adduced by the plaintiffs. Hence it will only be necessary to abstract the testimony of the plaintiffs.

C. G. Davis & Co. is a firm of cotton buyers at Texarkana, Tex., and has been engaged in that business for several years. G. W. Bishop owned a large cotton plantation in Miller county, Ark., and usually planted about 1,000 acres in cotton. About the 1st of August, 1917, C. G. Davis, the senior member of the firm, and G. W. Bishop had a conversation about the advisability of the latter's selling at that time a part of the cotton which was being grown on his plantation during that year. They agreed that it would be a good thing for Bishop to do this. Bishop told Davis that he had 1,000 acres in cotton and usually made 500 or 600 bales. On the 1st day of August, 1917, they entered into a contract for the sale by Bishop to C. G. Davis & Co. of 300 bales of the cotton at 24½ cents a pound. The cotton was already growing on Bishop's farm in Miller county, Ark., and was to be delivered at Texarkana, Tex., during the months of October, November, and December of that year.

In contracts of that kind it was the custom for the planter to deliver the number of bales sold out of the first cotton picked by him. During the fall Bishop picked 219 bales of cotton on his farm and delivered the same to C. G. Davis & Co., who paid him the contract price therefor. Bishop failed to deliver to Davis & Co. any more cotton, and they brought this suit in order to recover damages which they allege they sustained on account of his failure to deliver to them any more cotton. It was shown by Bishop that he delivered to them all the cotton that he grew on his farm in Miller county, Ark., during that year.

The court did not err in directing a verdict for the defendant. It is true, as contended by counsel for the plaintiffs, that the general rule is that, when the contract is to do a thing which in itself is possible, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it. The reason is that it was his own

fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. There are, however, well-known exceptions to this general rule, and one of them is that, where from the contract it is apparent that the parties contracted on the basis of the continued existence of a given thing, a condition is implied that, if the performance became impossible from the perishing of the thing, that shall excuse the performance.

In the instant case, according to the evidence adduced by the plaintiffs, the defendant agreed to sell to the plaintiffs 300 bales of cotton which were growing on his farm in Miller county, Ark. The contract was executed on the 1st day of August. The defendant had planted 1,000 acres in cotton, and that number of acres usually made 500 or 600 bales of cotton. The contract related to the crop to be grown by the defendant on the latter's farm in Miller county. Under these circumstances the performance of it, in the contemplation of both parties, depended upon the future growth and continued existence of the cotton.

The defendant delivered to the plaintiffs all the cotton that grew on the farm, and he was therefore excused from a further performance of the contract.

According to the plaintiffs' own testimony it was the intention of the defendant to sell him a part of the crop which was growing on his plantation in Miller county, and under the circumstances the designation of 300 bales was a mere statement of opinion as to the quantity, and cannot be regarded as a warranty that the defendant would raise that number of bales. Of course, if the defendant by the terms of the contract had warranted that he would raise 300 bales of cotton, he would be bound by the terms of his warranty, notwithstanding on account of weather conditions or other matters over which he had no control he failed to raise the designated number of bales. Here, we have already seen, it appears from the plaintiffs' testimony that it was the intention of the parties that the cotton should be grown on the defendant's own farm, and it is plain that the number of bales was specified in the contract for the purpose of limiting the quantity sold to that amount. Switzer v. Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762; Rice & Co. v. Weber, 48 Ill. App. 573; and Ontario Deciduous Fruit Growers' Association v. Cutting Fruit Packing Co., 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231.

In the last-mentioned case the court held that under a contract for the sale of the crop of a certain orchard, stating the minimum quantity of the fruit to be delivered, the seller cannot be held liable in damages for failure to deliver the specified quantity because of the failure of the crop due to unusual climatic conditions; nor can he be compelled to substitute other fruit for that contemplated in the contract.

In a case note to L. R. A. 1916F, at page 63, in discussing the question of intervening impossibility of performance of a contract as a defense to an action for the breach thereof, it is said:

"Whether or not a contract for the sale of produce to be delivered at a certain future date contemplates that it shall be grown on a particular tract of land, so that a failure of the crop on that land will excuse a nondelivery, is often a close question of construction of the particular contract. The rule appears to be that if the parties contemplate a sale of the crop, or of a certain part of the crop, of a particular tract of land, and, by reason of a drought, or other fortuitous event, without the fault of the promisor, the crop on that land fails or is destroyed, nonperformance is to that extent excused, the contract, in the absence of an express provision controlling the matter, being * * * subject to an implied condition in this regard, but that, if the contract does not specify or contemplate the crop of any particular tract of land, nonperformance will not be excused merely because it happens that, on account of a drought or other fortuitous event, without his fault, the promisor is unable to perform the contract, the cases following in this respect the general rule previously indicated that the mere inability of the obligor to perform will not generally excuse nonperformance."

It follows that the judgment must be affirmed.[87]

LOUISVILLE & N. R. CO. v. CROWE.

(Court of Appeals of Kentucky, 1913. 156 Ky. 27, 160 S. W. 759, 49 L. R. A. [N. S.] 848.)

Action by M. B. Crowe against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

HANNAH, J. Appellee sued appellant in the Allen circuit court alleging that in consideration of the Chesapeake & Nashville Railroad Company, its successors and assigns, agreeing to issue to him an annual pass during his natural life, good between Scottsville, Ky., and Gallatin, Tenn., he had on April 2, 1898, conveyed to it for a right of way a strip of land through his farm, 100 feet in width and 1,000 yards in length; that thereafter defendant, Louisville & Nashville Railroad Company, had purchased the said Chesapeake & Nashville Railroad Company, and was operating its line of railway over said right of way; that said Chesapeake & Nashville Railroad Company, in compliance with said agreement contained in said deed, had each year during the time it owned and operated said railroad issued to him the annual pass therein agreed to be issued, good between the points above mentioned; and defendant, Louisville & Nashville

[87] In accord: Howell v. Coupland, 1 Q. B. D. 258 (1876); St. Joseph Hay & Feed Co. v. Brewster (Mo. App.) 195 S. W. 71 (1917). Circumstances of this sort are no defense where the subject-matter is not required to be grown on a specific tract of land. Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642 (1892). See, further, ante, 686, note.

Railroad Company, since January 18, 1907, had likewise during each year it had owned said railroad issued such pass to him, up and until 1911, at which time defendant recalled a pass which it had issued to him for that year, and refused to issue another, good between said points. The plaintiff (appellee here) sought specific performance of the contract if the same could be had; and, if not, then he prayed for damages in the sum of $500.

The defendant filed a demurrer to the petition, and same was overruled, the court below holding that the case of L. & N. R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, decided February 20, 1911, was conclusive upon the question of the duty of the railroad company to withhold the annual pass, under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended by the act approved June 29, 1906, known as the Hepburn Bill; but further holding that the petition stated sufficient grounds for the recovery of damages in lieu of specific performance. The defendant, relying on said act of Congress, in discharge of all liability upon its part, alleged that it had tendered to plaintiff, and was still willing to issue to him, an annual pass over its road from Scottsville, Ky., to the Tennessee line. The action was brought in equity. The defendant failed to take any proof, and the case was tried by the court upon the pleadings and the depositions taken by plaintiff; the court rendering judgment in favor of plaintiff against defendant in the sum of $200, from which judgment this appeal is prosecuted.

The Mottley Case, above mentioned, is conclusive upon the question of plaintiff's right to have specific performance of the contract sued on; but in that case the Supreme Court said: "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it." This question has not heretofore been passed upon by this court. And we have been cited to no case involving the right of one party to a contract to recover damages for the thing taken and retained by the other party, where such other party has been prevented from performing his part of the contract by the enactment of a law, subsequent to the execution of the contract, making the continuance of said contract unlawful, where the contract in question was lawful when it was entered into. Nor have we been able to find any authority on this subject except the case of Cowley v. Northern Pacific Ry. Co. (1912) 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, which is almost identical with the one at bar, and which denies the right of recovery of damages on such contracts as this. However, we do not feel bound by that decision.

Appellant cites a number of authorities holding that, to the general rule that a party to a contract is not discharged by subsequent im-

possibility of performance, there is the exception that, where the performance becomes impossible by law, either by reason of a change in the law, or by some action by or under the authority of government, the promisor is excused. But these authorities merely hold that it is a general rule of law that where a contract is lawful when made, and a subsequent enactment renders performance of it unlawful, neither party shall be prejudiced, and the contract is at an end. They do not hold that one party can take the property of another under a promise to pay for it, and still hold it, and not pay for it, if, by reason of an enactment of law after the contract is made, such party is prohibited from making payment in the article he contracted to pay with. And if those cases did so hold, we would be inclined to disagree with them. The party obtaining the property in this way should be required to restore it, or to pay for it upon equitable terms.

Here, appellee in good faith conveyed and delivered up the possession of his land, in consideration of the promise of his vendee to pay for same in a particular thing, an annual pass. This was in effect a contract to pay appellee the purchase price of his land in annual installments, during the remainder of his life, instead of in one lump sum at the time of the execution of the deed; and, to pay said purchase price of his land in transportation over the said line of railroad, rather than in cash, or other medium of exchange. This consideration has not been fully paid. The medium of payment in said deed provided for and agreed upon is no longer of permissible use, by reason of the act of Congress above mentioned as construed by the Supreme Court of the United States in the Mottley Case; but, rather than do the appellee the injustice of declaring a forfeiture of the unfulfilled contract by a release and discharge of appellant from all liability thereunder, some other medium of payment should in good conscience be substituted for the medium which is no longer available; or appellee should recover or be restored to the rights he had when the said deed was executed by him.

In this case, it would not be equitable to restore to appellee the land taken and retained; nor could this now be done, the rights of the public having intervened. The equitable way to adjust the matter is to require appellant to pay to appellee a reasonable sum, based, not on the probable value of what he would have received thereunder for the remainder of his life, nor upon a breach of the contract, but for the right of way so taken and necessarily retained; taking into consideration, of course, what appellee has already received under the contract.

From the evidence in this case, we think the lower court did this, and the judgment is therefore affirmed.[38]

[38] Nonperformance creates no right to damages in case performance has been made illegal by a change in the domestic law. Louisville & N. R. R.

PASQUOTANK & N. R. STEAMBOAT CO. v. EASTERN CAROLINA TRANSP. CO.

(Supreme Court of North Carolina, 1914. 166 N. C. 582, 82 S. E. 956.)

Action by the Steamboat Company against the Transportation Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

It appeared in evidence that plaintiff had entered into a contract with defendant, in part as follows:

"Witnesseth, that whereas the said party of the first part is the owner of the steamship Virginia, fully manned and equipped for carrying passengers and freight; and, whereas the party of the second part is desirous of chartering said steamship for its use on certain Sundays only, in carrying passengers and freight from Elizabeth City, North Carolina, to Nags Head, North Carolina, and return to Elizabeth City, North Carolina: Now, therefore, it is agreed by and between the parties hereto in consideration of one dollar and other good and sufficient consideration, not herein mentioned, in hand paid, and moving from each to the other of them, as follows, to wit: (1) That the said party of the first part hereby leases and charters to the said party of the second part the said steamship Virginia fully manned and equipped for each Sunday during the period or term beginning Sunday, June 23, 1912, and ending Sunday, September 29, 1912, both Sundays, inclusive; and the said party of the second part is to pay to the said party of the first part for the use of said steamship on said Sundays the sum of eighty dollars ($80) per Sunday, payable on the 1st and 15th of each month after said steamship has been so used by said party of the second part during said term."

Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671 (1911); Cowley v. N. P. R. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559 (1912); Cordes v. Miller, 39 Mich. 581, 33 Am. Rep. 430 (1878), erection of wooden building forbidden by law; Brick Presbyterian Church Corp. v. Mayor, etc., of City of New York, 5 Cow. (N. Y.) 538 (1826), law forbade use as a cemetery; American Mercantile Exch. v. Blunt, 102 Me. 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. Rep. 463, 10 Ann. Cas. 1022 (1906); Bell v. Kanawha Traction & Electric Co., 83 W. Va. 640, 98 S. E. 885 (1919); Moller v. Herring, 255 Fed. 670, 167 C. C. A. 46, 3 A. L. R. 624 (1919), subject-matter taken into possession of a receiver; Marshall v. Glanvill, [1917] 2 K. B. 87, employee required by law to enter military service; Commonwealth v. Overby, 80 Ky. 208, 44 Am. Rep. 471 (1882), delivery of accused by his bail rendered impossible by imprisonment for another offense; Hanford v. Connecticut Fair Ass'n, 92 Conn. 621, 103 Atl. 838 (1918), epidemic of disease made performance contrary to public welfare. See, also, Baily v. De Crespigny, L. R. 4 Q. B. 180 (1869).

It has been held that a contractor takes the risk of impossibility due to foreign law. Barker v. Hodgson, 3 M. & S. 267 (1814). See Ford v. Cotesworth, L. R. 5 Q. B. 544 (1870); Cunningham v. Dunn, 3 C. P. D. 443 (1878).

The denial of a necessary city license does not discharge a contractor, although performance may be illegal without it. It was his duty to procure the license. Gravel Switch & L. S. Tel. Co. v. Lebanon L. & L. Tel. Co., 139 Ky. 151, 129 S. W. 559 (1910). Cf. Monaca Borough v. Monaca St. R. Co., 247 Pa. 242, 93 Atl. 344 (1915).

And, further:

"(7) It is further understood and agreed by and between the parties hereto that if on any of said Sundays the weather should be so bad that said steamship could not safely make said trip and land its passengers at Nags Head, then said steamship shall not make said trip on said day, and the said party of the second part will not be required to pay for said day the eighty dollars ($80) above herein mentioned."

The evidence showed that pursuant to this contract the steamer was supplied for the purpose indicated until August 4, 1912, when it was totally destroyed by fire. It was admitted that plaintiff had been paid for all the trips made to that time except those of July 21st and July 28th, and for the same no payment had been made. Defendant resisted recovery, claiming, first, that the contract was entire, and plaintiff had no right of action without showing full performance for the whole period of time covered by the contract. Defendant further set up a counterclaim against plaintiff by reason of failure to perform on its part. At the close of the testimony, a motion to nonsuit plaintiff's demand was allowed, and, defendant having then withdrawn his counterclaim, a judgment of nonsuit was duly entered, and plaintiff excepted and appealed.

Hoke, J. (after stating the facts as above). Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. As to the executory features of such an agreement, the destruction of the property, without fault, will amount to a discharge of the contract. 3 Page on Contracts, § 1730; Clark on Contracts (2d Ed.) p. 475.

Under the circumstances as stated and in reference to the adjustment of rights and liabilities of the parties by reason of stipulations already performed, if the contract in express terms or from its nature is entire and indivisible, requiring full performance before anything is due, then no recovery can be had, but, if the contract is severable and substantial benefit has been received under it and enjoyed by one of the parties, this must ordinarily be accounted for, either according to the rates fixed by the contract or under a quantum meruit, as the case may be, and if, under the terms of the contract, the work done or the services rendered are to be paid for by installments or at stated periods, these installments or payments being fixed with regard to the value of the work done or as specified portions are performed, in that event, if the property is destroyed, the claimant may recover for the installments due or for the portion of the work done as for an amount already earned.

These general principles are in accordance with decided cases here and in other jurisdictions. Keel v. Construction Co., 143 N. C. 429-432, 55 S. E. 826; Tussey v. Owen, 139 N. C. 457, 52 S. E. 128; Coal

Co. v. Ice Co., 134 N. C. 574, 47 S. E. 116; Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252; Chamblee v. Baker, 95 N. C. 98; Gorman v. Bellamy, 82 N. C. 496; Brewer v. Tysor, 50 N. C. 173; Viterbo v. Friedlander, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776; McCaslin v. Mfg. Co., 155 Ind. 298, 58 N. E. 67; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215, and the two cases of Lawing v. Rintles, supra, and Keel v. Construction Co. very well illustrate the different positions as applied to the facts of the present appeal. In Lawing's Case, a contract to construct certain buildings as a whole was held to be entire and, on accidental destruction of buildings before completion, it was held that the contractor could not recover any portion of the price. In the later case of Keel v. Construction Co., the contract was to construct a building, the payment to be by certain installments due as specified portions of the structure were completed; the apportionment having evident reference to the portion of the work done, and, in the opinion, the general principles applicable were stated as follows:

"When one contracts with the owner of a lot to furnish all the materials and build and construct a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of the owner, and the contractor, being given the opportunity, refuses to proceed further, in such case, he is liable to refund any money which may have been paid him on the contract, and also for damages for its nonperformance. Brewer v. Tysor, 48 N. C. 181; Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252; Beach's Modern Law of Contracts, § 232, citing Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349. And this principle will not be affected by the fact that the money is to be paid by installments, if the price is entire for a completed building and these installments are arbitrary and fixed without any regard to the value of any distinctive portion of the work done. School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373. But, if the contract is divisible and severable, if the price is not entire for a completed building, but is payable by installments, these installments being fixed with regard to the value of the work done, or as certain portions of same are finished, in that event, if the structure be destroyed by inevitable accident, 'the builder is entitled to recover for the installments which have been fully earned,' but it seems that he has no claim for a proportional part of the next installment which has been only partially earned. Brewer v. Tysor, 50 N. C. 173; Beach, Modern Law, citing Richardson v. Shaw, 1 Mo. App. 234. In this well-considered case, Lewis, Judge, delivering the opinion, says: 'The true principle which controls such a case as this is clearly stated in Addison on Contracts, 452: "If the contract price of the building is to be paid by installments on the completion of certain specified portions of the work, each installment becomes a debt

due to the builder as the particular portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the installments then due, but would not be responsible for the intermediate work and labor and materials." ' "

And such in effect is the case presented here, the contract showing that plaintiff was to be paid "$80 per Sunday, payable on the 1st and 15th of each month, after such steamship has been so used by said party of the second part during said term," and, in further support of the position that the price per Sunday was to be regarded as a severable item, it is provided further in the contract that in case the weather was such as to prevent the trip on any given Sunday, the stipulated price for such day was not to be required.

On the facts in evidence, therefore, the plaintiff, in any aspect of the case, had a definite claim for $160, earned under the provisions of the contract, which entitled him to bring suit and, if defendant desires to insist that it has been wronged by plaintiff's failure to perform further, the position should be made available by counterclaim, the course suggested and approved in some of the authorities cited. See Coal Co. v. Ice Co., 134 N. C. 579, 47 S. E. 116; Chamblee v. Baker, supra; Gorman v. Bellamy, supra.

In reference to this counterclaim of defendant, it may be well to note that the obligations of an ordinary business contract are imperative in their nature. This principle, which relieves a party to such a contract by reason of the destruction of the property with which it deals, is sometimes treated as an exception; the general rule being the other way. 9 Cyc. pp. 627–629. Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part. For this reason, and, further, because by the terms of the present contract the care and custody of the property was left with plaintiff, if it is established that plaintiff has failed to further perform the executory features of this agreement, the burden would be on plaintiff to show that the steamer was destroyed by fire, and that the plaintiff and its agents were in the exercise of proper care at the time.

For the reasons heretofore given, the judgment of nonsuit must be set aside and a new trial had.

New trial.

CARROLL v. BOWERSOCK.

(Supreme Court of Kansas, 1917. 100 Kan. 270, 164 Pac. 143, L. R. A. 1917D, 1006.)

Action by Martin Carroll, doing business as the Martin Carroll Company, against J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions.

The contract required the plaintiff to construct a reinforced concrete floor in a warehouse, for $1,825, payable in certain installments. The building was destroyed by fire after the footings were laid and the forms constructed for pouring in the concrete for columns. The reinforcing rods were in position, but not attached to the building. No installment was yet due.

BURCH, J.[39] The action was one to recover for part performance of a contract to construct a reinforced concrete floor in a warehouse, which was destroyed by fire before the floor was completed. The plaintiff recovered, and the defendant appeals. * * *

The court stated the following findings of fact and conclusion of law:

"Findings of Fact.

"The plaintiff entered upon the performance of the work in harmony with said contract, and worked for about three weeks. Before commencing the work he procured

Blueprints to be prepared therefor by an engineer at an expense of..			$ 85 00
Prior to the fire hereinafter mentioned he actually used of the steel for reenforcement	in	value	248 63
Labor for forms for cement	"	"	28 80
Hardware	"	"	4 80
Cement	"	"	23 20
Sand and rock	"	"	17 20
Labor	"	"	319 90
Some miscellaneous items	"	"	8 65
Expended for drayage	"	"	8 15
Blacksmithing	"	"	6 50
In addition to these he paid freight on tools	"	"	7 25
Railroad fare for men	"	"	5 95

"The reasonable value of superintending the work and for use of tools is 10 per cent. of the cost of the material and work actually used in the improvement.

"At the end of the third week, the building was totally destroyed by fire, without fault of either party to the contract. It was insured in the condition in which it was before the plaintiff commenced work, but there was no insurance upon the improvements made by the plaintiff. The defendant collected the insurance, and failed and refused to reconstruct the building upon demand of the plaintiff, so that it was impossible for the plaintiff to complete his contract.

[39] Parts of the opinion are omitted.

"Conclusion of Law.

"The plaintiff in this case should recover from the defendant a judgment for $698.09, the same being made up as follows:

Steel actually used	$248 63
Lumber used	28 80
Hardware used	4 80
Cement used	23 00
Cost of drayage	3 15
Cost of blacksmithing	6 50
Cost of sand and rock	17 20
Cost of superintending and use of tools	63 46
Money paid for labor and miscellaneous items	323 55
	$698 09"

It is apparent that the court permitted recovery for substantially what the plaintiff had done by way of performance of the contract before the fire.

The contract was to place the floor in a specific warehouse. Destruction of the warehouse without fault of either party put an end to construction of a floor in that warehouse. No warehouse except the one destroyed having been contemplated or contracted about, the defendant could not be charged with delinquency for not building any other. To do so would be to charge him with breach of an obligation which he did not assume. If continued existence of the particular warehouse to which the contract related were not taken for granted by both parties, the plaintiff would be bound by his contract and could not recover at all; no concrete floor having been constructed.

It was not material that the defendant collected insurance on the warehouse, purchased before the contract was made. The insurance covered nothing but property of the defendant. He paid for the insurance and was entitled to it, just as the plaintiff would have been entitled to insurance on his property had he seen fit to insure. If any part of the plaintiff's labor and material was incorporated into the insured building, so that the insurance covered it as substance of the structure, the plaintiff can recover, if at all, not because of the insurance, but because of the incorporation.

If a contractor should engage to furnish all labor and material and build a house, and the house should burn before completion, the loss falls on him. If a contractor should engage to refloor two rooms of a house already in existence, and should complete one room before the house burned, he ought to be paid something. So far the authorities are in substantial agreement.

The principle upon which the contractor may recover in a case of the character last instanced has been variously stated. Sometimes it is said that it was a material and substantive part of the contract on the owner's side that he would have the house in existence as long as might be necessary for the contractor to do the work. This statement of the principle arbitrarily attaches to the contract a warranty which

the parties did not put there, and places the owner in default when he has been guilty of no wrong. Impossibility of performance because of destruction of the building was not contemplated by either party. Performance was prevented without fault of either party, and the true rule is that neither party can be charged with delinquency because the contract cannot be fulfilled. Annotation, L. R. A. 1916F, 10, 52.

The contractor cannot give and the owner cannot obtain that which they contracted about. Neither one can complain of the other on that account, and the law must deal with the new situation of the parties created by the fire. The owner cannot be called on to reimburse the contractor merely because the contractor has been to expense in taking steps tending to performance. A contractor may have purchased special material to be used in repairing a house, and may have had much millwork done upon it. If the material remain in the mill, and the house burn, there can be no recovery. If the milled material be delivered at the house ready for use, and the house burn, there can be no recovery. It takes something more to make the owner liable for what the contractor has done toward performance. The owner must be benefited. He should not be enriched at the expense of the contractor. That would be unjust, and to the extent that the owner has been benefited, the law may properly consider him as resting under a duty to pay. The benefit which the owner has received may or may not be equivalent to the detriment which the contractor has suffered. The only basis on which the law can raise an obligation on the part of the owner is the consideration he has received by way of benefit, advantage, or value to him.

The question whether or not the owner has been benefited frequently presents difficulties. Sometimes the question is answered by the owner's own conduct, as when by taking possession, or by insuring as his own property, or by other act, he evinces a purpose to appropriate the contractor's material and labor. Sometimes the circumstances are such that the owner is precluded from rejecting the fruits of the contractor's efforts if he would, as when one room is finished under a contract to refloor two. In such cases it merely confuses the matter to bring in the terms "acceptance," "assent," and similar expressions indicative of the owner's attitude. If he should pay, it is not because assent or acceptance of benefit is "implied," or because he is "regarded as accepting benefit," but because of the fact that he has been benefited.

The test of benefit received has been variously stated. Sometimes it is said that benefit accrues whenever the contractor's material and labor, furnished and performed according to the contract, have become attached to the owner's realty. The facts of particular cases suggest different forms of expression. After considering all the authorities cited in the briefs, the court is inclined to approve, for the purposes of this case, the form adopted by the Supreme Court of Massachusetts, in the case of Young v. Chicopee, 186 Mass. 518, 72 N. E. 63, cited by the plaintiff. The action was one for labor and material furnished to

repair a bridge destroyed by fire while the work was proceeding. The contract required at least half of the material to be "upon the job" before work commenced. The contractor complied with this condition, and distributed material "all along the bridge" and on the river bank. A portion of the material thus distributed but not wrought into the structure was destroyed by fire. Liability for work done upon and material wrought into the structure was not disputed, but the contractor sought to make good his entire loss. The court said: "In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which, at the time of the destruction of the structure, had become so far identified with it as that but for the destruction it would have inured to him as contemplated by the contract." 186 Mass. 520, 72 N. E. 64.

Applying the test stated to the facts of the present controversy, it is clear that the plaintiff should recover for the work done in cutting the old floor away from the wall and in removing such part of the old floor as was necessary. The warehouse was improved to that extent by labor, the benefit of which had inured to the defendant when the fire occurred. If the fire had not occurred, the undesirable floor would have been out of the way, precisely as the contract contemplated. Likewise, the contractor should recover for the completed concrete footings.

The contractor should not recover for material furnished or labor performed in the construction of either column or floor forms. They were temporary devices, employed to give form to the structure which was to be produced. They were not themselves wrought into the warehouse, were to be removed when the work was completed, and inured to nobody's benefit but that of the contractor.

The contractor should not recover for either upright or floor rods, or for the labor of putting them in place. While the rods were wired together, they were not attached to the building and would not have been wrought into the structure until the concrete was poured. If the fire had not occurred, the contractor could have removed the rods without dismembering or defacing the warehouse, and the defendant could not have held the rods as amalgamated into the fabric of his structure.

There should be no recovery for superintendence and use of tools, except as regards that part of the work done which had become identified with the warehouse itself. Other items sued for should be allowed or disallowed by application of the principle indicated. * * *

In this case nonperformance was not the result of the contractor's fault, and no damages can be deducted on that account.

The defendant says he had a right to a specific kind of completed floor which he could test and which would comply with a prescribed test, and that cutting away the old floor from the walls of the building, and concrete footings for a floor which was never laid, were of no

value to him. The test is whether or not the work would have inured to his benefit as contemplated by the contract if the fire had not occurred. The cutting away of the old floor was done according to the contract, and the defendant had the benefit of that work as soon as it was finished. The evidence was that putting in the concrete footings was the next step in the construction of the concrete floor. Those footings would have inured to his benefit, in accordance with the contract, if the fire had not occurred. They became a part of his warehouse. Unless he could reject them for want of substantial compliance with the contract so far as they were concerned, he was benefited by them at the time of their incorporation into his structure. Test of a completed concrete floor was one of the things rendered impossible by the fire. * * *

The judgment of the district court is reversed, and the cause is remanded, with direction to take such additional evidence as may be necessary and determine the rights of the parties according to the views which have been expressed.[40]

JOHNSTON, C. J. (dissenting in part). I am of opinion that the upright rods set up and tied together were a part of the building, and a recovery for them should be allowed.

KING v. BRAINE.

(Michaelmas Term, 1597. Owen, 60.)

A man sells sheep, and warrants that they are sound, and that they shall be sound for the space of a year, upon which warrant an action of the case was brought, and it was moved that the action did not lye, because the warranty is impossible to be performed by the party, because it is onely the act of God to make them sound for

[40] *Coronation Cases, and Similar Ones.*—Even though the specific acts promised are all easily possible of performance, if unforeseen events have made impossible of attainment the obvious purpose for which the contract was made, the contract is discharged as to all unmatured rights and duties. Krell v. Henry, [1903] 2 K. B. 740; Chandler v. Webster, [1904] 1 K. B. 493, rooms hired from which to view the coronation pageant of Edward VII, the king's illness postponing the pageant; Alfred Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N. Y. Supp. 179 (1915), contract for advertising in a yacht race program, and race called off because of war.

Cf. Herne Bay S. B. Co. v. Hutton, [1903] 2 K. B. 740, 755; London, etc., Co. v. Schlesinger, [1916] 1 K. B. 20, enemy alien still bound to pay rent, even though interned elsewhere; Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346 (1909), rent still due, even though tenant is later denied his license to sell liquor. But see Stratford, Inc., v. Seattle Brewing & Malting Co., 94 Wash. 125, 162 Pac. 31, L. R. A. 1917C, 931 (1916), where a lease for saloon purposes was held discharged by the enaction of a prohibition law.

The English cases are in conflict with Carroll v. Bowersock, supra, with respect to quasi contractual rights in case of impossibility arising after part performance. The general rule in America is that applied in Carroll v. Bowersock. See Thurston's Cases on Quasi Contracts, pp. 246–267; Woodward on Quasi Contracts, chapter VII.

a year. But Clench and Fenner on the contrary; for it is not impossible, no more than if I warrant that such a ship shall return safe to Bruges, and it is the usuall course between merchants to warrant the safe return of their ships.

HOKANSON v. WESTERN EMPIRE LAND CO.

(Supreme Court of Minnesota, 1916. 132 Minn. 74, 155 N. W. 1043.)

Action by Herman Hokanson against the Western Empire Land Company. From an order sustaining demurrer to the complaint, plaintiff appeals. Reversed.

HOLT, J.[41] The action relates to a written contract, executed by the parties hereto, by the terms of which defendant, as the party of the first part, agreed to sell ten acres of land in the state of Washington, and plaintiff, as party of the second part, agreed to buy the same and pay $5,000 therefor, $1,300 of which was paid when the contract was signed, and $740 was to be paid on or before June 27, 1913, and the same amount on the 27th of each succeeding June until all was paid. The land was planted to fruit trees. The contract is replete with provisions requiring punctual and strict performance by the purchaser of his part of the agreement, but these need not be particularly referred to. In the contract is found this provision, which furnishes the basis for the action: "The agreement to resell this land according to attached agreement is hereby made a part of this contract, and, if second party gives due notice of his desire to sell, as per agreement, first party will extend the deferred payments on this contract until such sale is made."

Attached to the contract is the agreement referred to, being in the form of a letter signed by defendant and addressed to plaintiff, the part bearing on this controversy reading as follows: "If you decide that you wish to sell this land during the spring of 1913, we agree to sell same for you by June 1, 1913, at a net price $600 per acre, providing you notify us of your decision to sell by March 1, 1913. It is further agreed that, if you should decide to sell this land during the season of 1914, we will sell it for you by June 1, 1914, at a net price of $650 per acre, providing you notify us of your desire to sell by March 1, 1914. In making such sale for you, it is agreed and understood that we shall receive all amounts for which the land may be sold over and above the within-mentioned net prices, as our commission for making the sale. This is with the understanding that you will see that the orchard is well cared for and the value not affected by any neglect in the care of the tract during the year 1913."

The complaint, after stating the foregoing, setting out the contract

[41] Part of the opinion is omitted.

in hæc verba, alleged that prior to March 1, 1913, plaintiff decided that he desired to sell the land during the spring of 1913, and that by and before March 1, 1913, he duly notified the defendant of this decision to sell, and has always since been ready, willing, and able to sell and convey all his interest in said land upon a sale thereof by defendant, but that defendant has wholly failed to sell. Further allegations are made of performance by plaintiff of all the terms to be by him performed, and that prior to the commencement of the action he relinquished possession of the land. The action is said to have been begun in 1915, but the record does not show the date. The court sustained a demurrer to the complaint; and plaintiff appeals.

The inducement and part consideration for plaintiff's entering the contract to purchase the land was, no doubt, the undertaking by defendant to resell the same for the price and by the time stated in the letter attached to and made a part of the agreement. The argument is made that, since defendant's ability to sell the land by a certain time and for a specified price depended on the willingness to buy of a third party over whom it had no control, therefore the contract should be held impossible of performance and invalid. We do not think such to be the law. There is nothing in the undertaking inherently impossible. Purchasers are found daily for lands at varying prices. There is nothing so unreasonable either in the price fixed or the limit of time within which to make the sale that performance may be said to have been considered, by the parties, beyond the possibility of attainment, when the contract was made. A contract which appears possible of performance when made does not become invalid or unenforceable because conditions afterwards arise which render performance impossible. If there had been a speedy rise in the market value of this land so that it would have been worth $1,000 per acre by March 1, 1913, would there have been any difficulty for defendant to have sold it for $600 or $650 per acre? To make a contract invalid or unenforceable the thing agreed to be done must be impossible on its face, not merely improbable or impossible to the promisor. Cowley v. Davidson, 13 Minn. 92 (Gil. 86); Stees v. Leonard, 20 Minn. 494 (Gil. 448); Anderson v. May, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642. The inability to control the actions of a third party whose co-operation is needed for a performance of the undertaking, is not considered a legal impossibility avoiding the obligation. To this proposition the following authorities may be cited: 3 Elliot on Contracts, § 1916; Stone v. Dennis, 3 Port. (Ala.) 231; Wareham Bank v. Burt, 5 Allen (87 Mass.) 113; Van Etten v. Newton, 6 N. Y. Supp. 531, 7 N. Y. Supp. 663, 8 N. Y. Supp. 478; Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; Gravel Switch Tel. Co. v. Lebanon Tel. Co., 139 Ky. 151, 129 S. W. 559; The Harriman, 9 Wall. (U. S.) 161, 19 L. Ed. 629; Reid v. Alaska Packing Co., 43 Or. 429, 73 Pac. 337; and Watson v. Blossom, 4 N. Y. Supp. 489. Failure to resell, according to the contract, constitutes a breach there-

of entitling plaintiff to damages. These are fixed by the terms of the contract, and do not give rise to any difficulty. * * *

Order reversed.[42]

SUPERINTENDENT & TRUSTEES OF PUBLIC SCHOOLS OF CITY OF TRENTON v. BENNETT et al.

(Supreme Court of New Jersey, 1859. 27 N. J. Law, 513, 72 Am. Dec. 373.)

WHELPLEY, J.[43] This case presents the naked question whether, where a builder has agreed, by a contract under seal, with the owner of a lot of land, "to build, erect, and complete a building upon the lot for a certain entire price, but payable in arbitrary installments, fixed without regard to the value of the work done, and the house before its completion falls down, solely by reason of a latent defect in the soil, and not on account of faulty construction, the loss falls upon the builder or the owner of the land."

The case comes before the court, upon a certificate from the Mercer circuit, for the advisory opinion of this court.

The covenant of Evernham and Hill was to build, erect, and complete the school-house upon the lot in question for the sum of $2610; the whole price was to be paid for the whole building; the division of that sum into installments, payable at certain stages of the work, was not intended to sever the entirety of the contract, and make the payment of the installments payments for such parts of the work as might be done when they were payable: this division was made, not to apportion the price to the different parts of the work, but to suit the wants of the contractor, and aid him in the completion of the work; the consideration of the covenant to complete the building was the whole price, and not the mere balance that might remain after the payment of the installments: it cannot be pretended that the contractor, after payment of a part of the installments, might refuse to go on and complete the building, and yet retain that part of the price he had received. Haslack v. Mayers, 26 N. J. Law, 284.

No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it. Paradine v. Jane, Aleyn, 26; Walton v. Waterhouse, 2 W. Saund. 422a, note 2; Brecknock Co. v. Pritchard, 6 Term R. 750. This case was an action upon a

[42] In accord: Hurless v. Wiley, 91 Kan. 347, 137 Pac. 981, L. R. A. 1915C, 177 (1914). See, also, Tode v. Gross, post, p. 1247.

[43] The statement of facts is omitted.

covenant to build a bridge, and keep it in repair: the defendant pleaded that the bridge was carried away by the act of God, by a great and extraordinary flood, although well built and in good repair. The plea was held bad on demurrer.

To the same effect are Bullock v. Dommit, 6 Term R. 650; Phillips v. Stevens, 16 Mass. 238; Dyer, 33a. And there is no relief in equity. Gates v. Green, 4 Paige (N. Y.) 355, 27 Am. Dec. 68; Holtzapffell v. Baker, 18 Ves. 115. Chancellor Walworth, in Gates v. Green, in denying relief in equity against a covenant to pay rent after the destruction of the demised premises, admits the rule to be against natural law, and not to be found in the law of other countries where the civil law prevails; yet says it is firmly established, notwithstanding the struggles of some of the early English chancellors against it.

In Beebe v. Johnson, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518, it was held by Nelson, C. J., delivering the opinion of the court, that the defendant was not excused from performing his covenant to perfect, in England, a patent granted in this country, so as to insure to the plaintiff the exclusive right of vending the patented article in the Canadas, because the power of granting such an exclusive privilege appertained not to the mother country, but to the provinces, and was never granted, except to subjects of Great Britain and residents of the provinces; and the plaintiff and defendant were both American citizens.

The court said, if the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld, as where one covenants it shall rain tomorrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible. 3 Comyn, Dig. 93. If a party enter into an absolute contract, without any qualification of exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the damages; his liability arises from his own direct and positive undertaking.

In Lord v. Wheeler, 1 Gray (Mass.) 282, where a workman had agreed to repair a building for an entire sum, and after the owner had moved in, it was burned up before the repairs were completed, it was held that where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse, or slate his dwelling-house, if the horse dies, or the dwelling-house is destroyed by fire, before the work is done, the performance of the contract becomes impossible, and with the principal perishes the incident. The case was clearly distinguished from the ordinary contract of one to erect a building upon the lands of another, performing the labor and supplying the materials therefor; where, if before the building is com-

pleted or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder, he must rebuild. The thing may be done, and he has contracted to do it. Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Brumby v. Smith, 3 Ala. 123; 2 Pars. Cont. 184; 1 Chit. Cont. 568.

No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so—to do everything necessary for that purpose.

The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible.

The case of a bailment of an article—locatio operis faciendi—is not analogous to the case before the court; there, if the article intrusted to the workman is lost without his fault, the owner sustains the loss; not because he is the owner, but because the contract of bailment is well defined by the law; there is no express agreement to return the article to the owner in a finished state; but the agreement is an implied agreement, a duty imposed by the law upon a bailee, because the chattel has been bailed to him, to use his best endeavors to protect the bailment from injury. Parsons states the obligation of the workman to be, to do the work in a proper manner, to employ the materials furnished in the right way. These obligations grow out of the act of bailment; they are its legal consequences, and the law declares them

to be so, not because the parties have actually so stipulated, but because they are equitable and fair; and in the absence of express agreement such will be implied.

The case of Menetone v. Athawes, 3 Burrow, 1592, was relied upon by defendants' counsel to show that when the failure to perform the contract was not the fault of the contractor, he can recover. It was the bailment of a ship, to be repaired while in the shipwrights' dock, for the use of which the owner paid £5. The vessel was burned when the repairs were nearly completed; the action was for these repairs. It was like the case of Lord v. Wheeler, before cited. The right to recover was put upon the ground that the plaintiff was not answerable for the accident, which happened without his default, unless there had been a special undertaking; that this liability did not grow out of the law of bailments.

The cases of Trippe v. Armitage, 4 Mees. & W. 689; Woods v. Russell, 5 Barn. & Ald. 942; Clarks v. Spence, 4 Adol. & E. 448,—have no application; they are all cases arising under the bankrupt laws, involving the question when, under the circumstances of each case, the property in an incomplete chattel in process of manufacture passed out of the bankrupt, so as not to belong to his assignees. They are inapplicable, because the rights of the parties to this suit do not turn upon the question whether the property in an incomplete building is in the owner of the land or the builder, or whether the owner would derive a partial benefit from partial performance, but upon what was the express contract between the parties. The question upon whom the loss is to fall, occasioned by an inevitable accident, is not to be settled by determining what is equitable, what is right, or by the application of the maxim, res perit domino, or by any nice philosophical disquisitions whether the owner or the builder shall bear the loss. These considerations—this maxim—have their full application in cases where the rights of the parties have not been fixed by contract, but are to be settled by the law upon facts of the case; where resort is to be had to an implied contract, to a legal obligation raised by the law out of the natural equities of the case, in the absence of an express agreement.

Neither the destruction of the incomplete building by a sudden tornado, nor its falling by reason of a latent softness of the soil which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete the building for the specified price; it can still be done, for aught that was opened to the jury as a defense, and overruled by the court.

The whole defense was properly overruled, because it did not show the performance of the covenant impossible, or any lawful excuse for non-performance of the contract.

I am also of opinion that the damage occasioned by the destruction

of the building by the gale of wind must be borne by the defendants, for the reasons before given, and that the circuit court be advised accordingly.[44]

WHITMAN v. ANGLUM.

(Supreme Court of Errors of Connecticut, 1918. 92 Conn. 392, 103 Atl. 114.)

Action by Benjamin Whitman against Jerry F. Anglum. Judgment for plaintiff, and defendant appeals. No error.

On the 5th day of March, 1914, the plaintiff and defendant entered into a contract in writing whereby the plaintiff agreed to purchase, and the defendant agreed to sell, at least 175 quarts of milk each day from April 1, 1914, to April 1, 1915. The contract contained the following: "The said Whitman is to come and get the milk at No. 1 Wawarme avenue, in the city of Hartford."

The premises of the defendant are known as No. 1 Wawarme avenue. On the 23d day of November, 1914, by an order of the commissioner of domestic animals for the state, all the defendant's cattle and products of his farm were quarantined. The defendant was quar-

[44] Increased and unexpected difficulty or expense was held to be no excuse in the following cases: Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762 (1864); Stees v. Leonard, 20 Minn. 494, Gil. 448 (1874), quicksand encountered; Porto Rico Sugar Co. v. Lorenzo, 222 U. S. 481, 32 Sup. Ct. 133, 56 L. Ed. 277 (1912), broken machinery; Motschman v. U. S., 47 Ct. Cl. 373 (1912); Carnegie Steel Co. v. U. S., 240 U. S. 156, 36 Sup. Ct. 342, 60 L. Ed. 576 (1915), performance required the discovery of a new process, which was in fact discovered too late to perform on time; Harley v. Sanitary Dist. of Chicago, 226 Ill. 213, 80 N. E. 771 (1907), frozen ground; Ptacek v. Pisa, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537 (1907); Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29 (1910), landslide; John Cowan, Inc., v. Meyer, 125 Md. 450, 95 Atl. 18 (1915), rock encountered in excavating; Carter v. Root, 84 Neb. 723, 121 N. W. 952 (1909), rains; Transparent Rubber Works v. International Glass Co., 92 N. J. Law, 461, 105 Atl. 299 (1918), lack of manufacturing facilities; Corona Coal & Coke Co. v. Dickinson, 261 Pa. 589, 104 Atl. 741 (1918), coal vein became thinner and more difficult to work; Kingsville Cotton Oil Co. v. Dallas Waste Mills (Tex. Civ. App.) 210 S. W. 832 (1919), failure of a power company to supply power used in manufacturing; Marx v. Kilby Locomotive & Machine Works, 162 Ala. 295, 50 South. 136, 136 Am. St. Rep. 24 (1909); Brown v. Ehlinger, 90 Wash. 585, 156 Pac. 544 (1916), injunction prevented use of rock crusher at the place expected.

Where a contractor agrees to construct according to certain plans and specifications, he is not excused merely because the plans turn out to be unsuitable or difficult. Magnan Co. v. Fuller, 222 Mass. 530, 111 N. E. 399 (1916); Rowe v. Inhabitants of Peabody, 207 Mass. 226, 93 N. E. 604 (1911); Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, 101 N. E. 162, 49 L. R. A. (N. S.) 922 (1913). Cf. Pine Bluff Hotel Co. v. Monk & Ritchie, 122 Ark. 308, 183 S. W. 761 (1916).

Sickness is no excuse, the performance not being personal. West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635 (1908); Gem Knitting Mills v. Empire Printing & Box Co., 3 Ga. App. 709, 60 S. E. 365 (1908).

Financial stringency or bankruptcy is no excuse. Board of Commerce of Ann Arbor, Mich., v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486 (1915); Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002 (1910); Pratt v. McCoy, 128 La. 570, 54 South. 1012 (1911).

antined; and he was not allowed to go from the premises. Shortly after the quarantine order, all the cows on the farm were killed. The quarantine was intended as far as possible to prevent all persons and animals from going on or off the premises, as well as to prevent the removal of products of all kinds that might carry infection of the "hoof and mouth disease" then prevalent among the defendant's cattle. From November 22, 1914, the defendant failed to furnish or offer to furnish milk until March 13, 1915. From a judgment in favor of the plaintiff, the defendant has appealed.

SHUMWAY, J. (after stating the facts as above). This was an absolute and unconditional undertaking by the defendant to sell and deliver milk daily of the specified quality and amount. The defendant's claim is that he was excused from the performance of the contract by reason of the quarantine, which made it illegal for him to leave his premises and carry away any products of his farm or any articles that might carry infection. The quarantine order did not make it illegal to deliver milk, nor make it illegal for the defendant to procure its delivery.

This much is conceded. But the defendant contends that the clause in the contract, to wit, "The said Whitman is to come and get the milk at No. 1 Wawarme avenue," is an essential part of the contract, and, as delivery was to be made at the place named, therefore delivery under the terms of the contract was illegal. There is nothing in the record to show that the defendant could not perform his contract. While it may be true that the plaintiff could not enter the defendant's house or go upon other parts of the premises which were under quarantine, it does not follow that the contract could not be performed substantially if not literally. The contract was not to deliver milk produced on the premises. All that can be said is, the defendant was under a temporary disability to perform his contract. He is not, however, released from the obligations of his contract because it was difficult or impossible to perform them, so long as the performance was not illegal. School District v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Worthington v. Charter Oak Life Insurance Company, 41 Conn. 401, 19 Am. Rep. 495.

There is no error. The other Judges concurred.

THE RICHLAND QUEEN.

RICHLAND S. S. CO. v. BUFFALO DRY DOCK CO.

(Circuit Court of Appeals of the United States, 1918. 254 Fed. 668, 166 C. C. A. 166.)

Libel by the Buffalo Dry Dock Company against the steamship Richland Queen, her engines, etc., claimed by the Richland Steamship Company, together with a libel by the Richland Steamship Company against

the Buffalo Dry Dock Company. From decrees for the Dry Dock Company, the Steamship Company appeals. Affirmed.

WARD, Circuit Judge. This is an appeal from a decree of Judge Hazel in favor of the Buffalo Dry Dock Company for the reasonable cost of repairs to the steamer Richland Queen, and dismissing the cross-libel of the Richland Steamship Company for damages for loss of the use of the vessel due to unreasonable delay in making the repairs.

September 5, 1916, the steamer was sent to the Dry Dock Company's yard, and remained there until December 5th. No express contract for the repairs was made, but the reasonable value of the use of the dry dock and of the repairs is admitted to have been $39,984.08. The Steamship Company, in order to get possession of its vessel, paid $30,000 to the Dry Dock Company without prejudice, and gave a stipulation for the balance, and in its cross-libel alleged that the repairs should have been completed by October 9, 1916, and that it was deprived of the use of its steamer during the remainder of the season to November 13th, or 37 days, at the reasonable rate of $500 a day, aggregating $18,500.

The Dry Dock Company kept an open shop, and justified the delay by the fact that a strike of its workmen began October 14, 1916, without grievance or warning, which prevented by intimidation and violence old hands and new hands from working.

At the trial the only contention was as to the damages for delay, viz. whether the Steamship Company was entitled to a decree for $18,500, less the unpaid balance of the Dry Dock Company's bill of $9,984.08.

The working day in the Buffalo shipyards at the time in question was nine hours, with a half holiday on Saturday during the summer months, while some competing yards on the Lakes required a nine-hour, and some a ten-hour, day.

October 14, 1916, a committee of workmen demanded of the Dry Dock Company an eight-hour day without reduction of pay, which the company refused, and notified the men that thereafter they must work a straight nine-hour day for six days in the week. As a consequence 80 to 90 per cent. of the men left the yard, and although the company did its best to secure an adequate force of workmen, it was not able to do so. The strike involved no violence, although picketing was kept up in the neighborhood of the yard, and there was much persuasion of both old and new hands. The men gradually came back between November 15th and December 2d, without any change in the hours of labor, and there has been no labor trouble since that time.

Judge Hazel was of opinion that the Dry Dock Company, in view of all the circumstances, made the repairs to the steamer in a reasonable time, and was not liable under the decision of the Court of Appeals of the state of New York in D., L. & W. R. R. Co. v. Bowns, 58 N. Y. 573. In that case, however, there was an agreement to deliver

coal within a fixed time, with an express exception of interference by strikes. No time was fixed in the case under consideration for making the repairs, so that the obligation of the Dry Dock Company was to make them within a reasonable time, and there was no exception of strikes. The question, therefore, is simply whether the delay complained of was reasonable or unreasonable, not in view of the circumstances existing at the time the contract was made, but in view of the circumstances existing when the contract was being performed. Empire Transportation Co. v. P. & R. R. R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Hick v. Rodoconachi, 2 Q. B. D. 626.

The Court of Appeals of the state of New York has held that a peaceable strike of the employer's servants is no defense to a claim for delay (Blackstock v. New York & Erie R. R. Co., 20 N. Y. 48, 75 Am. Dec. 372), while a strike with violence is a defense (Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837. The employer in each of these cases was a common carrier, but, as the recovery sought was for damages caused by delay in delivery, the decisions are applicable to the situation under consideration, because common carriers are not insurers of prompt delivery, but only liable for ordinary care and diligence. The duty is the same as in the present case, viz. the performance in a reasonable time in view of all the circumstances.

We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike. The question, however, in each case is the same, whether the conduct of the employer was reasonable. A peaceable strike upon frivolous grounds, which the employer did all he could to prevent, should be a defense against a claim for delay. On the other hand, a violent strike on justifiable grounds, which the employer either fomented or unreasonably resisted, ought to be no defense. Of course, the employer in either case could end the strike by surrendering. We are not disposed to differ with Judge Hazel's finding that the Dry Dock Company's performance was reasonable in view of the strike.

Decree affirmed.[45]

[45] See, also, Empire Trans. Co. v. Philadelphia & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623 (1896); Geismer v. Lake Shore & M. S. R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886); Pittsburg, C. & St. L. R. Co. v. Hollowell; 65 Ind. 188, 32 Am. Rep. 63 (1879); Hulthen v. Stewart, [1903] A. C. 389. Where the defendant contracted to complete the work by a specific date, he is not ordinarily excused in case of delay caused by a strike. Budgett v. Binnington, [1891] 1 Q. B. 35; Barry v. U. S., 229 U. S. 47, 33 Sup. Ct. 681, 57 L. Ed. 1060 (1913); Morse Dry Dock & Repair Co. v. Seaboard Trans. Co., 161 Fed. 99, 88 C. C. A. 263 (1908); Koski v. Finder, 176 Ill. App. 284 (1913).

Contracts frequently provide that the contractor shall be excused by events such as fire, accident, strikes, war, and "other causes beyond the control" of the contractor. This provision is given a reasonable application, and the

MANTON, Circuit Judge (dissenting).[46] * * * And what is a reasonable time must be determined by what the parties had in mind when the contract was made, and this must be judged by the circumstances which surrounded the parties at the time the contract was made, rather than by the circumstances and conditions which subsequently arose, and in this connection knowledge which the appellee had as to its unsettled condition of labor, or the prospect of a strike, could not be locked up in the mind of the appellee, and should have been disclosed to the owners of the vessel; for it is true that the owner of the vessel, without knowledge, could reasonably have in mind that the work would be done within a reasonable time, such as normal conditions in the yard would permit. It was within the power of the appellee to disclose such information, and, indeed, to make it one of the conditions of accepting the work. Even where labor trouble is not anticipated, such provisions are frequently put in contracts. D., L. & W. v. Bowns, 58 N. Y. 573. * * *

Hardship, expense, or loss to the party performing his contract, or anything short of impossibility of performance, will not excuse a breach of the contract. In my opinion there has been a breach here to the damage of the libelant, and it should have a decree on the cross-libel.

MINERAL PARK LAND CO. v. HOWARD et al.

(Supreme Court of California, 1916. 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1.)

Action by the Mineral Park Land Company against P. A. and C. H. Howard. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for $3,650. The appeal is on the judgment roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco, in South Pasadena, Los Angeles county. The defendants had made a contract with the public authorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel and

promisor is more likely to be excused. See Davison Chemical Co. of Baltimore County v. Baugh Chemical Co. of Baltimore County, 133 Md. 203, 104 Atl. 404, 3 A. L. R. 1, with note, page 21 (1918); Moore & Tierney v. Roxford Knitting Co. (D. C.) 250 Fed. 278 (1918); Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co. (D. C.) 244 Fed. 250 (1917); Metropolitan Water Board v. Dick, [1918] A. C. 119; Wilson & Co. v. Tennants, [1917] A. C. 495; Peter Dixon & Sons v. Henderson, [1919] 2 K. B. 778; Ducas Co. v. Bayer Co. (Sup.) 163 N. Y. Supp. 32 (1916); Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872 (1894).

[46] Only a small part of the dissenting opinion is here printed.

earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately 114,000 cubic yards. Defendants agreed to pay 5 cents per cubic yard for the first 80,000 yards, the next 10,000 yards were to be given free of charge, and the balance was to be paid for at the rate of 5 cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of $2,506.55, of which only $900 had been paid, leaving a balance of $1,606.55 due. The findings support plaintiff's claim in this regard, and there is no question of the propriety of so much of the judgment as responds to the first count. The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards.

It alleged that the total amount of earth and gravel used by defendants was 101,000 cubic yards, of which they procured 50,869 cubic yards from some place other than plaintiff's premises. The amount due the plaintiff for this amount of earth and gravel would, under the terms of the contract, have been $2,043.45. The count charged that plaintiff's land contained enough earth and gravel to enable the defendants to take therefrom the entire amount required, and that the 50,869 yards not taken had no value to the plaintiff. Accordingly the plaintiff sought, under this head, to recover damages in the sum of $2,043.45.

The answer denied that the plaintiff's land contained any amount of earth and gravel in excess of the 50,131 cubic yards actually taken, and alleged that the defendants took from the said land all of the earth and gravel available for the work mentioned in the contract.

The court found that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of 10 or 12 times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantageously. It was not "advantageous or practical" to have taken more material from

plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was apparently thought to be governed by the principle—established by a multitude of authorities—that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. 1 Beach on Contracts, § 217; Klauber v. S. D. S. C. Co., 95 Cal. 353, 30 Pac. 555; Wilmington Trans. Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705; The Harriman, 9 Wall. 172, 19 L. Ed. 629.

It is, however, equally well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. 1 Beach, Contr. § 217; 9 Cyc. 631. Thus, where the defendants had agreed to pasture not less than 3,000 cattle on plaintiff's land, paying therefor $1 for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of 3,000 agreed to be pastured. Williams v. Miller, 68 Cal. 291, 9 Pac. 166. Similarly, in Brick Co. v. Pond, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than 2,000 tons of clay every year, paying therefor 25 cents per ton, the court held that the lessees were not bound to pay for 2,000 tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In Ridgely v. Conewago Iron Co. (C. C.) 53 Fed. 988, the holding was that a mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefore a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the land does not contain the stipulated quantity. Brooks v. Cook, 135 Ala. 219, 34 South. 960; Muhlenberg v. Henning, 116 Pa. 138, 9 Atl. 144; McCahan v. Wharton, 121 Pa. 424, 15 Atl. 615; Boyer v. Fulmer, 176 Pa. 282, 35 Atl. 235; Bannan v. Graeff, 186 Pa.

648, 40 Atl. 805; Gribben v. Atkinson, 64 Mich. 651, 31 N. W. 570; Blake v. Lobb's Estate, 110 Mich. 608, 68 N. W. 427; Hewitt Iron M. Co. v. Dessau Co., 129 Mich. 590, 89 N. W. 365; Diamond I. M. Co. v. Buckeye I. M. Co., 70 Minn. 500, 73 N. W. 507.

We think the findings of fact make a case falling within the rule of these decisions. The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it.

"A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." 1 Beach on Contr. § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth, and gravel.

On the facts found, there should have been no recovery on the second count.

The judgment is modified by deducting therefrom the sum of $2,-043.45, and, as so modified, it stands affirmed.[47]

NORTH GERMAN LLOYD v. GUARANTY TRUST CO.

(Supreme Court of the United States, 1917. 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960.)

Mr. Justice HOLMES delivered the opinion of the court:

This writ was granted to review two decrees that reversed decrees of the district court, dismissing libels against the steamship Kronprinzessin Cecilie. 238 Fed. 668, 151 C. C. A. 518; 228 Fed. 946,

[47] See critical note in L. R. A. 1916F, 1. In Clarksville Land Co. v. Harriman, 68 N. H. 374, 44 Atl. 527 (1895), the defendant's duty to float logs down a stream was held discharged when the water was rendered insufficient by drouth. But in Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648 (1916), the defendant's duty to furnish pasturage was held not discharged by a drouth that destroyed the grass, and in Northern Irr. Co. v. Watkins (Tex. Civ. App.) 183 S. W. 431 (1916), a drouth was held no excuse for failure to supply water for irrigation. Cf., also, Blackburn Bobbin Co. v. Allen, [1918] 2 K. B. 467, 119 L. T. 215, 3 A. L. R. 11.

965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1,892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 304, Americans; and 2 or 3 from Italy, Belgium, Holland, etc. She continued on her voyage until about 11:05 p. m. Greenwich time, July 31, when she turned back; being then in 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich, and distant from Plymouth about 1,070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia (July 28), that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia; and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless to the master: "War has broken out with England, France, and Russia, Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 p. m. August 2, and 1 a. m. August 3, and would have delivered the gold destined for England, to be forwarded to London by 6 a. m., August 3. On August 1st, at 9:40 p. m., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered for the

seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3, Germany was at war with France, and at 11 p. m., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, e. g., The Prinz Adalbert, L. R. [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers, or people," other exceptions necessarily are to be implied; at least, unless the phrase "restraint of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like Paradine v. Jane, Aleyn, 26, 82 Eng. Reprint, 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed. Baily v. De Crespigny, L. R. 4 Q. B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. Taylor v. Caldwell, 3 Best & S. 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. Lakeman v. Pollard (1857) 43 Me. 463, 69 Am. Dec. 77.[48] The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See Mitsui & Co. v. Watts, W. & Co. [1916] 2 K. B. 826, 845; The Styria v. Morgan, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. The Teutonia, L. R. 4 P. C. 171; The San Roman, L. R. 5 P. C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers, the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. Oliver v. Maryland Ins. Co., 7 Cranch, 487, 493, 3 L. Ed. 414; Craig v. United Ins. Co., 6 Johns. (N. Y.)

[48] Also Lawrence v. Twentiman, Rolle Abr. 450 (G) 10 (1611). Cf. Hall v. Wright, El. Bl. & El. 746 (1858); Dewey v. Alphena School Dist., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206 (1880).

226, 250, 253, 5 Am. Dec. 222. See also British & F. M. Ins. Co. v. Sanday [1916] A. C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture, it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office, if not a binding command, at least shows that if the master had remained upon his course one day longer, and had received the message, it would have been his duty as a prudent man to turn back. But if he had waited till then, there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form, and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of The Styria, supra, although not strictly in point, tends in the direction of the principles that we adopt.

Decree reversed.[49]

Mr. Justice PITNEY and Mr. Justice CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the circuit court of appeals, 238 Fed. 668.[50]

[49] Cf. Watts & Co. v. Mitsui & Co. [1917] A. C. 227; Horlock v. Beal [1916] A. C. 486.

[50] *Effect of War on Pre-existing Contracts.*—The outbreak of war may make performance illegal, or the government acting under its war powers may directly or indirectly prevent performance. In such cases the contractual duty is terminated. Zinc Corp. v. Hirsch, [1916] 1 K. B. 541 (with note in L. R. A. 1917C, 662); Metropolitan Water Board v. Dick, [1918] A. C. 119, Ann. Cas. 1918C, 390, 27 Yale L. Jour. 953; Moore & Tierney v. Roxford

CHAPTER V

DISCHARGE OF CONTRACT

SECTION 1.—RELEASE AND COVENANT NOT TO SUE

SIR WILLIAM DRURY'S CASE.

(In the Common Pleas, 1583. Cro. Eliz. 14.)

J. S. makes an obligation, dated and delivered the first of May; and upon the first of June following, the obligee maketh a release to the obligor, bearing date the first of March; and delivered the first of June, by which he releaseth all actions ab origine mundi until the date of the release. And all the justices were of opinion, that the obligation was not released.

BRADEN et al. v. WARD.

(Supreme Court of New Jersey, 1880. 42 N. J. Law. 518.)

A judgment for $1,941.89 had been obtained, and this was a proceeding for the enforcement of that judgment. The judgment debtor had paid $1,200 to the creditor in satisfaction of this judgment and had been given a release under seal.

REED, J.[1] * * * They contend further, however, that there has been no satisfaction of this judgment. This contention is based upon the fact that Braden received only $1,200 for a judgment for $1,941,

Knitting Co. (D. C.) 250 Fed. 278, 28 Yale L. Jour. 399 (1918); Woodfield S. S. Co. v. Thompson, 36 T. L. R. 43 (1919).

"*Economic Unprofitableness*" caused by war conditions is no excuse for nonperformance. Columbus Ry. Light & Power Co. v. City of Columbus, 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669, 6 A. L. R. 1648 (1919), contract to operate street cars for 25 years at a five-cent fare; City of Moorhead v. Union Light, Heat & Power Co. (D. C.) 255 Fed. 920 (1918); Berthoud v. Schweder & Co., 31 T. L. R. 404 (1915), defendant guaranteed a minimum of commissions, and then war closed the exchange; Assoc. P. C. Mfrs. v. Cory, 31 T. L. R. 442 (1915), danger of loss and extra expense due to submarines; Piaggio v. Somerville, 119 Miss. 6, 80 South. 342 (1919), same; Leiston Gas Co. v. Leiston, [1916] 2 K. B. 428, city bound to pay for minimum amount of gas, even though forbidden to burn street lights; Blackburn Bobbin Co. v. Allen, [1918] 2 K. B. 467, 3 A. L. R. 11, 119 L. T. 215, shipment by the Baltic sea impossible, but expensive shipment by rail from Finland through Sweden remained possible; Dixon v. Henderson, (K. B.) 117 L. T. 636 (1917); Wilsons v. Tennants (C. A.) 114 L. T. 878, [1917] 1 K. B. 208 (1917). See, further, notes in L. R. A. 1916F, 10, 71; Ann. Cas. 1918A, 1, 14; 3 A. L. R. 1, 21.

[1] The facts have been restated and part of the opinion has been omitted.

and the rule is invoked that the payment of a less sum will not satisfy a debt. Cumber v. Wane, 1 Smith's Lead. Cas. 439; Daniels v. Hatch, 21 N. J. Law, 391, 47 Am. Dec. 169.

One of the exceptions to this rule is when the payment is acknowledged by a release under seal. "But if the obligee or feoffee do at the day receive a part, and thereof make an acquittance, under his seal, in full satisfaction of the whole, it is sufficient by reason of the deed amounteth to an acquittal." Co. Litt. 212b.

There was such an acquittal given by Braden to Ward & Rutherford.

The relators contend, again, that the character of a sealed instrument has been so changed by the act of 1875, (Rev. p. 387, § 52,) that the acquittance has lost its common-law signification.

The act reads, that "In every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed."

I do not think this act aids the relators. If this statute includes within its operation sealed instruments like the release attacked, and it were permissible to inquire into its consideration, I do not see how it would invalidate this acquittance.

This act received a construction in the case of Aller v. Aller, 40 N. J. Law, 449. It was in that case held that the design of the act was not to change the character of a sealed instrument not shown to be fraudulent or illegal. It was held that a voluntary gift made under seal was enforceable—that in sealed instruments where it was evident no consideration was intended, the absence of a consideration was not essential.

By the same reasoning, when it appears that the consideration which the parties intended to pass, actually did pass, the instrument is valid. That is the admitted fact concerning the consideration for this release.

But the act was never intended to operate upon, and its terms do not include a release under seal. This release is not a sealed instrument upon which an action is brought, nor upon which a set-off is founded. This seems too obvious for discussion.

If any authority for such a view is requisite, it is found in the construction placed upon it by the courts of New York, whence this act comes.

It is found set out in the opinion in the case of Calkins v. Long, 22 Barb. (N. Y.) 99, where the act is construed, and also in the case of Gilleland, Ex'r, v. Failing, 5 Denio (N. Y.) 308.

In Stearns v. Tappin, 5 Duer. (N. Y.) 294, it was expressly held that the statute did not apply to a release under seal.

STIEBEL et al. v. GROSBERG.

(Court of Appeals of New York, 1911. 202 N. Y. 266, 95 N. E. 692, 36 L. R. A. [N. S.] 1147, Ann. Cas. 1912D, 1305.)

Action by Samuel J. Stiebel and others against John Grosberg. From a judgment of the Appellate Division (137 App. Div. 275, 121 N. Y. Supp. 923) affirming a judgment for plaintiffs, defendant appeals. Reversed and remanded.

HAIGHT, J.[2] This action was brought to recover the amount of a promissory note executed by the defendant on the 31st day of December, 1906, in which he promised to pay to the plaintiffs on demand the sum of $37,372.87, with interest. The defense interposed by the defendant was a written release, signed, sealed, and delivered by the plaintiffs to him on the 31st day of December, 1907. A reply was served by the direction of the court, in which the plaintiffs alleged that the release was given or intrusted to the defendant with the understanding that it was not to have a legal inception or effect as a release, or as a delivery, and was to be returned upon demand. There was no allegation in the reply to the effect that the release was delivered conditionally to become operative in case the defendant should be forced into bankruptcy; and, in case he was not adjudged a bankrupt, that the release should be returned to the plaintiffs.

Upon the trial of the case after the jury had been impaneled, the counsel for the defendant moved the court for judgment on the pleadings, thus bringing up for the determination of the court the question as to whether the reply contained any allegations that would nullify the release. The court denied the defendant's motion, and an exception was taken. Thereupon the plaintiffs' counsel opened his case to the jury, stating what he proposed to prove relating to the release, and then the defendant's counsel again moved for judgment upon the opening, which motion was also denied and exception taken. Thereupon one of the plaintiffs was sworn as a witness, and gave testimony under the objection and exception of the defendant, to the effect that the defendant had applied to him for a release, stating, in substance, that he had been sick and had lost all that he had; that one of his creditors had commenced action against him; that he could not pay and would be compelled to go into bankruptcy unless he could stave it off; that he considered the plaintiffs' claim a debt of honor which he would pay when he was able to do so; that he wanted a release which he would only use provided he was forced into bankruptcy; if he did not have to go through bankruptcy, he would return it. The plaintiffs then called the defendant as a witness, and showed from him that he had not been forced into bankruptcy, and then rested. The defendant of-

[2] Parts of the opinion are omitted.

fered no testimony in his own behalf, but moved for a direction of a verdict in his favor, "on the ground that the release is conclusive upon the parties, being a deed executed by the plaintiffs and now shown to have been duly delivered. It was turned over as a valid instrument at the time it was delivered and could not be accompanied by any condition resting in parol, and it was not pleaded in the reply that there was any parol condition in regard to the delivery." The motion of the defendant was denied and exception taken, and a verdict was directed in favor of the plaintiffs for the amount of the note, with interest, to which an exception was also taken.

The questions thus presented are:

First. Can a written release under seal be shown to have been delivered conditionally upon the happening of an event in the future upon an oral agreement that it should be returned in case the event did not happen?

Second. Was the conditional delivery properly pleaded in plaintiffs' reply?

At common law the seal to a written instrument was conclusive evidence of a sufficient consideration, and its conclusive character could not be changed by parol testimony. This rule of the common law, however, was modified by the statute (2 R. S. 406, § 77), which is now embraced in our Code of Civil Procedure, § 840, which provides that a seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed. Neither a receipt nor a release is a contract or an executory instrument. They are merely declarations or admissions in writing, and consequently it was held that the modification of the statute with reference to seals upon executory instruments does not extend to releases, which, when under seal, continue to be conclusive evidence of a sufficient consideration. Gray v. Barton, 55 N. Y. 68-71, 14 Am. Rep. 181; Ryan v. Ward, 48 N. Y. 204-208, 8 Am. Rep. 539.

For upwards of a century, or from the case of Fitch v. Sutton, 5 East, Rep. 230, down to the cases above cited, it has been repeatedly held that the giving of a receipt in full payment by a creditor of an undisputed account or claim does not conclude him from recovering the balance, although the receipt was given with knowledge and there was no error or fraud. The reason for so holding was that the receipt, not being under seal, was not conclusive upon the question of consideration; and, upon it appearing that there was no consideration for the receipt, it became of no binding force. Of course, this rule has no application to claims or accounts, which are in dispute, in which the parties agree upon a compromise, or where a receipt is given for unliquidated demands. Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Kellogg v. Richards, 14 Wend. 116. It therefore follows that liquidated and undisputed claims or accounts can be discharged by pay-

ment, or by the creditor executing a release under seal, by which he precludes himself from attacking the consideration for the release.

A release, however, must be delivered in order to become effective. The delivery is a separate, independent act from that of executing it. The same is true with reference to a deed of real estate. It has to be delivered in order to pass title and the right of possession of lands. The effect of a delivery of a deed cannot be changed by parol testimony. Hamlin v. Hamlin, 192 N. Y. 164, 84 N. E. 805. The reason for this rule is that the title and right of possession passes to the grantee upon delivery, and no person would be secure in his title and possession of real estate if it could be destroyed by oral testimony. The appellant claims that the same rule should apply to the delivery of a release; that the effect of such a delivery cannot be subsequently changed by pârol testimony. Our attention has not been called to any case in this court in which this precise question has been decided.

In the case of Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127, a question arose upon a finding of a contract for the purchase and sale of lumber on credit, accompanied by an oral understanding of the parties that the delivery should be contingent upon satisfactory reports of commercial agencies as to the pecuniary responsibility of the plaintiff. In that case we have a writing which is in form a complete contract which has been delivered upon a parol conditiòn that it was not to become binding until the happening of a future event that had not occurred, and it was held that the condition might be proven by parol.

In the case of Blewitt v. Boorum, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600, the action was brought to obtain an accounting, and for damages by reason of the violation of a contract, under seal, entered into between the parties in relation to the right to manufacture and sell a temporary binder for books. The defendants admitted the execution of the contract, but alleged that it had been delivered upon the parol condition that it was not to operate as a contract until the plaintiff had acquired the interest of a third person, which it is alleged he failed to acquire. Upon the trial oral evidence showing the condition and failure to perform was received, and the court found the facts accordingly. The question brought up for review was as to the competency of such evidence, and it was held that the contract was not required to be under seal, and that the evidence was competent. * * *

Attention has been called to the common-law effect of a seal, and to the fact that the rule has not been changed by statute so far as releases are concerned. A release or receipt, however, is perfectly good without a seal, provided the holder can show that full payment has been made therefor. The seal is only necessary when the payment of adequate consideration is questioned. With a delivery of a deed of real estate the rights of parties change. The grantor parts with his title and possession, and the grantee is vested with title and the right to

immediate possession. In the acknowledgment of the payment of a claim or the delivering of a release therefrom, the change that takes place between the parties is entirely different. If the release be delivered without consideration, the maker receives nothing and only parts with his right to prosecute the claim. The person receiving the release receives no additional property right, but merely is relieved from a claim that might be prosecuted against him. The reasons, therefore, which exist with reference to the delivery of deeds of real estate, do not exist with reference to the delivery of releases. The act of executing releases is separate and distinct from acts of delivery. The delivery has to be shown independent of the instrument; and, while parol evidence is incompetent for the purpose of changing or explaining the meaning of the written instrument, we incline to the view that oral evidence may be given for the purpose of showing whether the delivery of the instrument was intended to be absolute or conditional.

With reference to the second question brought up for review, it appears, as we have seen, that the plaintiffs' reply did not specifically allege that the release was delivered conditionally and was to be returned in case the defendant was not forced into bankruptcy. * * *

We think that the reply was defective in the particular mentioned, and that consequently the court erred in its rulings with reference thereto. It follows that for this reason the judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed, etc.

GIBBONS v. VOUILLON.

(In the Common Pleas, 1849. 8 C. B. 483.)

WILDE, C. J.[3] This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part; and the plea, which is pleaded either as a bar to the action generally, or, in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercer; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued; that the defendant was unable immediately to satisfy those debts; that, for the purpose of realizing his effects, it had been deemed advantageous to all the parties interested, that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes to state, that, in pursuance of the agreement, the several persons parties thereto of the second and

[3] The statement of facts and the concurring opinion of Williams, J., are omitted.

third parts, by that indenture gave and granted unto the defendant until May 17th, 1848 (the indenture bearing date May 17th, 1843), full and free license and authority to pass and repass, etc.; and that it was further provided, that, if any of the said persons parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and forever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained should in any such respect be contravened, and of and from all manner of actions, suits, etc., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference herein mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor.

The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar; but it is said, upon the supposed authority of Ford v. Beech, that the only remedy of the covenantee is, by a cross action for damages. Nothing, however, fell from the Court in Ford v. Beech, to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar? By reason of the rule that the right to a personal action once vested, and suspended, by the voluntary act of the party, for however short a time, is precluded and gone forever. It could only be pleaded in bar; for, that is its legal operation. To have allowed the agreement in Ford v. Beech to be pleaded in bar as a release, would have been obviously contrary to the intention of the parties; and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated? Here, we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be pos-

sible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not to sue for a given time enures as a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action—which in the ordinary course would go on to judgment and execution—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity, that, if we hold it to be a release, we must hold it to be a release from the moment of its execution; and that is manifestly contrary to the intention of the parties. To extinguish the debt, would manifestly be to defeat the whole intention of the deed. But upon what assumption is that ground taken? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Co. Litt. referred to by my brother Maule, seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, viz., the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties, that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.

Judgment for the defendant.[4]

[4] In accord, with excellent argument; Y. B. 21 Hen. VII, 23 and 24, 15; 21 Hen. VII, 30, 10.

DOWSE v. JEFFERIES.

(In the Court of Common Pleas, 1594. 1 And. 307.)

Dowse brought action of debt against Jefferies on obligation. The defendant pleaded in bar that the plaintiff by his deed indented since the making of the obligation granted to the defendant that he would not prosecute or molest the said defendant Jefferies by reason of the said obligation before the feast of St. John the Baptist, 1590, and demanded judgment. To this there was a demurrer, and the court adjudged that it was no bar, but rather a covenant of which the defendant could take advantage in his own behalf and not otherwise, and so the words and the intent of the covenant appear to be; for it does not appear that he is never at any time to sue the defendant on this obligation, but that he is not to sue him before a certain day, there being a great difference between these two cases. Where the covenant is like this one, until a certain time only, the damage is not so great as in the case where suit is never to be brought. In the one case damages are not to be recovered except in accordance with the harm that the defendant suffers by the suit's being brought before the proper time, and in the other case for the entire amount of the obligation and other loss sustained by the suit and recovery on the obligation. In the latter case, in order to avoid circuity of action, there is ground for allowing the covenant to be pleaded in bar of the action, but not in the former case; for in such a case it would not accord with either the words or the intent of the party plaintiff.[5]

LACY v. KINNASTON.

(In the King's Bench, 1702. Holt, K. B. 178.)[6]

This case is not stated in the books; but only that it was held by Holt, C. J., that a perpetual covenant never to take any advantage of a deed or covenant, is a release or defeasance of that deed or covenant; as where a man enters into an obligation to another, who covenants never to take any advantage, or to sue him upon that bond; here if afterwards an action of debt should be brought upon it, in such case the obligor may plead this covenant in bar to the action, for the obligee by his covenant hath deprived himself of all the remedy he could

[5] In accord: Thimbleby v. Barron, 3 M. & W. 210 (1838); Aloff v. Scrimshaw, 2 Salk. 573 (1689), "The ground of the decision in this case appears to be that a personal action once suspended by the act of the party is gone forever; therefore the covenant must be either an absolute discharge, or a mere covenant; the former of which, being manifestly repugnant to the intent, shall not be implied." S. c., Ayloffe v. Scrimpshire, Carth. 63, 1 Show. 46. Cf. Leslie v. Conway, 59 Cal. 442 (1881).

[6] Reported more fully in 1 Ld. Raym. 688, Salk. 575.

have upon this bond.[7] But if A. B. and C. D. are jointly and severally bound in a bond to E. F. who covenants never to sue C. D. upon that bond; this is no release or defeasance of the bond, because it doth not discharge the right, only the remedy against C. D. for he still hath a right of action against the other obligor;[8] and therefore if the obligee should bring an action of debt upon this bond against C. D. he is put to his action of covenant against the obligee, upon the covenant entered into.

FORD v. BEECH.

(In the Exchequer Chamber, 1848. 11 Q. B. 852.)

The verdict was entered up as directed in the preceding judgment; and judgment was entered on the record, with a consideratum est, "that the plaintiff take nothing by his said writ, but that he be in mercy, etc., and that the defendant go thereof without day, etc.;" with costs for defendant against plaintiff, and award of execution thereof.

The plaintiff brought error in the Exchequer Chamber; assigning for error, generally, that judgment ought to have been given for the plaintiff; and also that judgment ought to have been given for the plaintiff "by reason of the non-performance by the said William Beech of the promise in the said third count of the said declaration mentioned; that the said finding of the said jury on the said eighth issue joined between" etc. "amounts to a finding in favor of the said John Ford; and that judgment ought to have been given accordingly. That the said finding is imperfect, uncertain, and argumentative, and does not dispose of the whole of the said issue; and that no judgment can be given thereupon, or in respect thereof, or upon the said record and proceedings." That the fifth and sixth pleas "are not, nor is either of them, sufficient to bar the plaintiff from having or maintaining his action as to the causes of action to which those pleas are respectively pleaded. That the said pleas show an accord only, without satisfaction, or with only a partial satisfaction. That the said pleas attempt to set up, as a defence to the causes of action to which they are pleaded, an accord and satisfaction by a stranger to those causes of action. That the said pleas attempt to set up, as an answer to the causes," etc., "the payment of a less sum than the amount which they profess respectively to answer." Joinder.

Parke, B., in this vacation (February 3d), delivered the judgment of the Court.

This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in assumpsit, and

[7] In accord: Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Phelps v. Johnson, 8 Johns. (N. Y.) 54 (1811).

[8] In accord: Dean v. Newhall, 8 T. R. 168 (1799); Walmesley v. Cooper, 11 Adol. & El. 216 (1839).

contained five counts. The first count is upon a promissory note, dated May 28th, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded, to the first count, that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed, between the plaintiff, the defendant and one Alfred Beech, that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200 for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum of £6. 5s. every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the agreement. The plaintiff, in his replication to this plea, traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25; and a verdict was found for the defendant upon the issue joined upon that traverse. And, judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, non obstante veredicto upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted, in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and that the plea, which sets up the agreement in bar of

the present action, is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the Court is, therefore, what is the legal effect of the agreement between the parties, set forth in the plea; that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in Platt v. The Sheriffs of London [Plowd. 35, 36]: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge forever." And in Lord North v. Butts [2 Dyer, 139b, 140a (39)] it is said: "A thing personal or suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in Woodward v. Lord Darcy [Plowd. 184] it is said: "For a personal action once suspended by the act or agreement of the party is always extinct and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text-

books of authority, and recognized and applied through a long course of decision. And in Cheetham v. Ward [1 Bos. & P. 630, 633] it is said by Lord Chief Justice Eyre that the principle is "now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word suspended, used in the agreement, would be contrary to the intention of the parties: and it is a well-approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction.[9] * * *

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was, not to suspend his right of action in the meantime, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to cases where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies; the cases generally referred to in the books being where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be; such as a creditor making his debtor his executor, or a debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue; as to which the authorities are numerous; see Co. Litt. 264b, also Butler's note ib. (209), Woodward v. Lord Darcy [Plowd. 184], Sir J. Nedham's Case [8 Rep. 135a], Dorchester v. Webb [Cro. Car. 372], Wankford v. Wankford [1 Salk. 299], Freakley v. Fox [9 B. & C. 130], 2 Williams on Executors, 1124 [Ed. 4].

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release, note (1) to Fowell v. Forrest [2 Wms. Saunders, 47 gg], for the reason assigned, that the damages to be re-

[9] The discussion of several authorities is here omitted.

covered in an action brought for suing contrary to the covenant would be equal to the debt (Smith v. Mapleback [1 T. R. 441, 446]) or sum to be recovered in the action agreed to be forborne. Accordingly, in Deux v. Jefferies [Cro. Eliz. 352], in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas; it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to sue, and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here; for it never was the intent of the parties to make it a release." And there are other authorities to the like effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect; and, in the modern case of Thimbleby v. Barron [3 M. & W. 210], it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not, before the expiration of ten years, demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord Abinger, C. B., said: "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar:" and Parke, B., said: "The books are full of authorities" against the defendant, and referred to Ayloffe v. Scrimpshire [Carth. 63; 1 Show. 46]: judgment for plaintiff. In 1 Roll. Abr. 939, Tit. Extinguishment (L), plea 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and, if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release. It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release; the covenant in that case therefore went much beyond a mere covenant not to sue.

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid

circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions; Smith v. Mapleback [1 T. R. 441, 446], which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law merchant; see note (c) to Holdipp v. Otway [2 Wms. Saunders, 103b].[10]

The case of Stracy v. The Bank of England [6 Bing, 754] was cited, on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock, to which the plaintiffs were entitled; the defendants insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts; and alleged that the plaintiffs, contrary to their agreement, made the request, for the non-compliance with which they brought their action, before they had done those acts: the defendants therefore contended that such non-compliance was no breach of duty on their part. There was no right of action suspended by the agreement; as it is clear from the case that no request had ever been made to the Bank to transfer the stock, and no means had ever been given to enable the Bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterward: consequently, the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of suspending an action was used, perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of the stock, and to that only. At all events, as a

[10] See Goodrich v. Friedman, infra, p. 942.

decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent with an undoubted principle of law and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, non obstante veredicto, upon the confession and insufficient avoidance in the plea.

Judgment accordingly.[11]

WEST v. JONES.

(Superior Court of Delaware, 1919. 7 Boyce, 509, 108 Atl. 675.)

Action by William H. West against Robert H. Jones on promissory note. On motion for judgment at first term notwithstanding the affidavit of defense filed. Judgment entered for plaintiff.

BOYCE and RICE, JJ., sitting.

Plaintiff on or before the first day of the term to which the process was returnable filed copy of the promissory note, sued on after maturity, with an affidavit of demand, in accordance with Rev. Code 1915, § 4169. The note with the indorsements thereon was in the following words and figures:

$2,500.00 8357

Philadelphia, Pa., May 24, 1919.

Four months after date I promise to pay to the order of myself two thousand five hundred no/100 dollars at office Guaranty Funding Corporation, 1535 Chestnut St. Without defalcation. For value received.

No. ———. Due 9—24—19.

Robert H. Jones,
107 West 9th St. Wilmington, Del.

Indorsements:
Robert H. Jones.
John McClintoch, Jr.
W. H. West.
Daniel A. Ingler,
1215 Market St.

The defendant filed an affidavit of defense, the nature and character of which is:

The defendant on the 24th day of May, A. D. 1919, executed and indorsed a note in the sum of twenty-five hundred dollars ($2,500.00), payable four months after date (being the note in suit), and the said note was delivered by the said defendant to W. A. Benjamin, who was

[11] Cf. cases in note to Good v. Cheesman, infra, p. 986.

expressly authorized and appointed by the said defendant, as his agent to act in and about the discount or sale of the said note, and the said note was in turn delivered by the said W. A. Benjamin to the said plaintiff, and by him discounted; that subsequent thereto the said plaintiff agreed with the said W. A. Benjamin, who was then and there acting as agent for the said defendant, that the said plaintiff would renew the said note at maturity for a further period of four months upon the payment to the said plaintiff of the interest then due and the further sum of two hundred and fifty dollars ($250.00); that prior to the maturity of the said note the said W. A. Benjamin, acting as agent for the said defendant, did tender to the said plaintiff a new note of the said defendant (a copy of which is hereto attached and marked Exhibit A), and did also tender the interest then due and the sum of two hundred and fifty dollars ($250.00) as a consideration for the renewal of the said note, and in accordance with said agreement; that the said plaintiff refused to accept the said renewal note, interest, and the sum of two hundred and fifty dollars ($250.00), and refused to renew the said note.

Plaintiff moved for judgment notwithstanding the affidavit of defense filed.

Boyce, J., delivering the opinion:

The only defense to this action is that it was brought prematurely, because the period for which the note sued upon was to be renewed had not expired when the action was commenced. The question raised must be determined upon the face of the affidavit of defense. An agreement to renew or extend the time of the payment of a promissory note based upon a sufficient consideration would be binding, and if executed it will prevent the collection of the note until the expiration of the period of extension. The oral agreement relied upon in the affidavit of defense is collateral, and being unfulfilled it is no bar to the action. Whatever redress there may be for nonperformance lies in another action. Upon the whole, the affidavit of defense does not disclose a legal defense to the whole or part of the cause of action, necessary to prevent judgment on the affidavit of demand. Rev. Code 1915, § 4169.

Let judgment be entered for the plaintiff for the amount of his demand with interest.

SECTION 2.—SURRENDER AND CANCELLATION

SLADE et al. v. MUTRIE.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 19, 30 N. E. 168.)

Action by George H. Slade and others against James Mutrie on a note. There was a judgment for defendant, and plaintiffs except. Exceptions overruled.

FIELD, C. J. The counsel for the defendant concedes that by the law of this commonwealth the payment of a part of the debt after the whole debt has become payable is not a sufficient consideration to support a promise not under seal to discharge the remainder of the debt. Tyler v. Association, 145 Mass. 134, 137, 13 N. E. 360; Lathrop v. Page, 129 Mass. 19; Grinnell v. Spink, 128 Mass. 25; Potter v. Green, 6 Allen, 442; Harriman v. Harriman, 12 Gray, 341; Brooks v. White, 2 Metc. 283, 37 Am. Dec. 95; Foakes v. Beer, L. R. 9 App. Cas. 605. The judge ruled that, "if the plaintiffs, at the time they received the sum of one hundred and twenty-five dollars from the defendant, and gave him a receipt in full of all demands therefor, surrendered to the defendant the note in suit with the intention that the same should be canceled, and that the debt thereby evidenced should be extinguished, and intended to give to the defendant the balance of the debt, and that the payment made was to be in full for said debt, then the plaintiffs cannot recover on the note." The jury, in returning a general verdict for the defendant, must have found that the note was surrendered by the plaintiffs to the defendant that it might be canceled, and that the plaintiffs intended, by delivering the note to the defendant to give him the note, and discharge the remainder of the debt. For certain purposes a bill of exchange or a promissory note is regarded in this commonwealth not merely as evidence of a debt, but as the debt itself. They may be the subject of a gift, but to constitute a gift there must be a delivery by the owner to the donee, with the intention of passing the title. Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319; Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray, 382; Chase v. Redding, 13 Gray, 418. See Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Pierce v. Bank, 129 Mass. 425, 37 Am. Rep. 371; Taft v. Bowker, 132 Mass. 277; McCann v. Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; Cochrane v. Moore, 25 Q. B. Div. 57; Seminary v. Robbins, 128 Ind. 85, 27 N. E. 341, 12 L. R. A. 506. It follows from this that the delivery of a promissory note by the holder to the maker, with the intention of transferring to him the title to the note, is an extinguishment of the note, and a discharge of the obligation to pay it. Hale v. Rice, 124 Mass. 292; Stew-

art v. Hidden, 13 Minn. 43 (Gil. 29); Ellsworth v. Fogg, 35 Vt. 355; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Jaffray v. Davis, 124 N. Y. 164, 170, 26 N. E. 351, 11 L. R. A. 710.

Exceptions overruled.[12]

LICEY v. LICEY.

(Supreme Court of Pennsylvania, 1848. 7 Pa. 251, 47 Am. Dec. 513.)

Licey and others, administrators of Fretz, brought this action of debt, and declared on a bond, the profert of which was excused by averring possession unlawfully obtained by the obligor, who had torn off the seal.

At the trial before Krause, P. J., the plaintiffs gave in evidence the bond, of which the signature and seal had been torn off. The defendant proved admissions by the obligee that she had given the bond to the obligor to do what he pleased with it.

The court, on the authority of 2 Kent's Com. 439, was of opinion an assignment, or transfer, actually executed, was essential, and directed a verdict for the plaintiff.

Gibson, C. J.[13] There is a ground on which, however, the cause was not ruled below, that is fatal to the judgment. If the defendant's evidence be true, the bond in suit was given up by the obligee to be cancelled, and it was cancelled. Was not the debt, therefore gone? There is a plain and well-founded common-law distinction, in this particular, between things which lie in livery and things which lie in grant. As the former pass by force of the livery, of which the deed is only evidence, they cannot be revested by destroying the instrument, for a right can be dissolved only by the means which created it; but, as the latter exist only by force of the deed, they necessarily cease to exist when it no longer sustains them. So far was this carried in respect to things which depend on a deed, that an accidental destruction of the seal was held, in the earlier cases, to destroy the right, though a different rule prevails at present, by which the donee is allowed to show the truth. But cancellation, eo animo, will now, as it ever has done, destroy any right which stands exclusively upon

[12] In accord: Lanham v. Meadows, 72 W. Va. 610, 78 S. E. 750, 47 L. R. A. (N. S.) 592 (1913); Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176 (1882).

The destruction of the note by the holder with intent to make a gift operates as a discharge. Sullivan v. Shea, 32 Cal. App. 369, 162 Pac. 925 (1916); Darland v. Taylor, 52 Iowa, 503, 3 N. W. 510, 35 Am. Rep. 285 (1879); Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340 (1839); Denunzio v. Scholtz, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529 (1903).

The Negotiable Instruments Law (Mass. St. 1898, c. 533, § 122; Consol. Laws N. Y. c. 38, § 203) now provides that a written renunciation shall discharge a party to a negotiable instrument the same as a surrender of the instrument itself.

[13] Part of the opinion is omitted.

the instrument. Thus a lease for years might have been surrendered by cancellation before the statute of frauds, which now requires it to be done, at least, by a note in writing. But the very case before us is put as an instance of the principle in the last London edition of Sheppard's Touchstone, 70. "And if a deed," it is said—"nay, a bond—be delivered up to the party that is bound by it to be cancelled, and it is so, or if he that hath the deed doth, by agreement between him and the other, cancel the deed by either of these means the deed (provided no estate passed by it) is become void." Even if a bond thus delivered, but not cancelled, come again to the hands of the obligee, though it be valid at law [14] the obligee will be relieved in equity: Cross v. Powel, Cro. Eliz. 483; and see Vin. Abr. Faits, X, 2, 3, 4. These authorities are decisive of the principle. * * *

Judgment reversed, and venire de novo awarded.

ATTORNEY GENERAL v. SUPREME COUNCIL A. L. H.

In re LAW.

(Supreme Judicial Court of Massachusetts, 1910. 206 Mass. 183, 92 N. E. 147.)

Information by the Attorney General, at the relation of the Insurance Commissioner, against the Supreme Council American Legion of Honor, to wind up the affairs of defendant, a fraternal beneficiary association. From a decree disallowing a claim based on a certificate issued to Francis M. Law, claimant appeals. Reversed.

LORING, J. Law's Case (claim 156) is another of the 17 appeals from the decree of October 29, 1909. See Attorney General v. American Legion of Honor (Hall's Case), 206 Mass. 158, 92 N. E. 136.

In this case the member died on June 9, 1902, and on September 22, 1902, the beneficiaries were paid $2,000 and surrendered the certificate for cancellation.

The local collector made an affidavit that after the adoption of bylaw 55 the member paid him "an assessment, or perhaps more than one on the old basis, and that he sent it or them to the defendant at Boston," that it or they were refused, but the member "continued to tender me full payment on every assessment," and on his remittance blanks to the Supreme Secretary "I made a note of this tender."

No evidence to control the facts so testified to was introduced. We think that this was a sufficient protest to preserve the rights of the member and that he is now entitled to share in the emergency

[14] "In debt on obligation the defendant pleaded that the plaintiff delivered the obligation to him in lieu of an acquittance, and that afterwards he lost the obligation and the plaintiff found it; by the whole court the plea was held bad, for such a delivery is only matter in pais and it is necessary to reply to this writ by matter in writing. Quære whether the defendant could have pleaded that it was not his deed, by reason of the second delivery." Y. B. 5 Edw. IV, 4, 10.

fund for the difference between what was paid the beneficiaries and what is now due (see Dunlavy's Case, 206 Mass. 168, 92 N. E. 140, and cases there cited), unless this claim has been released by the surrender of the certificate for cancellation.

It is laid down in Byles on Bills (13th Ed.) 199, that: "It is a general rule of law, that a simple contract may before breach be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration." This was stated in Dobson v. Espie, 2 H. & N. 79, 83, to be an accurate statement of the law. To that effect see Foster v. Dawber, 6 Ex. 839; Leake on Contracts, 654; Addison on Contracts (10th Ed.) 160.

It is true that the surrender of a negotiable instrument operates as a release. Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168; Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Ellsworth v. Fogg, 35 Vt. 355; Draper v. Hitt, 43 Vt. 439, 5 Am. Rep. 292; Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265; Young v. Power, 41 Miss. 197; Stewart v. Hidden, 13 Minn. 43 (Gil. 29). See, also, Simons v. American Legion of Honor, 178 N. Y. 263, 268, 70 N. E. 776. But that rule depends upon the law merchant. Foster v. Dawber, 6 Ex. 839; Cook v. Lister, 13 C. B. (N. S.) 543, 592; Dobson v. Espie, 2 H. & N. 79, 83; Byles on Bills (13th Ed.) 199, 200; Leake on Contracts, 565, 654; Addison on Contracts (10th Ed.) 160.

We are of opinion that the rule applied in Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168, does not apply to common-law contracts.

The sum to which these beneficiaries are now entitled is to be found as follows: From $5,000 with interest to August 12, 1904, there is to be deducted (1) the amount of the difference between the assessments due on the $5,000 basis (without interest where tender was made) and the assessments paid with interest from the several dates on which they were paid to August 12, 1904; and (2) the sum already paid to the beneficiaries.

Decree accordingly.

SECTION 3.—PAROL EXONERATION AND RESCISSION

MARK STEWARD'S CASE.

(In the King's Bench, 1586. 4 Leon. 106.)

An assumpsit before action brought may be discharged by word, otherwise after action brought.

CONIERS AND HOLLAND'S CASE.

(In the King's Bench, 1588. 2 Leon. 214.)

In an action upon the case upon assumpsit, by Coniers against Holland, the defendant pleaded, that after the promise, that the plaintiff had discharged him of it: and by WRAY, Chief Justice. It is a good plea, and so it hath been often ruled, and it was late the case of the Lord Chief Baron, against whom in such an action, such a plea was pleaded, and he moved us to declare our opinions in Serjeant's-Inn: and there, by the greater opinion, it was holden to be a good plea; for which cause, the Court said to Buckley, who moved the case, that the plea is good, and judgment was entered accordingly.

EDWARDS v. WEEKS.

(In the Common Pleas, 1678. 1 Mod. 262.)[15]

Action upon the case. The plaintiff declares, that the defendant, in consideration that the plaintiff would deliver to him such a horse, promised to deliver to the plaintiff in lieu thereof another horse, or five pounds upon request: and avers, that the plaintiff had delivered to the defendant the said horse, and had requested him, &c. The defendant pleads, that the plaintiff, before the action brought, discharged him of that promise, but says not how: to which the plaintiff demurred.

Strode, Serjeant. If he had pleaded a discharge before the request made, the plea had been good without shewing how he discharged him: but after the request once made, a verbal discharge is not sufficient; and he cited the case of Langden v. Stokes, Cro. Car. 384, and the Year Book of 22 Edw. 4, 40 b.

THE COURT agreed and gave judgment for the plaintiff, nisi causa, &c.[16]

EDWARDS v. CHAPMAN.

(In the Court of Exchequer, 1836. 1 Mees. & W. 231.)

Indebitatus assumpsit, in the sum of £200, for the price and value of goods sold and delivered.

Plea, as to the price and value of 850 pairs of trimmings, parcel of the said goods in the said declaration mentioned, to wit, the sum of

[15] S. c. 2 Mod. 259.

[16] "A simple contract may, before breach, be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration." Byles on Bills (13th Ed.) 190.

£180. 12s., parcel &c., that the said goods, parcel, &c., were sold and delivered by the plaintiff to the defendant, in pursuance of a certain contract before then made between the plaintiff and the defendant; and that afterwards, and before the commencement of the suit, to wit, on &c., it was agreed between the plaintiff and the defendant that the said contract should be wholly rescinded and annulled, and the same was then wholly rescinded and annulled accordingly. Verification.

General demurrer, and joinder in demurrer.

Cowling, in support of the demurrer. It is admitted by the plea that the goods were sold and delivered to the defendant, and have been kept by him, and therefore it is quite immaterial whether the contract has been rescinded or not.

R. V. Richards, contra. The cause of action arises from the contract for the sale of the goods, and not from the delivery of them; and if the parties agree to rescind and annul the contract, which the plaintiff by demurring admits to have been the case, no action can be maintained.

PARKE, B. A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction.

Judgment for the plaintiff.[17]

[17] In Foster v. Dawber, 6 Ex. 839 (1851), Baron Parke said: "When the receipt in full was given, it was prima facie evidence against the plaintiff that the amount stated in it was paid. It was not conclusive evidence. * * * Now, it is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation."

In Mayor, etc., v. Butler, 3 Lev. 237, (1685), the court said: "It was argued for the defendant, that a promise by parol may be discharged by parol. Cro. Cha. 383, Langden v. Stokes, Cro. Ja. 483, Hartford v. Pile, and Ibid. 160, the opinion of Justice Haughton, Sty. 8, 2 Leon. 214, so here the first promise is discharged by the account, and the promise thereupon. But the whole Court were contrary; they agreed on a promise merely executory of both parts, as the cases cited before are; any thing may be discharged by parol; as if I promise you 5s. if you will go to Paul's, before you go I may discharge you from the going, and thereby the other shall be discharged from paying the 5s. for no debt was due before the going, nor any thing executed either by the one, or the other: but in the case at Bar there was a debt due and executed in the plaintiffs, and that could not be discharged without a release."

See, also, Tacoma Lumber Co. v. Field, 100 Wash. 79, 170 Pac. 360 (1918).

That a voluntary waiver may be inoperative to discharge a contract duty before breach, and yet may prevent performance from continuing to operate as a condition precedent, see Jobst v. Hayden Bros., 84 Neb. 735, 121 N. W. 957, 50 L. R. A. (N. S.) 501 (1909); Becker v. Becker, 250 Ill. 117, 95 N. E. 70, Ann. Cas. 1912B, 275 (1911).

GARNSEY v. GARNSEY.

(Supreme Judicial Court of Maine, 1917. 116 Me. 295, 101 Atl. 447.)

HALEY, J.[18] An action of assumpsit on a contract in writing of the following tenor:

"Sanford, Maine, May 2, 1898.

"For value received we jointly, but not severally, promise to pay to our mother, Mary J. Garnsey, annually, during her life, an amount equal to the interest paid by the Kennebec Light & Heat Company on $3,800 face value five per cent. bond, maturing in the year 1918.

"F. A. Garnsey.
"A. E. Garnsey."

The action is brought by Mary J. Garnsey, the promisee named in the contract, against Almon E. Garnsey, one of the signers, and Julia A. Garnsey, administratrix of the estate of Fred A. Garnsey, the other joint promisor. The case is before this court upon report. * * *

It is the claim of the defendant Julia A. Garnsey administratrix, that the plaintiff has released her as administratrix of her husband from the contract, even if there was a sufficient consideration when given by the two sons to the mother. She testifies: That at one time the plaintiff told her she did not want her to pay the obligation, "didn't expect me to pay; she didn't need it, and I needn't worry anything about it; she was going to give it to me. She said she was going to give it to Almon; she was giving it to me; she intended to use us just alike: that on several times the plaintiff stated that she did not expect her to pay it, and didn't want her to." Upon the other hand, the plaintiff is positive she never told her she did not expect her to pay anything on it and did not want her to, and that she never said any such thing, and that she did expect it.

The circumstances of the case tend to support the testimony of the plaintiff. But, even if she did say that which Julia A. Garnsey claims she said to her, it was not a release of the estate of Fred A. Garnsey from the obligation that he had signed. It was, at most, if the defendant's version is right, a mere verbal promise without consideration and of no binding effect. In order for it to release the estate of Fred A. Garnsey from the contract made and signed by him, it was necessary to be a promise upon a sufficient consideration. There was no consideration moving from any one to Mary A. Garnsey to release the estate of Fred A. Garnsey from his contract. A mere statement by a creditor that he intends to release, or that he does release, a debtor, there being no consideration moving from any one for the promise, the debt is not thereby discharged. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a suffi-

[18] Part of the opinion is omitted. There was a sufficient consideration for the promise sued on.

cient consideration, but a naked promise to release without consideration is not a discharge. * * *

The mandate must be judgment for plaintiff for $190 annually for the years declared upon, with interest at 5 per cent. on the payments when they became due to the date of the writ, and interest on the total from the date of the writ to the date of judgment of the May term. 1917, to be cast by the clerk.

Judgment for plaintiff as per rescript.[19]

GRAY v. BARTON.

(Court of Appeals of New York, 1873. 55 N. Y. 68, 14 Am. Rep. 181.)

This action was brought to recover the balance of an account alleged to be due from defendant to plaintiff. The facts are sufficiently stated in the opinion.

GROVER, J. The judgment cannot be reversed upon the ground of a compromise between the parties. There was some evidence tending to show that the defendant doubted the correctness of the account rendered by the plaintiff, and that for the purpose of satisfying himself asked to examine his books; and some tending to show that he denied the authority of his wife, by whom the goods had been purchased from the plaintiff, to purchase them upon his credit; but the referee having given judgment for the plaintiff, this court cannot assume that either of these facts was found by him. Besides, the evidence does not show any compromise by the parties either of a demand which was disputed by the defendant, or for the discharge of an admitted indebtedness upon payment by the defendant of a less sum. The evidence proved, and the referee has found that the defendant being indebted to the plaintiff, he proposed to give him the debt; that the latter said a gift would not stand in law; that the plaintiff said if the defendant would

[19] In accord: Pope v. Vajen, 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688 (1889); Maness v. Henry, 96 Ala. 454, 11 South. 410 (1892), a loose. oral statement by the creditor; Sigourney v. Sibley, 21 Pick. (Mass.) 101, 32 Am. Dec. 248 (1838), mere determination not to prosecute the claim; Memphis v. Brown, 20 Wall. 289, 22 L. Ed. 264 (1873), executory accord with conditions unfulfilled; Upper S. J. Canal Co. v. Roach, 78 Cal. 552, 21 Pac. 304 (1889), directors passed a resolution not to sue on the note; Metcalfe v. Kent, 104 Iowa, 487, 73 N. W. 1037 (1898); Sommers v. Myers, 69 N. J. Law, 24, 54 Atl. 812 (1903); George v. Lane, 80 Kan. 94, 102 Pac. 55 (1909). Cf. Linthicum v. Linthicum, 2 Md. Ch. 21 (1849).

In Young v. Power, 41 Miss. 197 (1866), a creditor said to her debtor: "Don't put yourself to any trouble about what you owe me; if I never need it, I will never call on you for it." The creditor died without needing the money, and her executor sued to compel payment and got judgment. The court said: "It appears from the evidence that the declarations of the testatrix, which are relied on as a forgiving of the debt due her by the defendant, were altogether gratuitous, and that the promise was without valuable consideration, and that the forgiving, in terms, was not complete and absolute, but that some further act was requisite to consummate it. The matter, therefore, rested in her discretion, and depended on her mere volition."

give him a dollar that would make it lawful, and then proposed if the defendant would give him a dollar he would give him the entire debt; whereupon the defendant did give the plaintiff a dollar for the purpose of satisfying the whole debt, which the plaintiff accepted, and balanced his books as follows:

Wm. Burton, cr. by cash on account................................	$ 1 00
Gift to balance account...	820 91

And that the plaintiff, for the purpose of carrying out the arrangement gave the defendant a receipt, of which the following is a copy: "Received of William Burton one dollar, in full, to balance all book accounts up to date of whatever name and nature." The referee further found that it was the intention of both parties that the plaintiff, by such acts so done, should and did give to the defendant the whole of said debt for $1; which sum was paid and received for the sole purpose of discharging the entire debt. From which facts the referee deduced the following legal conclusions: That there was no valid compromise or accord and satisfaction of the debt; that it was not a valid gift in law of the debt from the plaintiff to the defendant; that the plaintiff was entitled to recover of the defendant the amount of the debt less the $1 paid. The only construction of the findings of fact is, that a gift of the entire debt by the plaintiff to the defendant was intended to be made, and was made, if the facts were sufficient to constitute a legal gift. No compromise of a disputed demand or of an admitted debt, upon payment of less than the amount, was talked of, agreed upon, or at all within the contemplation of the parties. That intention clearly was that the plaintiff should give the entire debt to the defendant, and that he should accept the same as a gift from him. The dollar was given not in payment, but merely to satisfy defendant of its validity. The debt was then due, and the counsel of the respondent cites numerous cases where it has been held that a payment of a less sum upon a debt actually due cannot satisfy or discharge the entire debt, but only so much as is paid, although agreed to be received in satisfaction of the whole. The cases to this effect are uniform from Fitch v. Sutton, 5 East, 230, to Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546.

The reasons upon which these cases were determined were, that it was not good as an accord and satisfaction, as it was obvious that a smaller sum could not satisfy a greater; that when the debt was due payment of a part by the debtor was no consideration for a promise of the creditor to discharge the residue, as the creditor received nothing to which he was not entitled, and there being no consideration for any such agreement, it was a nude pact and void. To discharge the debt, it was held that there must be a release under seal. Although the reason why the use of a seal would effect a discharge while the same writing not sealed would not produce such result is rarely alluded to, yet it is perfectly obvious; at common law the seal was conclusive evi-

dence of a sufficient consideration, and hence, when attached to a release of a debt, was conclusive of a sufficient consideration therefor. This rule of evidence has been modified by statute to some extent. 2 R. S. 406, § 77. This modification does not extend to releases. The question in this case is, not whether there was an accord and satisfaction, or a valid compromise of the debt, but whether there was a valid gift of it by the plaintiff to the defendant. Hence the authorities in regard to the two former do not apply.

The counsel for the respondent insists that the defendant cannot avail himself of the latter for the reason that it was not set up in the answer; but no such objection was raised upon the trial. Had it then been taken it might have been obviated by procuring an amendment if necessary. Omitting to make it upon trial was a waiver. The question whether there was a valid gift of the debt upon the facts proved and found is involved in the case and must be determined. A gift may be defined as a voluntary transfer of his property by one to another without any consideration or compensation therefor. To make it valid the transfer must be executed, for the reason that there being no consideration therefor no action will lie to enforce it. To consummate a gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter with intent to transfer the title to him. The question is, was there such a delivery of the debt by the plaintiff to the defendant, or what was equivalent thereto, in this case? In Champney v. Blanchard, 39 N. Y. 111, the defendant had in her hands money of the intestate, for which she had given the intestate a receipt. The intestate, on the day of her death, gave this receipt to the defendant, saying in substance she gave the defendant the money therein specified. This was held a valid donatio causa mortis. A delivery is equally necessary in such a gift as in one inter vivos. True there was, in strictness, no debt from the defendant to the intestate. The former held the money as trustee for the latter, but the case is an authority for the position that to constitute a gift a manual delivery of the thing given is not necessary, nor need it be present in all cases; that a delivery of the evidence of the right of the donor to the donee, with intent to transfer the title, is sufficient.

In Westerlo v. DeWitt, 36 N. Y. 341, 93 Am. Dec. 517, it was held that the delivery of a certificate of deposit unindorsed, with intent to transfer to the donee the money therein specified, was sufficient to constitute a valid gift of such money. It would necessarily follow that the delivery by the donor of the evidence of any debt against a third person, with like intent, would transfer the debt to the donee. In such cases the thing given is the debt, not the evidence; and yet a delivery of the latter, with intent to give the former, will effect that result. It would also follow that the delivery by a creditor of a note or bond and mortgage to his debtor, with intent to give him the debt, would be sufficient to transfer and discharge such debt. Kent (2 Com.

439), speaking of the delivery essential to a gift, says: that in this as in every other case delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing given be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed.

The debt in this case consisted of an account for goods sold. Had the plaintiff written upon a copy of the account that the same was canceled by a gift thereof to the defendant, and signed and delivered the same to the defendant with intent to make a gift thereof to him, and the latter had accepted it as a gift from him, can there be a doubt that the gift would have been effectual? It was all the delivery the subject was capable of. But in this case the plaintiff balanced his books by gift to the defendant. Had he stopped here, making no delivery of any thing to the defendant, the act would not have been of any effect; nothing would have been delivered to him; and the books continuing in the possession of the plaintiff, the gift would not have been executed. But when, to complete his purpose of giving the debt, he executed and delivered to the defendant a receipt in full for the account, to effect the intention of the parties, the law will construe the instrument, if necessary, as an assignment of the account and of the right of action thereon to the defendant. My conclusion is that the gift of the debt was valid, and constituted a defense to the action; that the proof of want of consideration for the receipt given by the plaintiff was answered and avoided by the proof that it was given to consummate a gift of the debt by him to the defendant.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur except RAPALLO and FOLGER, JJ., not voting.

Judgment reversed.[20]

[20] In accord: Ferry v. Stephens, 66 N. Y. 321 (1876); Carpenter v. Soule, 88 N. Y. 251, 42 Am. Rep. 248 (1882); McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638 (1890); Green v. Langdon, 28 Mich. 221 (1873); Holmes v. Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444 (1902); Hathaway v. Lynn, 75 Wis. 186, 43 N. W. 956, 6 L. R. A. 551 (1889). See Ferson, "The Rule in Foakes v. Beer" (1921) 31 Yale L. Jour. In Wilson v. Keller, 9 Ill. App. 347 (1881), the court held a mere oral release inoperative, but said: "A verbal gift is necessarily an executed contract; and delivery of the subject-matter of the gift is of the essence of the title. There must be actual delivery, so far as the subject is capable of delivery. * * * If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. * * * In the case before us, as the book account was against the appellee herself, the delivery of a receipted copy of it, or of an acquittance, or possibly a copy of the account not receipted, if the intention to transfer was clearly shown, would be a delivery suited to the subject-matter of the gift; and probably

KING v. GILLETT.

(In the Court of Exchequer, 1840. 7 Mees. & W. 55.)

Assumpsit for the breach of a promise to marry the plaintiff in a reasonable time. The declaration was in the usual form, alleging mutual promises to marry. Plea, that after the making of the promise in the declaration mentioned, and before any breach thereof by the defendant, to wit, on, &c., the plaintiff wholly absolved, exonerated, and discharged the defendant from his promise and the performance of the same. Verification.

Special demurrer, and joinder therein.

The following points of argument were stated in the margin:— The plaintiff will contend that a contract founded on mutual promises can only be rescinded before breach by mutual consent; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant will contend that a promise may be discharged by parol before breach, and that it is not necessary in pleading to state the evidence of such discharge, or the special circumstances under which it arises, or that there was any consideration for the same.[21]

ALDERSON, B. In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the Court was this: Whether to an action founded on mutual promises to marry within a reasonable time, the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before

an erasure of the charges from the account book would be regarded as an equivalent act."

It is generally stated, and has often been held, that an unsealed written release is inoperative, in the absence of a consideration: Mobile R. Co. v. Owen, 121 Ala. 505, 25 South. 612 (1899); Kidder v. Kidder, 33 Pa. 268 (1859); Collyer v. Moulton, 9 R. I. 90, 98 Am. Rep. 370 (1868); Carr v. Bartlett, 72 Me. 120 (1881); Benson v. Reger, 186 Iowa, 19, 168 N. W. 881, 172 N. W. 166 (1918). In most cases so stating the rule, the possibility of making a parol executed gift was not being directly considered. Dennett v. Lamson, 30 Me. 223 (1849), an unsealed release does not qualify a witness by extinguishing his interest; Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491 (1860), it does not discharge a joint promisor; Reynolds v. Reynolds, 55 Ark. 369, 18 S. W. 377 (1892), part payment not satisfaction; "there was no gift of the balance due, and it was not so considered or treated"; Snowden v. Reid, 67 Md. 130, 8 Atl. 661, 10 Atl. 175 (1887), where Miller, J., concurred "solely upon the ground that I do not regard the evidence as sufficient to establish a gift of the money in question, and not upon the ground that a creditor cannot make a gift to his debtor of the debt due to him by the latter, except by a delivery up of the note or other instrument evidencing the debt, or by an assignment or release in writing of the debt itself"; Moore v. Maryland Casualty Co., 150 N. C. 153, 63 S. E. 675, 24 L. R. A. (N. S.) 211 (1909), no clear intent to make a gift.

[21] Argument of counsel has been omitted and the statement of facts is condensed.

breach, the plaintiff and defendant by mutual agreement had rescinded the contract previously made between them. No doubt such a plea would be good; but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries,[22] and there are two decided authorities, Holland and Conier's case (2 Leon. 214), and Langden v. Stokes (Cro. Car. 383). And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is: for, although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succeed upon it at Nisi Prius, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant; but the plaintiff should have liberty to amend on payment of costs.

Leave to amend accordingly.[23]

SECTION 4.—PAYMENT OR TENDER THEREOF

FLOWER'S CASE.

(About 1600. Noy, 67.)

A borrowed one hundred pound of F and at the day brought it in a bagg and cast it upon the table before F and F said to A being his nephew, I will not have it, take it yôu and carry it home again with

[22] Rast. Entr. 685; Brown's Entr. 67; Hern's Pleader, 31.

[23] *Discharge by Exercise of a Power Reserved.*—It is not infrequent that one of the parties to a contract expressly reserves a power of discharging or terminating a contract after a certain period or on certain conditions. His subsequent exercise of this power operates as a discharge, and it is in one sense a discharge by mutual agreement: the power was created by mutual agreement, but its final exercise is a unilateral act, and may, at the time, be very obnoxious to the other party. For examples of this sort of discharge, see Golden Cycle M. Co. v. Rapson C. M. Co., 188 Fed. 179, 112 C. C. A. 95 (1911), where "it is agreed that in the event the Mining Company shall acquire a substantial interest in a coal mine as owner * * * then the Mining Company may, at its option, declare this contract terminated upon giving the Coal Company 90 days' written notice of its intention to do so": Wilmington & Raleigh R. Co. v. Robeson, 27 N. C. 391 (1845), ante, p. 719; Ray v. Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187 (1853), ante, p. 717 (sale of chattel with "right of return"), and note appended thereto. See, also, cases cited in the note to Vickrey v. Maier, 164 Cal. 384, 129 Pac. 273 (1913), ante, page 311, holding that the reservation of such a power does not render the contract invalid for lack of consideration.

you. And by the Court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of F and A might well wage his law. By the Court, otherwise it had been, if A had only offer'd it to F for then it was chose in action onely, and could not be given without a writing.[24]

DIXON v. CLARK et al.

(In the Court of Common Pleas, 1847. 5 C. B. 365.)

Debt, the sum demanded being £26.

The defendants pleaded that as to part of the demand, to-wit, £5, the plaintiff ought not to recover any damages because, when that sum became due and before action brought, the defendant had made a tender of the £5.

Replication that at the time the tender was made a larger sum was due, to-wit, £13 15s.; that this was one entire sum and on one entire contract; and that the defendant had refused to pay the whole sum due.

Demurrer to the replication. Joinder.

WILDE, C. J.[25] * * * The argument involved the general question, whether a tender of part of an entire debt is good; and several ancient and modern authorities bearing on this question were referred to, but no case directly in point was cited; nor have we been able to find any. On consideration, however, we are of opinion, upon principle, that such a tender is bad, and consequently that the replication is good.

In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is that the defendant has been always ready (tou-

[24] Cf. Cochrane v. Moore (1890) 25 Q. B. Div. 71.

Payment extinguishes the debt, and it cannot be revived. Marvin v. Vedder, 5 Cow. N. Y. 671 (1825); Lancey v. Clark, 64 N. Y. 209 (1876).

Full performance as required by any legal duty operates to extinguish the duty.

[25] The statement has been rewritten, and part of the opinion has been omitted.

A tender of money due does not operate as a discharge of a unilateral debt. Town v. Trow, 24 Pick. (Mass.) 168 (1833); Cowles v. Marble, 37 Mich. 158 (1877); Bank v. Davidson, 70 N. C. 118 (1874). To have the limited operation indicated in Dixon v. Clark, supra, the debtor must remain always ready (keep his tender good), and must pay the money into court when sued. Becker v. Boon, 61 N. Y. 317 (1874); Werner v. Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443 (1891). Also the tender must be at the right time and place, in the required form and amount, without requiring the creditor to make change, and the money must be produced and accessible to the creditor. Knight v. Abbott, 30 Vt. 577 (1858); Waldron v. Murphy, 40 Mich. 668 (1879); Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158 (1889).

If a debt is payable in goods, a tender of the goods properly separated and distinguished will discharge the debt, the title to the goods passing to the creditor. Barney v. Bliss, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696 (1824); Hambel v. Tower, 14 Iowa, 530 (1863); Dewees v. Lockhart, 1 Tex. 535 (1847).

jours prist) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance by refusing to receive it. And, as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (uncore prist), but must be accompanied by a profert in curiam of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the uncore prist and profert in curiam), yet he will answer the action, in the sense that he will recover judgment for his costs of defense against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. * * *

Besides the averment of readiness to perform, the plea must aver an actual performance of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender on the very day. * * * Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender post diem, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender, but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. * *

Judgment for the plaintiff.

SECTION 5.—NOVATION—SUBSTITUTED CONTRACT

ROE v. HAUGH.

(In the Exchequer Chamber, 1697. 12 Mod. 133.)

B was indebted to A in the sum of £42, and C in consideration quod A accipere vellet ipsum C fore debitorem ipsius A pro quadraginta duob. lib. eidem A per B tunc debit. in vice et loco ejusdem B super se assumpsit, et eidem A promisit quod ipse C easdem quadraginta duas lib. eidem A solvere vellet. A dies; his executors, on this

promise, bring an assumpsit against C averring in their count, that A, the testator, trusting to the said promise of C accepit præd. C fore debitorem ipsius A without saying anything that he discharged B. Non assumpsit pleaded; verdict and judgment for the plaintiff. Writ of error brought in the Exchequer Chamber.

The error insisted on was that this is a void assumpsit, here being no good consideration, for except B was discharged, C could not be chargeable.

For which reason BLENCOWE, POWELL, and WARD were of opinion judgment should be reversed, but POWIS, NEVILL, LECHMERE, and TREBY that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of C, for as such it would not bind him except B was discharged; but they would construe it to be a mutual promise—viz., that C promised to A to pay the debt of B and A on the other side promised to discharge B, so that though B be not actually discharged, yet if A sues him, he subjects himself to an action for the breach of his promise.

The judgment was affirmed.

KLINKOOSTEN v. MUNDT.

(Supreme Court of South Dakota, 1916. 36 S. D. 595, 156 N. W. 85. L. R. A. 1918B, 111.)

Action by Jacob Klinkoosten against William J. Mundt. From an order overruling plaintiff's motion for directed verdict, and from a judgment for defendant, plaintiff appeals. Reversed and remanded.

McCOY, J. Plaintiff, as assignee of the original payee, brought this suit against defendant to recover upon a negotiable promissory note for $25 executed and delivered by defendant to the Unitype Company. There was judgment in favor of plaintiff in the justice court, from which defendant appealed to the circuit court. In circuit court there was a verdict and judgment in favor of defendant. At the close of all the evidence plaintiff moved the court for a directed verdict in favor of plaintiff, on the ground that the undisputed testimony shows that plaintiff purchased the note in due course in good faith, in the ordinary course of business for value before maturity, and that the undisputed evidence shows no defense, in that it does not show a release or novation. The motion was denied, to which ruling plaintiff excepted. Plaintiff now assigns such ruling as error.

Defendant admitted the execution of the note. The defendant pleaded as a defense that prior to the transfer of said note to plaintiff the Unitype Company released defendant from the payment of said note and agreed in writing to accept as payor in lieu of defendant the Messenger Publishing Company. It appears from the evidence that at the time of the execution of said note defendant was the proprietor

of a printing and publishing business, and purchased certain printing machinery from the Unitype Company, and gave 46 notes, amounting to $1,450 in consideration of the purchase price of said machinery, the note in question being one of such notes. Under the contract for the purchase of said machinery it was provided that the title to such machinery should remain in the Unitype Company until the full payment of said notes. After the making of this contract, and before the maturity of said note, defendant sold and transferred his printing and publishing business and said machinery to the Messenger Publishing Company. About the time this sale and transfer were made to the Messenger Company, defendant wrote the Unitype Company that he had made such sale; that the Messenger Company had agreed to make new notes for those remaining unpaid for such machinery, and would assume the entire obligation of defendant, provided the Unitype Company would consent to take their notes. The Messenger Company also wrote the Unitype Company in substance as follows: We have purchased the interest of Mundt in his contract under which the Unitype typesetting machine was installed. We, therefore, assume the rights and obligations of Mundt in the contract, and agree to pay the unpaid notes given by him, and carry out all his obligations under the terms of the agreement. It is agreed between Mundt and the Messenger Company that on completion of the payment of the balance of these notes and the carrying out in full of the terms of the agreement, you are to issue a bill of sale for said machinery to the Messenger Publishing Company.

This letter was signed by the Messenger Publishing Company by its president, and at the bottom thereof, over the signature of defendant, appeared the following: "The Unitype Company is hereby authorized to issue a bill of sale to the Messenger Publishing Co. for the above-described machine when all the terms of the contract have been fully met and all the notes given under the same duly paid." Also on the bottom of this letter appears the following: "Accepted. The Unitype Co., by E. J. Andrews, Treas."

The note in question was never paid. The Messenger Publishing Company never executed and delivered to the Unitype Company its notes in place of the notes given by defendant. In order to constitute novation, there must be either an express or implied agreement on the part of the creditor to substitute the new debtor in place of the original debtor, and also an express or implied agreement to release and discharge the original debtor. Kelso v. Fleming, 104 Ind. 180, 3 N. E. 830; Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778; Dempsey v. Pforzheimer, 86 Mich. 652, 49 N. W. 465, 13 L. R. A. 388; Cornwell v. Megins, 39 Minn. 407, 40 N. W. 610; Piehl v. Piehl, 138 Mich. 515, 101 N. W. 628; Hanson v. Nelson, 82 Minn. 220, 84 N. W 742; Lowe v. Blum, 4 Okl. 260, 43 Pac. 1063; Roberts v. Samson, 50 Neb. 745, 70 N. W. 384; Page, Contracts, 958; 29 Cyc. 1132.

All that the Unitype Company ever assented to, as shown by the correspondence, was that the Messenger Publishing Company might assume the rights and obligations of defendant under the contract and make payment of the notes given by defendant, and when said notes had all been fully paid and satisfied, it would transfer title to the machinery to the Messenger Publishing Company. There was no assent or agreement, either express or implied, that the Messenger Company be substituted in place of defendant as a debtor to the Unitype Company. There was no assent or agreement, either express or implied, to discharge or release defendant. In most of the adjudicated cases where it has been held that implied novation had occurred there were circumstances such as the delivery to the original debtor of his notes and new notes taken in place thereof, or other circumstances, indicating an intention on the part of the creditor to accept the new debtor in place of the old, and to release and discharge the obligation as against the original debtor. No circumstances of that character appear in this case. We are of the view that the court erred in overruling the motion to direct a verdict for plaintiff; no defense of release by novation having been shown.

The judgment and order appealed from are reversed, and the cause remanded.[26]

SMITH, J. (concurring).[27] * * * A contract of novation is effective between the original creditor and the new debtor. The original debtor, if sued upon the original obligation, may plead a valid contract of novation as an accord and satisfaction of his indebtedness. If a valid contract of novation is not proved, the defense of accord and satisfaction fails.

[26] There is no novation, unless the original debtor is discharged. A mere assent by the creditor to the assignment of the contract by the original debtor, where such debtor had rights as well as duties, does not operate as a discharge. Liversidge v. Broadbent, 4 H. & N. 603 (1859); Mills v. McMillan, 78 Fla. 294, 82 South. 812 (1919); Corinth S. & S. Turnpike Co. v. Gooch, 113 Miss. 50, 73 South. 869 (1917); Staples v. Davis, 75 N. H. 383, 74 Atl. 872 (1909).

An assignment of a contract becomes a novation, where the assignee has agreed to undertake the duties as a substitute for the assignor, and the other party has agreed to such substitution, not only in the matter of performance as a fact, but also in respect to the legal duty to perform. See Robinson v. Rispin, 33 Cal. App. 536, 165 Pac. 979 (1917); Manor v. Dunfield, 33 Cal. App. 557, 165 Pac. 983 (1917). The assent of the creditor to this substitution can be shown by implication from conduct and circumstances, as well as by express words, and some courts appear to be liberal in drawing the inference. See Gillett v. Ivory, 173 Mich. 444, 139 N. W. 53 (1912); T. W. Stevenson Co. v. Peterson, 163 Wis. 258, 157 N. W. 750, L. R. A. 1918B, 105 (1916).

[27] Part of the concurring opinion of Smith, J., is omitted.

SMART v. TETHERLY.

(Supreme Court of New Hampshire, 1878. 58 N. H. 310.)

Assumpsit, for goods sold and delivered. H. owed the plaintiff a balance of $100 on a bill of lumber. The defendant owed H. more than that sum for labor. H. gave the plaintiff an order for that amount on the defendant, and it was mutually agreed by the three parties that the defendant should pay the plaintiff the amount of the order, and apply that sum on his indebtedness to H. The plaintiff was allowed to amend his declaration by adding a special count on the defendant's acceptance of the order, and the defendant excepted. The cause was tried on the amended count, and the plaintiff had a verdict.

ALLEN, J. An amendment which changes the cause of action, or introduces a cause of action entirely new and different from that stated in the original declaration, is not allowed. Butterfield v. Harvell, 3 N. H. 202; Goddard v. Perkins, 9 N. H. 488; Stevenson v. Mudgett, 10 N. H. 340, 34 Am. Dec. 155; Melvin v. Smith, 12 N. H. 462; Moses v. Boston & M. R. R., 32 N. H. 524, 534; Wood v. Folsom, 42 N. H. 70. The original declaration was for goods sold and delivered. The amendment proposed was a new count, on the acceptance of an order by the defendant given to the plaintiff by a third person, H. If the defendant accepted the order, and the plaintiff took him instead of H. as a debtor, the defendant's debt to H. and H.'s debt to the plaintiff for that amount were extinguished, and a new liability of the defendant to the plaintiff was created. The mutual agreement of the three parties was a novation. It was not an agreement of the defendant to pay for the lumber which the plaintiff had sold to H., but an agreement to pay a specific sum to the plaintiff in consideration of the discharge of a like amount of his indebtedness to H. Heaton v. Angier, 7 N. H. 397, 28 Am. Dec. 353; Tatlock v. Harris, 3 T. R. 174; Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; 1 Pars. Cont. 220, 221. The plaintiff cannot treat his claim as an assignment, merely, of H.'s claim against the defendant, and as security for his own claim against H., for in that case he could only sue in the name of H.

The proposed amendment introduced a new cause of action, destroyed the identity of the original cause, and must be disallowed.

Verdict set aside.[28]

[28] *Substituted Creditor.*—An assignment of his right by a creditor with notice to the debtor now operates as a practically complete substitution of creditors, even without the debtor's consent. See chapter on Assignment. By the earlier law it did not so operate; but an assent to the assignment given for a consideration moving from the assignee would operate as a novation. See Wilson v. Coupland, 5 B. & Ald. 228 (1821); Wharton v. Walker, 4 B. & C. 163 (1825).

PERRY & WALDEN v. GALLAGHER.

(Court of Appeals of Alabama, 1919. 82 South. 562.)

Assumpsit by J. L. Gallagher against Perry & Walden. Judgment for plaintiff, and defendants appeal. Affirmed.

Count 4 of the complaint is as follows:

Plaintiff claims of the defendants the further sum of $32.50 for that on, to wit, December 1, 1914, the defendants promised to furnish plaintiff with lumber to the value of $32.50, and that one Coleman Gann was indebted to plaintiff in the sum of $32.50, and said defendants stated to plaintiff that they were indebted to Gann and that they would deliver to plaintiff said lumber; and plaintiff, in pursuance of said agreement, discharged said Gann from his said indebtedness, with the consent of said Gann, but the defendants failed then or refused to comply with said agreement and to deliver said lumber to plaintiff; and this relates to the same transaction as counts 1, 2, and 3, and plaintiff claims interest on said claim.

SAMFORD, J. The fourth count of the complaint, upon which the cause was tried, sets up a novation, and the insistence of appellant is that the complaint is subject to demurrer for the reason that it fails to allege that the defendants were indebted to the original debtor of plaintiff, and whom it is alleged the plaintiff discharged from further liability to him upon the express agreement of defendants to pay plaintiff the amount due, representing to plaintiff at the same time that they (the defendants) were indebted to plaintiff's original debtor in the amount which they were agreeing to pay. The complaint alleged a previous valid indebtedness due from the original debtor to plaintiff, an agreement of all the parties to the new contract or obligation, an agreement that it was an extinguishment of the old contract or obligation, and a new contract or obligation binding between the parties thereto. It was not necessary to allege a consideration passing to the defendants other than the release by plaintiff, at the instance of defendants, of the claim which he held against the original debtor. This was not a promise of the defendants to answer for the debt, default, or miscarriage of another, but was an original undertaking by them, where, on account of their promise, the plaintiff released the claim which he had theretofore held. The complaint was not subject to demurrer interposed. Perry & Walden v. Gallagher, 200 Ala. 68, 75 South. 396; Hopkins v. Jordan (Sup.) 77 South. 710; McDonnell v. Ala. Gold Life, 85 Ala. 414, 5 South. 120; 20 R. C. L. pp. 367, 368, § 10; Underwood v. Lovelace, 61 Ala. 155; Howard v. Rhodes (App.) 81 South. 362.

As has already been seen, it was not necessary to a novation that the defendants should have been actually indebted to plaintiff's original debtor, and therefore the court was not in error in giving the several charges in line with the excerpt from his oral charge as requested by

plaintiff, and in refusing charges requested by defendants, asserting contra propositions, to wit:

"If Perry & Walden accepted the order given to Gallagher by Gann and agreed to pay it in lumber, and that Gallagher released Gann and took the debt on Perry & Walden, it would not be material whether or not Perry & Walden owed Gann."

"An essential element of every novation is a new contract to which all the parties agree." 20 R. C. L. p. 367.

If the agreement is had, it can make no difference that it was not perfected at the same moment between all of the parties, or that all were not present at the time. McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59. It is therefore essential in this case, in order to establish the plaintiff's contentions, that the evidence should show an agreement of all the parties to the terms of the new contract. This, however, was a question for the jury, and there was sufficient evidence upon which to base this finding. The refusal to give the general charge at the request of the defendant was not error.

The ruling of the court on the motion for a new trial, on the ground that the verdict of the jury is contrary to the evidence, will not be disturbed.

We find no error in the record, and the judgment is affirmed.

Affirmed.[29]

TAYLOR v. HILARY.

(In the Court of Exchequer, 1835. 1 Cromp., M. & R. 741.)

Assumpsit. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one Henry Holt to have goods as he might want them, not exceeding in the whole £200, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding &c., did afterwards, to-wit &c., sell and deliver to the said Henry Holt certain goods of great value, not exceeding in the whole £200, to-wit, of the value of £190, as he the said Henry Holt did want them; of which the defendant afterwards, to-wit, on &c., had notice. Breach, that Henry Holt had not paid for the said goods, or any part thereof, nor had the defendant, although often requested, paid for the same, or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to-wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff,

[29] In accord: Corbett v. Cochran, 3 Hill (S. C.) 41, 30 Am. Dec. 348 (1836); Gleason v. Fitzgerald, 105 Mich. 516, 63 N. W. 512 (1895); cf. Fairlie v. Denton, 8 B. & C. 395 (1828).

Where one partner retires and a creditor accepts the remaining partner as sole debtor, there is a novation. Lyth v. Ault, 7 Ex. (W. H. & G.) 669 (1852).

agreed by and between the plaintiff and defendant that the plaintiff should supply to the said Henry Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months accepted by the defendant; which agreement of the defendant he the plaintiff, before any breach of the promise and undertaking in the said count mentioned, accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performance of that promise and undertaking. Verification.

To this plea the plaintiff demurred; and alleged as cause of demurrer, that there was no material difference between the agreement set out in the count and that set out in the plea, and that the only difference applied to the time of credit to be given; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

PER CURIAM.[30] Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not therefore require an averment of performance.[31]

BANDMAN v. FINN.

(Court of Appeals of New York, 1906. 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. [N. S.] 1134.)

Action by Albert Bandman against William E. Finn. From an order of the Appellate Division, First Department (103 App. Div. 322, 92 N. Y. Supp. 1096), sustaining exceptions to the direction of a verdict at Trial Term and ordering a new trial, defendant appeals. Reversed, and judgment directed to be entered on directed verdict.

CULLEN, C. J. On May 14, 1902, the defendant became the purchaser from the executors of Henry Hilton of certain premises on

[30] The argument of counsel, and certain remarks by Parke, B., during such argument, have been omitted.

[31] In accord: McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am St. Rep. 793 (1890); McNish v. Reynolds, etc., Co., 95 Pac. 483 (1880); Smith v. Kelley, Maus & Co., 115 Mich. 411, 73 N. W. 385 (1897); Montgomery v. American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175 (1900); Youngberg v. South End Warehouse Co., 177 Cal. 504, 171 Pac. 97 (1918); Poteet v. Imboden, 77 W. Va. 570, 88 S. E. 1024 (1916); Long v. Shepherd, 159 Ala. 595, 48 South. 675 (1909), the parol alteration is valid, even though the written contract expressly provides that it cannot be altered except by a writing.

Whether before or after breach, if there are mutual existing duties as yet unperformed, a mutual agreement to discharge is valid. Cutter v. Cochrane, 116 Mass. 408 (1874); Kellett v. Robie, 99 Wis. 303, 74 N. W. 781 (1898); Dreifus Co. v. Columbian Exposition Salvage Co., 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704 (1900); Prye v. Kalbaugh, 34 Utah, 306, 97 Pac. 331 (1908); Spier v. Hyde, 78 App. Div. 151, 79 N. Y. Supp. 699 (1903).

Broadway and Lafayette Place, in the city of New York. Out of the negotiations leading to that sale, in the procurement of which the plaintiff's assignor, one Schmidt, had acted as broker, the defendant executed and delivered to said Schmidt the following agreement: "I, William E. Finn, in consideration of H. Schmidt executing a release of claim for commission to Horace Russell and Edward D. Harris, as executors, etc., do hereby agree to pay to said H. Schmidt one thousand dollars on passing of title 726–730 Broadway and 31–39 Lafayette Place, which closing has been set down for May 15, 1902, and to further pay him the additional sum of $8,600 on completion of roof of contemplated building on said premises. In the event of a sale of these premises, I agree to pay H. Schmidt said Eighty-six hundred dollars on consummation of said sale. William E. Finn. Witness: Charles A. Stahl." In October, 1903, no building having been erected on the premises and the defendant not having sold the same, Schmidt retained a lawyer, Mr. Levy, to negotiate with the defendant for a satisfaction and surrender of the obligation. Finally the negotiations terminated on Monday before Thanksgiving Day, during that year, in an oral agreement whereby the defendant promised to pay Schmidt the sum of $2,500 on the Wednesday following, and Schmidt agreed to execute to the defendant a release of all his claims and to surrender to him the agreement. The parties met at the time and place appointed, and the defendant offered to carry out the contract. Schmidt had not with him the written agreement which was to be surrendered. On the defendant requiring the production of the agreement, Schmidt went away with the ostensible purpose of procuring it. He never returned, but refused to carry out the contract. Thereafter the defendant sold the premises, and after the consummation of that sale, Schmidt having assigned his contract, the assignee brought this suit. At the conclusion of the evidence, each party requested the court to direct a verdict, the plaintiff for the full amount claimed in the agreement and the defendant for the sum which he had agreed to pay therefor. Neither party requested the submission of the cause to the jury. The court directed a verdict for the plaintiff for the sum of $2,500, and ordered the plaintiff's exceptions to be heard in the first instance by the Appellate Division. That court sustained the exceptions and ordered a new trial. From that order an appeal has been taken to this court. Neither party having asked to go to the jury, the determination of any question of fact was necessarily submitted to the trial court. The case having been before the Appellate Division only on the exceptions taken on the trial, all the facts and inferences therefrom must be assumed to have been found in the defendant's favor, and the Appellate Division could not sustain the exceptions unless in no view of the evidence could a jury have found in the defendant's favor.

The testimony in the case tended to show—we may say conclusively showed, for it was uncontradicted—that on Monday there was effected

a complete oral agreement by which, on the Wednesday following, the defendant was to pay Schmidt $2,500, and Schmidt was to surrender the agreement and release his claim. This was not the mere act of the lawyer, but Schmidt was informed of the proposed agreement in detail, accepted it, and the defendant was notified of such acceptance. No objection was raised at the trial, nor is it made on this appeal, that the agreement was invalid under the statute of frauds, because not in writing, and therefore that question is not before us; but the plaintiff insisted that the case is one of accord and satisfaction, and till executed had no binding force, and either party was at liberty to withdraw from it. This was the view entertained by the Appellate Division in setting aside the verdict; the learned trial court having directed the verdict on the ground that the new contract entered into between the parties operated as a novation and discharged the liabilities under the old contract. I am of opinion that the trial court was correct. Doubtless the general rule is that an executory agreement for accord without satisfaction made under it does not bar a cause of action, and that tender of performance is insufficient for that purpose. Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491. It is also the rule that payment of a less sum than that due does not constitute a valid satisfaction, although otherwise if the debtor gives the creditor additional security. Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.

These rules, however, do not apply to the present case. At the time of the agreement between the parties in November, 1903, there had been no breach of the written contract with the defendant. Under that contract he was obligated to pay only in one of two contingencies, on the completion of the roof of the contemplated building on such premises, or in case of a sale of the same by the defendant. Neither of these contingencies had occurred. Therefore the situation was that of a creditor holding an unmatured and contingent obligation, agreeing with his debtor for the surrender of the obligation. Even in the case of a claim unmatured, but not contingent, the payment and receipt of a less sum than that specified is a full satisfaction of the larger claims not yet due. Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Bowker v. Childs, 3 Allen (Mass.) 434. As is said in the cases, it may be much more advantageous to the creditor to obtain the money before it is due, and this is sufficient consideration for receiving a smaller sum. So, also, it has been held that an executory agreement for such a surrender or compromise will be enforced. In Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401, the defendant was indebted to the plaintiff in a sum for the payment of which at a future date he executed his written agreement, and as collateral security for the payment of the obligation he delivered certain stock and promissory notes of third parties. Before the maturity of his obligation he entered into an oral agreement with the plaintiff by which he agreed to pay it immediately a less sum than that owing by

him, and the plaintiff agreed on such payment to cancel the obligation and surrender the collateral. It was held that the earlier date of payment was sufficient consideration for the agreement on the part of the plaintiff and that the agreement would be enforced. It was there said: "The actual payment of the amount agreed to be paid by Dunan would have constituted a good accord and satisfaction if the collateral consideration relied on was sufficient to support the agreement; but the question is, not whether there has been an accord and satisfaction, but whether there was a valid consideration for the agreement of December 3d and 5th, and, if there was, whether the failure of the creditor to perform his part of that agreement by refusing to accept the money precludes a court of equity from enforcing it." In the present case the original agreement between the parties, though witnessed, was not under seal, and hence we are not embarrassed with the technical rule that an agreement under seal can be modified only by an instrument of a similar character. The plaintiff's assignor having at the time of the second agreement no cause of action against the defendant, I do not see why he could not enter into a valid agreement with the defendant for the transfer and surrender of the latter's obligation to the same extent as he might have done with any third party.

The learned counsel for the respondent insists that what the plaintiff's assignor negotiated for was, not the surrender of an unmatured obligation, but the satisfaction of an existing claim, and that therefore the rules as to accord and satisfaction applied. Assuming that Schmidt urged that the claim was due, to this the defendant did not assent. On the contrary, the defendant's position was that there was no existing liability on the contract, and he required as a condition of the settlement not only a release of any claim but the surrender of the contract. The counsel also suggests there might have been such delay in the construction of the building on the premises as to render the defendant liable, even though the roof of the building was not completed. To this it is sufficient answer that no such fact was pleaded in the complaint nor any proof of it given on the trial. The real nature of the transaction must therefore be determined on the record before us, regardless of the conflicting claims of the parties, and on that record it appears that no default had been made by the defendant when the second agreement was made. Therefore the plaintiff had no cause of action at that time, and the principles of accord and satisfaction have no application.

It is further to be observed that in the aspect most favorable to the plaintiff the claim at the time of the agreement for the surrender of the contract was a disputed one. The contention of the defendant that it was not due was not only made in good faith, but, as we have said, was well taken. The rules as to accord and satisfaction do not obtain in their entirety in the compromise of disputed claims. Thus the payment of a less sum than that claimed or actually owing is a good satisfaction, if the dispute is bona fide. Fuller v. Kemp, 138 N.

Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. On the other hand, if a defendant gives his note or mortgage in settlement of the demand, he cannot defend on the ground that there was no liability on his part, or, if liable, it was for a less amount. Stewart v. Ahrenfeldt, 4 Denio 189; Feeter v. Weber, 78 N. Y. 334. Nor does the rule that an executory agreement for accord, until performed, does not constitute a defense, which always obtains in the case of a conceded debt (Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491), equally apply to an agreement or compromise of a disputed claim. In most of the cases in the reports the debtor had given his promissory note or some security for the amount agreed upon. I appreciate that these cases may be distinguished from the one before us, because it may be said that the note or security was itself an execution of the accord. But there are at least two cases in this court in which that distinction cannot be drawn.[82] * * *

The ground, therefore, on which the decisions in the Wehrum and Dunham Cases proceeded, is that there may be a valid executory agreement to compromise a disputed claim, which, though unexecuted, is binding on the parties and determines their rights. The distinction between the two classes of cases is well illustrated in Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162. There the Supreme Court of Pennsylvania said: "This case was unfortunately tried on a wrong basis throughout. It was assumed that the agreement of May, 1892, was an accord, and as its terms had not been fully carried out, that there had been no satisfaction, that the agreement was, therefore, inoperative, and the parties were remitted to their rights and liabilities under the original contract. This was a radical error. The agreement of May, 1892, was a compromise of disputed rights. The defendants claimed that the plaintiff was violating the contract in such manner as to entitle them to rescind, and they had in fact taken possession of the land a short time before by force. The plaintiff, on the other hand, claimed that he was pursuing his contract rights, and he had in turn ousted the defendants by force from the land. The parties then came together, agreed upon a settlement, put its terms in writing, which was signed by both, and partly carried out. Such an agreement is not an accord, but a compromise, and is as binding as any other contract." The agreement in the present case was not tentative, but specific and final. The defendant agreed to pay, and the plaintiff agreed to receive, a specific sum at a specified time and place. Had the defendant defaulted in the performance of his agreement, the plaintiff's assignor could have sued on his promise, regardless of the merits of the claim under the original contract. Equally the defendant may hold the plaintiff's assignor to the agreement.

[82] The court here discussed Wehrum v. Kuhn, 61 N. Y. 623 (1874), and Dunham v. Griswold, 100 N. Y. 224, 3 N. E. 76 (1885).

The order of the Appellate Division should be reversed, the plaintiff's exceptions overruled, and judgment directed to be entered on the directed verdict at the Trial Term, with costs to the appellant in both courts.

HAIGHT, J. (dissenting).[38] * * * The question presented upon this review is as to whether the negotiations for a settlement that had taken place between plaintiff and the defendant had ripened into a completed contract, so that a novation had taken place and the new contract substituted for the old, or whether the negotiations had proceeded to the extent only that their minds had met upon the terms with the understanding that the settlement by the payment of the money and the delivery of the release was to take place on a future day; in other words, that there was an accord executory without satisfaction. I think the undisputed evidence in this case, even adopting the most favorable view that can be taken thereof for the defendant, brings it within the latter rule of an accord executory—a meeting of the minds of the parties upon the terms, with the satisfaction or payment postponed until a future time. The defendant had offered Schmidt $2,500 for his claim under the contract. Schmidt had said that he would accept it, and the defendant was to pay over the $2,500, and Schmidt was to execute and deliver a release of his claim on the Wednesday following, at the hour designated. The payment of the money and the delivery of the release were to be concurrent acts. The satisfaction, therefore, was executory. It was postponed until the future. There had been simply an accord of their minds upon the terms of the settlement. It was, therefore, an uncompleted contract, one which could not be enforced by action or substituted for the existing contract. The rights of the parties herein cannot be stated more forcibly by me than to quote from Justice Barrett in the case of Panzerbeiter v. Waydell, 21 Hun, 161. In that case one of the parties had made a claim against the other and action had been brought thereon. Negotiations were then undertaken for a settlement and the terms had been agreed upon, but the payment of the claim and the execution of the release and the discontinuance of the action were to be made on a future day. The learned justice says with reference thereto: "There was no acceptance of the discontinuance and release, nor were they even left with the defendants or their attorneys. There was, in fact, no intention to surrender these documents without concurrent payment. * * * This is a plain case of an accord executory; such an agreement would have been no bar to the original suit unless executed by the acceptance of the $150. * * * The promise to discontinue and release was not binding upon the plaintiff. Consequently the defendants were without a consideration for their promise. In the case of mutual and concurrent promises there must be reciprocity of obligation." Mitchell v. Hawley, 4 Denio, 414, 47 Am.

[38] Part of the dissenting opinion of Haight, J., is omitted.

Dec. 260; Russell v. Lytle, 6 Wend. 391, 22 Am. Dec. 537; Daniels v. Hallenbeck, 19 Wend. 408; Tilton v. Alcott, 16 Barb. 598; Day v. Roth, 18 N. Y. 448; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Brennan v. Ostrander, 50 N. Y. Super. Ct. 426; Noe v. Christie, 51 N. Y. 270; Osborn v. Robbins, 37 Barb. 481.

I do not understand the learned Chief Judge to question the rule I here invoke. He, however, contends, if I understand his opinion correctly, that the claim existing between Schmidt and the defendant was an unmatured claim, and for that reason the parties had the right to agree upon the compromise of it, and that it was not subject to the rule that, where a payment of a portion of an undisputed claim had been made and receipt given therefor in full, it did not conclude the party from recovering the balance due, as stated in the case of Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539. I quite agree to this. I concede that the parties may agree to surrender and compromise an unmatured claim. They may also agree to compromise and settle a disputed claim. What I do not agree to is that a different rule obtains with reference to the settlement of a disputed claim from that of an unmatured claim. Where the minds meet upon the terms of a settlement of a disputed claim and the delivery of the release, and the payment is postponed to a future date, it is but an accord executory, and not a complete settlement or agreement, for the reason that no consideration passes between the parties at the time. It is but a mutual understanding as to terms, but a failure to complete by satisfaction. The same is true with reference to the settlement of an unmatured claim. Hearn v. Kiehl, 38 Pa. 147, 80 Am. Dec. 472.

Under the provision of the contract the whole of the $8,600 became due and payable from the defendant to Schmidt upon the consummation of the resale of the premises. This took place within a few minutes after 3 o'clock of the day that was fixed for the settlement between the defendant and Schmidt. It is quite possible that the defendant had reason to believe that this sale would be effected when he made his offer to compromise with Schmidt. Schmidt was not advised of the fact that negotiations for a sale were pending between the defendant and Wanamaker. But, in view of the findings in this case, I incline to the view that no question of law arises with reference to this branch of the case which we can consider upon this review.

I favor an affirmance of the order of the Appellate Division.

MERRY v. ALLEN.

(Supreme Court of Iowa, 1874. 39 Iowa, 235.)

The plaintiff brought this action to foreclose a mortgage given to secure ten promissory notes for $2,000 each, the suit being to foreclose for the notes due.

The defendant, Allen, answered admitting the execution of the notes and mortgage by him and his co-defendant Richart, who, it is alleged, had conveyed his interest in the mortgaged premises to Allen. The answer further alleges that the plaintiff and the defendant, Allen, on the 30th day of January, 1871, executed an agreement, as follows:

Allen was to keep only a part of the land originally bought and to give his notes for different sums, with a new mortgage as security. Merry agreed to return the original notes and mortgage, the subject of the present action. The writing stated it was "for the purpose of a full and complete settlement."

The plaintiff replied that the new contract was never finally agreed upon and has never been performed by either party.

Verdict was for the defendant. Plaintiff appeals.[34]

MILLER, C. J. I. It is insisted by the appellant's counsel, that the defendant has undertaken to plead an accord and satisfaction in bar of the plaintiff's action, but that he fails to allege full performance on his part. At the common law it is well settled, that an accord without satisfaction is no bar to a suit on the original obligation. If, however, the accord be founded upon a new consideration, and accepted as satisfaction, it operates as such and will take away the remedy upon the old contract. See Hall v. Smith, 15 Iowa, 584, and authorities cited.

In the case before us the new agreement pleaded in the answer is not properly an accord. It is rather in the nature of a rescission of a former contract, and the substitution therefor of a new and different one, based upon a new consideration. The original contract was for the sale to the defendant of certain real and personal property for a consideration in money, to be paid to the plaintiff. The new agreement stipulates for the rescission of the former contract; a re-conveyance by the defendant of most of the land and personal property purchased under the first contract, the delivery up of the notes made by defendant to plaintiff, and various other stipulations on part of each of the parties.

This new agreement being based upon a new consideration, if accepted by the plaintiff as a compromise of, or in substitution for, the indebtedness of the defendant under the original contract would have the effect to take away any right of action which the plaintiff previously had on the first contract. There was, therefore, no error in the refusal of the court to give the instructions asked by the plaintiff touching this question. The court properly left it to the jury to determine whether this new agreement was entered into by the parties. In other words, whether this agreement or the one alleged by the plaintiff was the actual contract made by the parties, and accept-

[34] The statement of facts is condensed.

ed by plaintiff as a compromise of the defendant's indebtedness to her

II. It is insisted that the verdict is not sustained by sufficient evidence.

Upon appellant's theory of the law, that it was necessary for the defendant to show a full and complete performance on his part of the new agreement, it is possible that the verdict could not be upheld. But, in the view we have taken of the case, it was only necessary that the defendant should show that this new agreement was entered into by the parties. In other words, that he should show the making of the agreement by both parties. By its terms it purports to be for the the compromise of an indebtedness from the defendant to the plaintiff, and the substitution of a new contract upon a new consideration extinguishing such indebtedness. It was not required of the defendant that he should show that he had fully performed on his part the new agreement. The defense was complete by proving the making and acceptance of the new contract. That the evidence was sufficient to warrant the jury in thus finding, we entertain no doubt.

If the defendant has failed to comply with the new agreement, plaintiff's remedy is on that agreement.

The foregoing view fully disposes of the case, and relieves us from a discussion of the other questions presented by counsel for appellant, which in our opinion are not material.

The judgment of the court below will be affirmed.[35]

ELTON COP DYEING CO., Limited, v. ROBERT BROADBENT & SON, Limited.

(In the Court of Appeal, 1919. 122 Law Times, 142.)

The plaintiffs were a limited liability company and they carried on the business of spinners and doublers of yarn.

The defendants were a limited liability company, and they were makers of winding and doubling machinery.

By several contracts, made on various dates between the months of March and Oct. 1915, the plaintiffs agreed to buy from the defendants, and the defendants agreed to sell and deliver to the plaintiffs

[35] In accord: Babcock v. Hawkins, 23 Vt. 561 (1851); Morgenthaler v. Somers, 164 Wis. 159, 159 N. W. 717 (1916); Simmons v. Globe Printing Co., 201 Mo. App. 133, 209 S. W. 130 (1919); Hall v. Smith, 15 Iowa, 584 (1864); Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 (1896); Lorentowicz v. Bowers, 91 N. J. Law, 225, 102 Atl. 630, L. R. A. 1918B, 1139 (1917), "this distinctly left it to the jury to say whether the old arrangement was superseded by the return of the goods and an agreement to pay $100 more, or whether the actual payment of the $100 with the return of the goods was a prerequisite to the new arrangement going into effect, which is the precise distinction between what is called a novation and an accord and satisfaction unexecuted"; Morecraft v. Allen, 78 N. J. Law, 729, 75 Atl. 920, L. R. A. 1915B, 1 (1910); Simmons v. Clark, 56 Ill. 96 (1870).

sixteen doubling frames of the defendant's manufacture for the use of the plaintiffs in their mills for their said business. * * *

It was a term and condition of the contracts * * * that the doubling frames would do the plaintiffs' work satisfactorily.

The plaintiffs further alleged that the defendants were at all times aware (as the fact was) that the doubled yarns produced by the plaintiffs were yarns in which regularity of twist was an essential, and the plaintiffs, in the course of entering into the contracts, made known to the defendants that the doubling frames * * * were required for the purpose of producing yarns as aforesaid and that the plaintiffs were relying upon the skill and judgment of the defendants. Accordingly it was, by sect. 14 of the Sale of Goods Act 1893, a term and condition of the contracts, and each of them, that the doubling frames would be reasonably fit for the said purpose.

In purported performance of the contracts, the defendants had delivered to the plaintiffs sixteen doubling frames, and had been paid for ten of the same. * * * The frames so delivered, however, were defective and incapable of doing the plaintiffs' work satisfactorily * * * and were not reasonably fit for the purpose aforesaid.

The frames were, the plaintiffs alleged, incapable of producing evenly doubled yarn, or yarn with regularity of twist, by reason of the fluctuating speed at which the yarn continually left the bobbin on the spindle, the yarn coming off in jerks and very irregularly. * * *

The plaintiffs on numerous occasions in their correspondence and interviews with the defendants complained, as they alleged, of the defects and gave to the defendants notice of the losses that were being and were likely to be incurred by the plaintiffs by reason of the defects, and ultimately on the 8th May 1917 it was agreed by and between the plaintiffs and the defendants that the defendants should alter the said frames and remedy the said defects upon the terms and conditions set out in the correspondence confirming such agreement.

The principal term of the agreement was contained in a letter which was written to the plaintiffs by the defendants on the 8th May 1917 and which was as follows:

In consideration of our agreeing to bear half the expense of adding nip rollers and cap bars to the remaining fourteen frames to your instructions, you will pay for the machines and withdraw all claims against us for any damages in respect of the frames delivered or on any other account.

The plaintiffs had at all times been ready and willing as they alleged to fulfil their part of the agreement of the 8th May 1917, but the defendants after having altered or remedied seven of the doubling frames had wrongfully and in breach thereof failed, neglected, and refused to alter or remedy the remaining seven of the doubling frames which remained useless and worthless to the plaintiffs.

By reason of the premises the plaintiffs had, as they alleged, been damnified. They had lost the price of the defective machines and the

cost incurred in the erection of the same. They had further incurred loss on large quantities of yarn and manufactured goods spoilt through defective doubling and through cancellations of contracts on the part of their customers and through allowances which they had had to make to their customers in respect of faulty yarn, and had also sustained loss of production through the doubling frames being unusable.

The plaintiffs accordingly claimed £16,280 18s. 1d. damages in an action by them against the defendants which was commenced on the 9th April 1918.

On the 23rd May 1919 the action came on for trial before Shearman, J., sitting without a jury at the Manchester Assizes when the following judgment was delivered.

SHEARMAN, J. I had better deliver judgment now on this particular point.

This is an action brought by the plaintiffs and elaborated in great detail. It is an action for damages on several contracts, which are set out in the statement of claim, and which were made between the months of March and Oct. 1915, and a large superstructure of particulars and pleadings has been reared on that claim.

The pleader was fully aware that a further agreement was entered into on the 8th May 1917, because the draughtsman of the statement of claim, who took his risk in his hands, has pleaded that agreement, and has pleaded there was an agreement that the defendants should alter the doubling frames upon certain terms and conditions, and he went on to allege that the terms and conditions had not been fulfilled, and that therefore the plaintiffs fell back on their original cause of action. It is perfectly good pleading in that sense. On the face of it, it was not in the least demurrable, because the agreement between the parties was a conditional one, and the condition is accord and satisfaction. The plaintiffs agreed to take in satisfaction a certain accord subject to the condition that it was complied with in certain ways.

The pleader for the defendants took another view as to that agreement, and alleged that the document which had been entered into was not an accord and satisfaction which depended upon certain conditions or satisfaction. But he pleaded in plain terms, and quite accurately, that the document which had been referred to in the statement of claim amounted to an agreement which was common ground to both parties. He pleaded that the agreement was accepted by the plaintiffs in discharge of their alleged cause of action.

I have to consider, looking at this document entered into, whether the plaintiffs when they entered into the agreement to abandon their claim, entered into an agreement which was only to abandon it conditionally upon the full performance of the substituted agreement, or whether they agreed to take certain terms in satisfaction of their cause of action. It is an interesting and arguable point and I may be wrong. * * *

The result is that, holding the view I do that this was an accepting by the plaintiffs of the promise of the defendants as an accord and satisfaction of their claims, the only remedy left for the plaintiffs is, if the new contract is not performed, an action for the breach of the new contract without recourse to the original cause of action.

The pleadings are in an action brought on the original cause of action and not on the substituted cause of action. Therefore, unless anything can be done by way of amendment it seems to me that the action fails and must be dismissed with costs.

From that decision the plaintiffs now appealed.[36]

WARRINGTON, L. J. This is an action brought by the plaintiffs to recover damages for breach of a warranty as to the quality of the goods, the subject of a contract for the sale of those goods by the defendants to the plaintiffs.

The parties had disputed as to whether there had or had not been a breach of this warranty, and that dispute had taken place during the month of Feb. 1917. To that action it is pleaded—which is the only plea that I need refer to—as follows: "The defendants agreed on the terms and conditions set out in certain letters which are referred to in par. 6 of the statement of claim to bear half the actual cost of nip-rollers and cap-bars for fourteen frames on the plaintiffs' instructions, and in consideration of the defendants so agreeing the plaintiffs agreed to pay for the doubling frames and withdraw all claims against the defendants for any damages in respect of the frames delivered or of any other account. The said agreement was accepted by the plaintiffs in discharge of the alleged cause of action."

Now, putting it shortly, without reference to the particular facts, it comes to this: There is a cause of action for damages for breach of the original contract. That cause of action is satisfied by an accord and satisfaction, that accord and satisfaction being the entering by the defendants and the plaintiffs into the subsequent agreement as it is pleaded.

I think that the law with reference to the question is put as neatly as it can be in Morris v. Baron and Co. (118 L. T. Rep. 34; (1918) A. C. 1, at p. 35). It is in the speech of Lord Atkinson in the House of Lords. "The law as to the accord and satisfaction of a breach of an agreement was much discussed in argument. There is no doubt that the general principle is that an accord without satisfaction has no legal effect, and that the original cause of action is not discharged as long as the satisfaction agreed upon remains executory. That was decided so long ago as 1611 in Peytoe's case (9 Rep. 77 (b), 79 (b). If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made."

[36] Parts of the statement, parts of the opinions of Warrington and Atkin, L. JJ., and all of the opinion of Eve, J., are omitted.

The question here is whether the plaintiffs did or did not accept the promise of the defendants contained in the agreement, which is alleged as accord and satisfaction, in satisfaction of their cause of action. If they did, then that cause of action is gone, and if they have any further complaint to make it must be for breach of the second of the two agreements. * * *

The question really, I think, turns upon what is the meaning of the first clause of the agreement. Reading that first clause it seems to me quite plainly to express the agreement of the parties to accept that promise in satisfaction. It is in consideration not of the defendants doing what they agree to do, but in consideration of their agreeing. I insert the implied clause which I think must be there: On the defendants agreeing to add the nip-rollers and cap-bars to the remaining fourteen frames, and to bear half the expense, then the plaintiffs will pay for the machines and withdraw all claims against the defendants for any damages in respect of the frames delivered, or on any other account. That is to say, in consideration of the defendants agreeing to do this the plaintiffs will agree to withdraw their present cause of action. * * *

On the whole the judgment of the learned judge, in my opinion, was correct. I think, therefore, this appeal ought to be dismissed.

ATKIN, L. J. I agree.

In my judgment there is no doubt that there can be no discharge of a contract after breach except by alleging an accord and satisfaction. But, at the same time, I think that there can be no doubt but that the satisfaction may consist in the accord between the parties. It may be treated by both parties as satisfaction.

For that proposition though there is judicial authority to which I will refer, I should like to rely upon the passage in the third edition of Bullen and Leake, Precedents and Notes (at p. 478): "A substituted agreement in my opinion may be accepted in accord and satisfaction of an existing cause of action, the new promise only, and not the performance of it, being taken in satisfaction and discharge." * * *

When you contemplate that the promise, that which was to be done, was something which it was contemplated would at least take seven weeks and would only take seven weeks on the condition that the material was to be obtained, and when one recognises the difficulty that there was in 1917 in obtaining material of any sort, the formalities that had to be gone through by way of obtaining priority certificates and so on, and that the parties were contemplating a possible performance after seven weeks, whereas measures had been taken to bring the dispute before the court there and then because a writ had been issued, it seems to me quite plain that the parties intended that the plaintiffs' claim should be abandoned at once, and that the promise might come after the final withdrawal of the claim. That seems to me to make it quite plain that that which was the consideration for the withdrawal of the

claim was the promise to do the act and not the performance of the promise.

Therefore I think that in the present case the plea is correct and is established, and I think that the original cause of action was discharged. * * *

Appeal dismissed.

SECTION 6.—ACCORD EXECUTORY—ACCORD AND SATISFACTION

RICHARDS v. BARTLET.

(In the King's Bench, 1584. 1 Leon. 19.)

Dorothy Richards, executrix of A. her former husband, brought an action upon the case upon a promise against Humfrey Bartlet, and declared, that in consideration of two weights of corn delivered by the testator to the defendant, he did promise to pay to the plaintiff ten pounds, to which the defendant said, that after the assumpsit the plaintiff in consideration, that the said two weights were drowned by tempest, and in consideration that the defendant would pay to the plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said defendant of the said promise, and averred further, that he hath been always ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the plaintiff, first because that here is not any consideration set forth in the bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff, see 19 H. 6. Accord, 1. 9 E. 4. 13. 12 H. 7. 15. See also Onlies case, 19 Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because it is not executed, it is not any bar: and afterwards judgment was given for the plaintiff.

REILLY v. BARRETT.

(Court of Appeals of New York, 1917. 220 N. Y. 170, 115 N. E. 453.)

Action by William F. Reilly against William M. Barrett, as president of the Adams Express Company. A judgment for the plaintiff was unanimously affirmed by the Appellate Division (168 App. Div. 925,

931, 152 N. Y. Supp. 1139), and defendant appeals by permission. Affirmed.

ANDREWS, J. This action was brought to recover damages for personal injuries caused by the alleged negligence of the defendant. As an affirmative defense a supplemental answer alleged:

"That on or about the 16th day of August, 1912, the defendant, in good faith, served his verified answer to the complaint herein denying generally the validity of the plaintiff's claim, and thereafter, and on or about the 10th day of December, 1913, an agreement was made between the plaintiff and the defendant, through their respective attorneys, by which the defendant agreed to pay to the plaintiff in full settlement of the cause of action set forth in the complaint the sum of $200, and the plaintiff, in consideration thereof, agreed to accept the said sum in full settlement of the action, and upon the payment thereof to discontinue the action without costs."

The answer then alleges tender of the sum of $200 to the plaintiff and his refusal to accept the same, and the continued readiness of the defendant to pay over such sum to the plaintiff.

The sufficiency of this defense was challenged by the demurrer, and the sole question in this court is whether the decision of the Special Term, affirmed by the Appellate Division, sustaining such demurrer, is correct.

An agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim something other than what he believes himself entitled to, is an accord. The execution of such an agreement is a satisfaction.

An accord, when followed by satisfaction, is a bar to the assertion of the original claim. Until so followed it has no effect.

The fact that the original claim is based on contract or in tort is immaterial. Either may be barred by accord and satisfaction. So it is whether the claim is liquidated or unliquidated, except that in the former case certain principles as to consideration are enforced which are not applicable to the latter.

These rules apply to every such transaction. It may be called a compromise. But whatever the name given the original claim is not barred until the satisfaction is completed. Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Brooklyn Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 569.

The satisfaction contemplated by the accord may involve the payment of money or the delivery of property. Or the creditor may agree to accept the debtor's promise itself in satisfaction rather than the performance of this promise. Kromer v. Heim, supra.

In any event the defendant who seeks to set up this defense as a bar to the original action must allege and prove both the accord and the satisfaction. If his claim be that his promise was accepted in satisfaction, that he must plead. The burden is upon him to show the

existence of a bar. Babcock v. Hawkins, 23 Vt. 561. Because of his failure to include such a statement in his supplemental answer the demurrer thereto was rightly sustained.

The answer clearly shows an executory agreement by which the defendant agreed, within a reasonable time, to pay the plaintiff the sum of $200, and by which the plaintiff agreed to accept that sum when tendered in settlement of the action, and thereupon to discontinue such action without costs. There is no allegation that the defendant's promise was to be received in satisfaction, and no facts pleaded from which such an inference can be drawn. The answer is therefore defective in that it pleads only an accord.

The plaintiff relies upon Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134. But, as is clearly pointed out, that was the case of a creditor holding an unmatured and contingent obligation agreeing with his debtor for the surrender of the obligation. The authority of Kromer v. Heim is not weakened, and it has been cited as late as Mance v. Hossington, 205 N. Y. 33, 98 N. E. 203.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed.

WHITE v. GRAY et al.

(Supreme Judicial Court of Maine, 1878. 68 Me. 579.)

WALTON, J. Plaintiff held a note against defendants for $800. Defendants were insolvent and were endeavoring to compound with their creditors. In consideration of which, the plaintiff agreed that, if their efforts were successful, he would take in payment of his note a lot of land, and new notes for $500, payable, one-half in one year, and one-half in two years. Defendants' efforts were successful, and they offered to settle with the plaintiff upon the terms stated in the agreement; but he refused, denying all liability under his agreement, and claiming the full amount due upon his note. No deed of the land was ever executed, nor were the notes mentioned in the agreement ever made or tendered to the plaintiff.

The question is whether these facts constitute a valid ground of defense to an action on the note. We think not.

It is settled law in this state that a defense based on an alleged accord and satisfaction can be sustained only when the accord has been completely executed. Neither an offer to perform nor an actual tender of performance is sufficient. Nothing short of actual performance—meaning thereby, performance accepted—will sustain such a defense. The debtor's remedy, if the creditor has wrongfully refused to accept performance, is a separate action upon the agreement. Young v. Jones, 64 Me. 563, 18 Am. Rep. 279; Bragg v. Pierce, 53 Me. 65; Cushing v. Wyman, 44 Me. 121.

The agreement which, in the case first cited, failed as a ground of defense, was successful when made the ground of a separate action. Mattocks v. Young, 66 Me. 459.

The distinction between an agreement which is, per se, to satisfy and extinguish an existing debt, and an agreement, the performance of which is to have that effect, must not be overlooked. The former operates as an immediate satisfaction of the debt. The latter, only when performed. The agreement set up as a defense in this case is clearly of the latter kind.

Judgment for plaintiff.[87]

WALTER H. GOODRICH & CO. v. FRIEDMAN et al.

(Supreme Court of Errors of Connecticut, 1917. 92 Conn. 262, 102 Atl. 607.)

Action by Walter H. Goodrich & Co., a corporation, against Louis Friedman and others. Judgment for plaintiff, and defendants appeal. Error.

Action to recover the value of certain goods and articles sold and delivered, brought to and tried by the city court of New Haven. Facts found and judgment rendered for the plaintiff and appeal by the defendants. Error.

The plaintiff is a corporation engaged in the business of selling oils,

[87] That an accord executory is no bar, even though the defendant has tendered performance and this has been refused by the plaintiff, see Carter v. Wormald, 1 Ex. 81 (1847); Gabriel v. Dresser, 15 C. B. 622 (1855); Cooke v. McAdoo, 85 N. J. Law, 692, 90 Atl. 802 (1914); Humphreys v. Third Nat. Bank, 75 Fed. 852, 859, 21 C. C. A. 538 (1896); Young v. Jones, 64 Me. 563, 18 Am. Rep. 279 (1875); Clifton v. Litchfield, 106 Mass. 34 (1870); Kidder v. Kidder, 53 N. H. 561 (1873); Russell v. Lytle, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537 (1831); Tilton v. Alcott, 16 Barb. (N. Y.) 598 (1853); Hearn v. Kiehl, 38 Pa. 147, 80 Am. Dec. 472 (1861); Keen v. Vaughan's Ex'x, 48 Pa. 477 (1865); Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491 (1879), where there was perhaps only an unaccepted offer and not a new agreement; Harbor v. Morgan, 4 Ind. 158 (1853); Camden Fire Ins. Ass'n v. Baird (Tex. Civ. App.) 187 S. W. 699 (1916); James v. David, 5 T. R. 141 (1793), Lord Kenyon saying: "I am sorry that the agreement, as disclosed in the plea, is not a conclusive answer to the action; but as no satisfaction is pleaded, the plaintiff is entitled to judgment."

In Y. B. 15 Edw. IV, 8, pl. 5, Pigot, J., said: "There is a difference between an arbitrament and an accord; in the case of an accord an actual payment or other recompense is necessary, or it will not be valid; if there is a dispute between you and me as to certain trespasses, whereupon there is an accord between us that I pay certain money in settlement, and I tender the money to you and you refuse to receive it, the accord is void, but if you receive the money it operates as satisfaction. Also for non-payment of the money you would have no action. In arbitraments it is otherwise, for upon an award that I pay you certain money you would have an action."

After bilateral contracts became enforceable at common law, attempts were made to cause a bilateral accord to operate as satisfaction. See Reniger & Fogasse's Case, 1 Plow. 1 (1550); Termes de la Ley, tit. Concord; Case v. Barber, T. Raym. 450 (1681); Allen v. Harris, 1 Ld. Raym. 122 (1701). These attempts failed, except where the new contract is clearly substituted for the prior claim.

gasoline, and the like. The defendants, between the dates of July 15, 1915, and December 13, 1916, made purchases of oils, gasoline, and other products, and made payments for these articles as set forth in the bill of particulars and made part of the plaintiff's complaint. On or about November 6, 1916, the plaintiff demanded payment of the defendants, who then owed the plaintiff $595.56, but the defendants were unable to pay in cash. The plaintiff requested the defendants to execute a note for the amount of the indebtedness then existing, and suggested a note payable in 60 days. The defendants refused to give a 60-day note, but offered to execute a note payable in 4 months, whereupon a note in the following form was executed and delivered to the plaintiff.

"595.56. November 6, 1916.

"Four months after date we promise to pay to the order of Walter H. Goodrich & Co. five hundred and ninety-six and 56/100 dollars at Union & N. H. Trust Co. Value received."

There was no agreement between the plaintiff and the defendants that this note was received in payment of the existing debt. The plaintiff indorsed the note and discounted it at the bank where it was made payable, where it was later protested for nonpayment. The plaintiff still holds the note, and it is unpaid. The note was at all times the property of the plaintiff. This action was instituted on December 19, 1916, prior to the maturity of the note. The amount of the plaintiff's claim as it appears from its bill of particulars is $755.05. Of this amount $156.49 represents sales which were made subsequent to November 16, 1916, the date of the note. The defendants admitted the execution, delivery, and acceptance of the note by the plaintiff, but claimed that the plaintiff was precluded from obtaining a recovery for the sum of $596.56, the amount of the note, before it became due. The trial court overruled this claim, and rendered judgment for the full amount of the plaintiff's bill.

There are several reasons of appeal. In substance, the error assigned is the conclusion of the trial court that the plaintiff's acceptance of the negotiable promissory note and the negotiation of the same did not preclude a recovery of the indebtedness evidenced by the note before its maturity.

RORABACK, J. (after stating the facts as above). This action was commenced about 2½ months before the maturity of the note. It is a general rule that the nonexistence of a cause of action at law when the suit is brought is a fatal defect, which cannot be cured by the accrual of a right of action while the suit is pending. In other words, an action at law can be supported only on the facts as they existed when the action was commenced. Woodbridge v. Pratt & Whitney Co., 69 Conn. 304, 305, 37 Atl. 688; Dickerman v. N. Y., N. H. & H. R. Co., 72 Conn. 271, 275, 44 Atl. 228.

The acceptance of the note in the present case was at the least an agreement for delay, and the plaintiff could not commence an action on the original debt evidenced by the note until the note became due. 2 Parsons on Notes and Bills, 135. The reason for this rule is that the entering into a new agreement and undertaking subjected the defendants, debtors, to peculiar liabilities, or afforded the plaintiff, creditor, fresh and peculiar rights which constituted a good consideration for the extension of credit. Chitty on Contracts, 593. This note "implied an agreement to suspend the remedy on the original demand during the term of the note." Brabazon v. Seymour, 42 Conn. 551, 554. See, also, 1 C. J. p. 1148, and cases cited in note 43 at the bottom of page 1148.

It appears that when this action was commenced the note had been discounted and was in the control of the bank, a bona fide holder. The defendants at this time were liable to pay the note to a third party. To now hold that the defendants at this time were liable for the price of the goods for which the note was given would be a plain evasion of the rule that a cause of action must be supported by the facts as they existed when the action was commenced.

There is error, and a new trial is ordered.

The other Judges concurred.[38]

GOOD v. CHEESMAN.

(Court of King's Bench, 1831. 2 Barn. & Adol. 328, 109 Eng. Rep. 1165.)

Assumpsit by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1830, it was proved, on behalf of the defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following mmorandum: "Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October 1829." It did not appear whether

[38] Kendrick v. Lomax, 2 C. & J. 405 (1832); Mercer v. Cheese, 4 M. & G. 804 (1842); Ford v. Beech, 11 Q. B. 852 (1848), semble.

The giving of a renewal note by a debtor is held to operate as a discharge of a surety on his former debt, on the ground that it suspends the creditor's remedy against the debtor until the maturity of the renewal note. It is generally assumed that the creditor's suit before that time would fail. See Andrews v. Marrett, 58 Me. 539 (1870); Myers v. Welles, 5 Hill (N. Y.) 463 (1843); Okie v. Spencer, 2 Whart. (Pa.) 253, 30 Am. Dec. 251 (1836); Gould v. Robson, 8 East, 576 (1807).

or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional £20 per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November 1829, wrote to the plaintiff as follows: "If you should see Mr. Wooldridge" (one of the creditors who signed) "to-day, I should be glad if you would endeavour to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case, whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule nisi was obtained accordingly.

Lord TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for

the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITTLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from Heathcote v. Crookshanks (2 T. R. 24). And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in Com. Dig. Accord (B, 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shewn that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

Rule discharged.[39]

[39] The executory composition agreement may itself be made to operate as a substituted contract and novation; or the agreement may be that its per-

HADLEY FALLS NAT. BANK v. MAY.

(Supreme Court of New York, 1883. 29 Hun, 404.)

Appeal from a judgment in favor of the defendant, entered upon a verdict directed by the court, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

DANIELS, J. The defendant was clearly liable upon the notes made by him which were set out in the complaint, unless the compromise agreement delivered to him in May, 1875, in itself constituted a legal defense. This agreement, as the evidence at the trial tended to establish it, was in the following form:

"Know all men by these presents, that we, the undersigned creditors of Reuben May, do, for and in consideration of the sum of one dollar

formance shall operate as a satisfaction. See In re Hatton, L. R. 7 Ch. App. 723 (1872). In the latter case actual performance operates as a discharge even though it consists only in part payment of the debt, and meantime prior to the time set for the substituted performance it operates to suspend the creditor's original right: Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488 (1918).

In Slater v. Jones, L. R. 8 Ex. 186 (1873), action was brought against a debtor who pleaded that the creditors had passed a resolution under the Bankruptcy Act of 1869 agreeing to accept a composition of six shillings in the pound as a full settlement, the time for payment of which sum had not yet arrived. This was held to be a good plea. Kelly, C. B., said: "Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense." After approving the decision of In re Hatton, L. R. 7 Ch. App. 726 (1872), holding that after default by the debtor in performance of the composition the creditor can maintain suit on the original claim in full, he continued: "Then it is contended that the case of Ford v. Beech, 11 Q. B. 852 (1848), interposes an insurmountable difficulty in the defendant's way; for if the composition resolution is a good bar now, the right of action for the debt would be gone forever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. Ford v. Beech, however, has no application here. For all that is necessary to decide is that although, rebus sic stantibus, the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them."

Martin, B., said: "The principle [of Ford v. Beech] has itself been the subject of much comment in recent cases, and it has been suggested by the late Mr. Justice Willes that many of the difficulties caused by a rigid application of it are removed by construing covenants not to sue as releases with conditions subsequent."

Bramwell, B., made a similar attempt to distinguish Ford v. Beech.

In Newington v. Levy, L. R. 5 C. P. 607, 611 (1870), Willes, J., said: "We see no difficulty in upholding a release with a condition subsequent, in accordance with the suggestion of Maule, J., in Gibbons v. Vouillon, 8 C. B. 487 (1849). * * * We can see no substantial distinction between the case of a payment avoided by subsequent events and a release so avoided. This is not a case of temporary suspension, like Ford v. Beech; but a case in which the release will be forever operative unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties." He thereupon held that a plea of an unexecuted composition was a good plea for the time being, but was afterwards avoided by the nonpayment of the composition. This was affirmed in the Exchequer Chamber, L. R. 6 C. P. 180 (1870).

to us each in hand paid, covenant with the said Reuben May and with each other to receive and accept the sum of twenty-five per centum on the dollar, owing to us and set opposite to our names, in satisfaction of our demands.

"In witness whereof we have hereunto set our hands and seals, this - day of May, 1875.

"[L.S.] John Hancock National Bank,
"By R. S. Moore, President.
"Hadley Falls National Bank,
"By Ch. W. Ranlet, P.
"B. H. Arthur.

"In presence of Abram Kling."

The action upon the notes was commenced in December, 1880, and it was shown upon the trial that payment of the stipulated sum of twenty-five per cent. on the dollar had been demanded and refused. It was under these circumstances that the court at the trial held that no action could be maintained upon the notes themselves. This ruling seems to have been made on the authority of Breck v. Cole, 6 N. Y. Super. Ct. 80, but that case was not authority for it. The action there determined was upon a note made by the debtor himself, in addition to those which the creditors by their composition agreement had stipulated to receive in full satisfaction of their debts, and it was held that this additional note of the debtor had been unlawfully exacted by the creditor and delivered to him by the debtor; that it was a fraud upon the other creditors, and therefore no action could be maintained upon it.

This principle is very well settled and entered into the decision of the case of Lawrence v. Clark, 36 N. Y. 128. But it was not involved in the determination of the present case, and failed to justify the disposition which was made of it at the circuit. The case of Good v. Cheesman, 2 Barn. & Adol. 328, relied upon as sustaining the ruling which was made, was also clearly distinguishable in its facts, for there the creditors agreed to accept payment of their debts by the debtor, "covenanting and agreeing to pay to a trustee of our nomination one-third of his annual income, and executing a warrant of attorney as collateral security until payment thereof." The debtor was always ready to perform, but the creditors failed to appoint the trustee to whom payment could be made, and the warrant of attorney delivered. And it was because the creditors had accepted this covenant, which the debtor had been at all times ready to perform and they had deprived him of the power of doing so by their omission to select the trustee, that the defense depending upon the composition agreement was sustained. The case of Norman v. Thompson, 4 Exch. 755, is equally as inapplicable to the present controversy, for there had been no default in the performance of the agreement. But the debtor, on the contrary, showed by his plea the sufficiency of which was in controversy that he had been at all times ready and willing to perform.

By the agreement which was entered into on the part of the plaintiff in this action the only covenant or stipulation which was made, was that it would accept the sum of twenty-five per centum on the dollar in satisfaction of its demands. It was therefore not an agreement to accept or receive the promise of the debtor to pay that amount in satisfaction, but the actual payment of that percentage by the debtor was requisite to perform the agreement and satisfy the debts. The terms of the agreement can be satisfied by no other rational construction; and where that is the effect which must be given to them, then the debtor cannot rely upon the agreement for his protection after he himself has failed to perform it by refusing to make the stipulated payment. The case of Penniman v. Elliott, 27 Barb. 315, is a direct authority supporting this legal proposition. Its correctness was conceded in Hall v. Merrill, 18 N. Y. Super. Ct. 266, and it has repeatedly been applied in the same manner in the determination of the effect of similar compromises or compositions made under the bankrupt law.

In re Hatton, L. R. 7 Ch. App. Cases, 726, the creditors had agreed to accept five shillings in the pound in two installments in satisfaction of their debts. The debtor paid the first but failed to pay the second installment, and on account of that default the creditors were held entitled to enforce the original liability as that had been incurred by the debtor. And a similar view was sustained in Goldney v. Lording, L. R. 8 Q. B. 182, and Newell v. Van Praagh, L. R. 9 Com. Pleas, 96.

The principle applicable to this class of cases is that if the promise be "for a new consideration, performable at a future day certain, then the original right of action is suspended until that day comes. If the promise is then duly performed this right is destroyed, but if the promise is not then duly performed this right revives and the promisee has his election to sue on the original cause of action or on the new promise, unless by the terms or the legal effect of the new contract the new promise is itself a satisfaction and an extinction of the old one." 2 Pars. on Con. (6th Ed.) 683. And where the time of performance has not been specified the debtor is required to perform it within a reasonable time, and if he fails to do so the consequence will be the same under this general principle of the law. The same distinction was approved in Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491, and Chemical Bank v. Kohner, 85 N. Y. 189, and Baxter v. Bell, 86 N. Y. 195, in no respect whatever either questions or impairs its effect.

By the failure of the debtor to pay the stipulated twenty-five per cent mentioned in the agreement delivered to him he deprived himself of all the benefit which it was designed he might secure by the performance of its terms. From the time of that failure the proposal ceased to be binding upon the plaintiff, and it afterwards had the right to resort to the notes held by it and enforce them as legal obligations against him. The judgment and order should therefore be reversed and a new trial directed, with costs to the plaintiff to abide the event.

MACOMBER, J., concurred.

Present—DAVIS, P. J., DANIELS and MACOMBER, JJ.

Judgment and order reversed and a new trial directed, with costs to plaintiff to abide event.[40]

LYNN et al. v. BRUCE.

(Court of Common Pleas, 1794. 2 H. Bl. 317, 126 Eng. Rep. Reprint, 571.)

This was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for £200. The second was as follows: "And whereas also afterwards, &c. in consideration that the said Robert and Thomas (the plaintiffs) at the special instance and request of the said Charles (the defendant) had then and there consented and agreed to accept and receive, of and from the said Charles, a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and two pence, then due and owing from the said Charles to the said Robert and Thomas, upon and by virtue of a certain other writing obligatory, bearing date, &c. made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them, in the sum of two hundred pounds, in full satisfaction and discharge of the said last mentioned writing obligatory, and all monies due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, upon request; and the said Robert and Thomas in fact say, that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the said Charles afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas

[40] In accord: In re Hatton L. R. 7 Ch. App. 726 (1872); Ransom v. Geer (C. C.) 12 Fed. 607 (1882); Flack v. Garland, 8 Md. 188 (1855); Penniman v. Elliott, 27 Barb. (N. Y.) 315 (1858); Braude v. Vehon, 201 Ill. App. 486 (1916); Beck v. Witteman Bros., 185 App. Div. 643, 173 N. Y. Supp. 488 (1918).

There is no revival of the original right in case the debtor's promissory notes were given and accepted in instant satisfaction, even though these notes are never paid. Bartlett v. Woodworth-Mason Co., 69 N. H. 316, 41 Atl. 264 (1898); Swartz v. Brown, 135 App. Div. 913, 119 N. Y. Supp. 1024 (1909); Mullin v. Martin, 23 Mo. App. 537 (1886).

a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last mentioned sum of seventy-three pounds thirteen shillings and six pence, the amount of the said last mentioned composition, yet the said Charles not regarding, &c. hath not yet paid the sum of three pounds seven shillings and six pence, being the residue of the said sum of seventy-three pounds thirteen shillings and six pence, the composition last aforesaid, or any part thereof, &c."

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count, and after argument the opinion of the Court was thus delivered by

Lord Chief Justice EYRE. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is, that in consideration that the plaintiff at the defendant's request, had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon £105. 5s. 2d. due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for £200., in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred, that the composition amounted to £73. 13s. 6d., and that the defendant had paid the plaintiff £70. 6s., part thereof. The breach is, that he did not pay £3. 7s. 6d. the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration. If it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of Allen v. Harris, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said, that the books are so numerous that an account ought to be executed, that it was impossible to overturn all the authorities; the expression is, "overthrow all the books." It was added, that if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. "Interest reipublicæ ut sit finis litium;" accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three of the cases in 1 Roll. Abr. title Accord, pl. 11, 12, 13, is, because the plaintiff hath not any remedy for the whole, or where part has been performed for that which is not per-

formed; which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages, for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts, before it can produce legal obligation of legal effect, that in Peytoe's Case, 5 Co. 79 b, it was holden, that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in Cro. Eliz. 304, 305, to the same effect. It was argued according to the cases in Roll. Abr. that an accord executory in any part, is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar. But put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.[41]

NASH v. ARMSTRONG.

(In the Common Pleas, 1861. 10 C. B. [N. S.] 259, 142 Eng. Rep. Reprint, 451.)

The declaration stated that, by deed dated the 29th of February, 1860, the said John Beatson, being then possessed thereof for a term which had not yet expired, let to the defendant certain rooms part of a house of the said John Beatson, therein described, from the 1st of March in that year to the 24th of June in that year, at rent to be ascertained by two valuers, one on the part of the said John Beatson, and one on the part of the defendant, or an umpire to be agreed on by the said two valuers, such rent to include the use of the fixtures and fittings then in and upon the said demised premises, and which then belonged to the said John Beatson, the expense of the valuer to be employed by the said John Beatson to be paid in the first instance by the defendant, and retained by him out of the rent for the said demised premises accruing due from him on the said 24th of June, 1860; and afterwards the said valuers were respectively accordingly duly appointed, but did not, without any default of the said John Beatson or the plaintiff in that behalf, ascertain the rent so to be paid as afore-

[41] Other cases saying that upon an accord no remedy lies are Allen v. Harris, 1 Ld. Raym. 122 (1701); Reeves v. Hearne, 1 M. & W. 323 (1836); Clifton v. Litchfield, 106 Mass. 34 (1870); Bell v. Pitman, 143 Ky. 521, 136 S. W. 1026, 35 L. R. A. (N. S.) 820 (1911). This rule is sometimes explained on the ground that an accord lacks consideration. Bryant v. Gale, 5 Vt. 416 (1832); Tucker v. Dolan, 109 Mo. App. 442, 84 S. W. 1126 (1905). Sometimes the supposed "accord" is a mere unaccepted offer; more often the real question before the court is whether there has been a discharge of the former claim and not whether the new agreement itself creates a legal duty.

said, or appoint any umpire; and the defendant, nevertheless, at his request, occupied the said rooms under the said demise until the said 24th of June, and afterwards as tenant thereof to the plaintiff as administrator as aforesaid, for a long time, to wit, until the 1st of September, 1860, the said John Beatson having previously died: that afterwards, and whilst the amount of rent to be paid by the defendant for and in respect of his said occupation of the said rooms to the said 24th of June, and thence to the said 1st of September, was and remained unascertained and not agreed upon, and unpaid, it was, at the defendant's request, mutually agreed between the plaintiff as administrator as aforesaid, and the defendant, that, if the plaintiff, as administrator as aforesaid, would not insist upon such valuation as aforesaid, and would not require that the said valuers should be called upon to appoint an umpire to ascertain the amount of the said rent to be paid for the defendant's said occupation until the said 24th of June, and that the said valuers should be instructed not to appoint such umpire as aforesaid, the defendant would pay to the plaintiff, as administrator as aforesaid, for and in respect of his occupation of the said rooms under the said deed, and for and in respect of the said subsequent occupation thereof as tenant to the plaintiff as administrator as aforesaid, a reasonable sum in that behalf, to wit, the sum of £70; and that neither the plaintiff as administrator as aforesaid nor the defendant should ever call upon the other of them to carry out or perform or fulfil the terms of the said deed: Averment, that the plaintiff did everything, and everything existed and had before suit happened to entitle the plaintiff, as administrator as aforesaid, to payment of the said sum of money last mentioned, to wit, £70: Breach, that no part thereof had been paid.

To this count the defendant demurred, the ground of demurrer stated in the margin being, "that a contract under seal cannot be varied or discharged by a parol agreement." Joinder.

R. G. Williams, in support of the demurrer. There is no valid consideration for the promise stated in the declaration. [WILLIAMS, J. Why is it not a good consideration in assumpsit, that the plaintiff foregoes his rights under the deed?] It is varying by parol the terms of a deed. [WILLIAMS, J. That is not so.] By the parol agreement, the defendant is to pay the rent ascertained in a way different from that provided by the deed. [WILLIAMS, J. The plaintiff is seeking to enforce an agreement founded upon a consideration that the plaintiff will not put in force his rights under the deed.] A deed can only be varied by deed. Would a recovery in this action be pleadable in bar to an action upon the deed? [WILLES, J. I should have thought it a good answer by way of equitable plea. The payment of the £70 under the agreement would surely be ground for an unconditional perpetual injunction against proceeding upon the deed.][42] * * *

[42] Part of the argument of counsel is omitted.

WILLIAMS, J. I am of opinion that there should be judgment for the plaintiff on this demurrer. I do not think it necessary to dispute the correctness of many of the doctrines contended for in the argument; for, I do not consider that the conclusion we have arrived at in any degree conflicts with any of the rules of law adverted to. On the face of this declaration there is an admitted promise by the defendant to pay a certain sum of money at a stipulated time, and an admitted breach of that promise. That is a perfectly good promise if founded upon a sufficient legal consideration; and the simple question is, whether there is a sufficient legal consideration disclosed on the declaration. I am of opinion that there is. It appears upon the face of the declaration that the plaintiff, as the personal representative of the original contracting party, being in a condition to bring an action upon the original contract, or otherwise to put it in force, in consideration of his abstaining from enforcing the rights conferred on him by that contract, the defendant promised to pay in respect of the occupation of the premises under the deed referred to, and in respect of his subsequent occupation thereof as tenant to the plaintiff as administrator, a reasonable sum. It was not necessary, in order to make that a good consideration, that the mutual promises should amount to a release of the right of action flowing from the original contract. The plaintiff, having a right to enforce the benefits conferred on him by the contract, enters into an agreement not to do so, whereby he changes his situation to this extent, that, whereas before he had a right to sue upon the deed, if he now exercises that right he renders himself liable to an action. He has, therefore, plainly given a good consideration for the defendant's promise, and there is a complete cause of action disclosed on the face of the declaration. Upon principle, this is in truth nothing more than the ordinary case to be found in the old books, of an action against an heir whose ancestor has made a bond binding himself and his heirs, and who has assets by descent: if he contracts with the obligee of the bond, that, if the latter will forbear to put the bond in suit, he will pay the sum secured by a given day,—that is a good assumpsit, and the forbearance till the day named is a good consideration to support the promise. The bond is not released by that. The only result is, to subject the obligee to an action if he puts the bond in suit before the expiration of the time agreed on. To that extent the terms of the bond are varied, and yet the bond remains unreleased; nevertheless, the consideration which flows from the agreement of the obligee not to put the bond in suit is good, and furnishes a ground of action if it is broken. That principle is applicable here.

WILLES, J. I am entirely of the same opinion. It appears to me that this declaration is neither open to the objection that it is an attempt to vary by parol the terms of a deed, nor to the objection that it is an action upon an accord.

BYLES, J. I had at first some doubt whether the maxim Unumquodque dissolvitur eodem legamine quo ligatur, was not applicable

here; for, till satisfaction, the plaintiff might always have an action upon the deed, and one cannot but see that this would lead to circuity of action. Further, whatever may be the value of the decision in Leslie v. De la Torre, the reported observations of Lord Kenyon are very much in favour of Mr. Williams's argument. But Gwynne v. Davy is not so. Three of the judges there intimate an opinion that an action might be maintained on the parol agreement. And no other authorities have been cited to shew that the rule is applicable to a cross-action, and is not confined to an action on the deed.

KEATING, J. I concur with the rest of the court in thinking that the declaration discloses a promise founded on a good consideration, and that it is not open to the objection that the plaintiff is seeking by parol to vary the terms of an instrument under seal.

Judgment for the plaintiff.

FRANCIS et al. v. DEMING et al.

(Supreme Court of Errors of Connecticut, 1890. 59 Conn. 108, 21 Atl. 1006.)

THAYER, J. To the plaintiffs' complaint, claiming the foreclosure of a judgment lien, the defendants, filed a special answer alleging, in substance, that the plaintiffs, after the judgment was rendered and after the judgment lien was filed, agreed to discharge the same if the defendants should within one month from June 10, 1889, pay the plaintiffs a sum materially less than the amount of the judgment, give them a release of damages for the attachment made in the writ, and make return to the probate court that the defendant Henry A. Deming had given notice of the settlement of his administration account with the estate of one Emily Francis, deceased; and that said notice was given, said release signed, and on the 8th, 9th, and 10th days of July, 1889, said Henry A. Deming went to the office of the plaintiffs' attorney prepared to pay the money and deliver the release, but did not find the attorney, who was sick at home as the defendant then learned; and that afterwards, and after the present suit was brought, the money was actually tendered to the plaintiffs' attorney, who refused to receive it. To this answer the plaintiffs demurred. The court sustained the demurrer, and from that decision this appeal was taken.

It is not alleged or claimed that the defendants agreed to obtain the release, make the return, and pay the money within one month from June 10th, and that this agreement was accepted by the plaintiffs in discharge of the judgment. It was not an accord with mutual promises, therefore, but a mere promise by the plaintiffs to discharge the judgment if these things were done. Their performance was thus a condition precedent to the defendants' right to a discharge. Goodrich v. Stanley, 24 Conn. 613. The agreement, if the condition is fully performed, constitutes an accord and satisfaction of the judgment, and is

a bar to the action. Unperformed, it is a mere accord, and does not bar the action. Williams v. Stanton, 1 Root, 426; Scutt's Appeal, 43 Conn. 109. This is admitted by the defendants, but it is claimed that, in law, what has been done by them constitutes performance. When money is to be paid by one party to another, and the contract fixes no place for the payment, the rule is that the payment must be to the person at the place where he is, if he be within the same dominion. 1 Swift, Dig. 292; 2 Pars. Cont. 636. Parke, B., in Startup v. Macdonald, 6 Man. & G. 624, says: "In such a case the party bound must find the other at his peril, and within the time limited, if he be within the four seas." Here no place was fixed for the payment. It was the defendants' duty, therefore, to seek the plaintiffs or their duly-authorized agent or attorney, and make tender to them within the time limited. This they did not do. Calling at the office of the attorney, prepared to pay, does not meet the requirements of the law. Deming there learned that the attorney was at his house. He made no tender of the money and release at the office to the person in charge. He did not seek the attorney at his house and tender them to him. Nor did he seek the plaintiffs, who reside in an adjoining town, and tender performance to them. The allegations of the answer show no excuse for his failure to do so. No waiver of performance within the time limited is claimed. As the tender after the action was begun was of the money only, and did not include either interest or the costs which had accrued, it was not a legal tender, and would not entitle the defendants to a discharge.

But the defendants urge that this is a proceeding in equity, and that the rules of equity are not so stringent as those of law concerning the necessity of a tender within the time limited, and that, as the answer shows that they were on July 10th, and still are, ready and willing to perform, the demurrer should have been overruled. When a condition is subsequent, and is broken, equity will generally relieve the party in default if he shows sufficient excuse for non-performance within the time specified. In the present case the defendants had no right to a discharge of the judgment, except upon the performance of the condition within the time. The performance of the condition was the consideration for the plaintiffs' promise to discharge the judgment. In such a case, where the rights of the party in default are dependent upon a condition precedent which is neither fulfilled nor waived, as no right or title vests, equity can afford no relief. Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447; Giddings v. Insurance Co., 102 U. S. 111, 26 L. Ed. 92; Wells v. Smith, 2 Edw. Ch. (N. Y.) 78; Mills v. Hoag, 7 Paige (N. Y.) 21, 31 Am. Dec. 271; Seton v. Slade, 2 White & T. Lead. Cas. (Har. & W. Amer. Ed.) 1143. This case presents no equities in the defendants' favor. The plaintiffs agreed, if the defendants performed within one month, to accept nearly $300 less than was due them upon their judgment. The return of the probate notice the defendant Deming was legally bound to make. The release he has never

tendered. Under these circumstances, showing no excuse for non-performance, neither law nor equity can afford him assistance.

There was no error in the judgment appealed from. The other judges concurred.[43]

HUNT v. BROWN.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 253, 15 N. E. 587.)

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that if the plaintiff would assent to a compromise by the executors of the plaintiff's father's will of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their claim. The executors then settled the claim for 62 per cent. of the amount, with the plaintiff's assent; then Russell died and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial, and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration,—that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent,—and that, if it was so dealt with, it was sufficient. Evidence, or even an admission, that the compromise was for the plaintiff's advantage, would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

[43] Where the so-called accord is not a bilateral contract, but is a mere offer to be accepted by actual performance, it is revocable prior to action in reliance thereon; and prior to performance it does not operate as a bar. See Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491 (1879); Harbor v. Morgan, 4 Ind. 158 (1853). Nor would an action lie for refusal to perform as offered.

2. If Russell had received the 62 per cent. as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction, (Bowker v. Childs, 3 Allen, 434, 436;) and if it was technically a satisfaction, whether, like a payment, (Fuller v. Shattuck, 13 Gray, 70), it must not have been pleaded in the suit upon the notes, if it was to be relied on at all; or whether there remained any contract unexecuted by the party satisfied, which he would break if he afterwards brought suit. But Russell did not accept 62 per cent., so that the only question is whether his agreement in any other way extinguished the notes in whole or in part; since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of 38 per cent. of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. Goodnow v. Smith, 18 Pick. 414, 416, 29 Am. Dec. 600; Petty v. Allen, 134 Mass. 265, 267; Taylor v. Manners, L. R. 1 Ch. 48. But the common law knows no such release. Shaw v. Pratt, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See Cumber v. Wane, 1 Smith, Lead. Cas. 633, (8th Amer. Ed.) and notes; Bragg v. Danielson, 141 Mass. 195, 196, 4 N. E. 622; May v. King, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired in satisfaction of 38 per cent. of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement and what was done under it had released or satisfied 38 per cent., they were warranted at least equally in finding that it was purely executory, in purport as well as in form, viz., to accept a percentage in satisfaction when it was paid. The court could not rule as matter of law that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said that the contract must have been found to embrace the element that Russell would not sue for more than 62 per cent., and it may be argued that, if not technically a release, it ought to have been available in defense pro tanto, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a

covenant not to sue is allowed to inure as a release. The answer is that, whether available in this way or not, whether or not such a defense would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defense. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral contract. See, further, Costello v. Cady, 102 Mass. 140; Blake v. Blake, 110 Mass. 202. A breach of it was a substantive course of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. Smith v. Palmer, 6 Cush. 513, 521; Cobb v. Curtiss, 8 Johns. (N. Y.) 470. See Burnett v. Smith, 4 Gray, 50, 52; Davis v. Hedges, L. R. 6 Q. B. 687.

When a defendant has the choice of setting up a matter in defense, or of suing upon it in another action, if he chooses not to set it up in defense, of course the judgment in the action against him is no bar to a subsequent suit by him. Smith v. Palmer, ubi supra; Glass Co. v. Morey, 108 Mass. 570, 573; Davis v. Hedges, ubi supra. Russell's agreement was not pleaded in the former action. Even if it had been executed, it would not have been admissible under a plea of payment. Ulsch v. Muller, 143 Mass. 379, 9 N. E. 736; Grinnell v. Spink, 128 Mass. 25. The present plaintiff not having set up the agreement, and having no other defense, very properly saved himself costs, and his antagonist delay, by submitting at once to the inevitable, and offering judgment. See Rigge v. Burbidge, 15 Mees. & W. 598.

Exceptions overruled.[44]

[44] Where a creditor makes a new agreement with a third person for the future discharge of his claim by a substituted performance by this third person (like that in Ford v. Beech, ante, p. 937), this new agreement is said not to be an "accord" and is certainly enforceable. Strutt v. Farlar, 16 M. & W. 249 (1847); Henderson v. Stobart, 5 Exch. 99 (1850).

An agreement between a creditor and his debtor providing for a future discharge by a subtituted performance by the debtor may be made either before or after breach of the original obligation by the debtor. It should be enforceable in either case. See, after breach: Crowther v. Farrer, 15 Q. B. 677 (1850); Farmers' State Bank v. Singletary, 22 Ga. App. 653, 97 S. E. 90 (1918). Before breach: Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202 (1882); Smyth v. Holmes, 10 Jurist, 862 (1846), where Parke, B., said: "Such an agreement before breach of the original agreement is binding. * * * An action will lie on mutual promises; and this is such an action, and not an action on an accord."

VERY v. LEVY.

(Supreme Court of the United States, 1851. 13 How., 345, 14 L. Ed. 173.)

Mr. Justice CURTIS.[45] This is a suit in equity to foreclose a mortgage, commenced in the Circuit Court of the United States for the District of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory, for the sum of four thousand dollars, bearing interest at the rate of seven per cent. per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the city of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage, and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods such as jewelry, etc., in which the respondent dealt, at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of $1,898.25, and afterwards, on the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows:

"Little Rock, March 3d, '43. I hereby agree to take in goods, such as jewelry, etc., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very, by J. S. Davis, Attorney in Fact."

That in further pursuance of this agreement, the respondent kept in his hands, and ready for delivery, and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize any one to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied,

[45] Part of the report has been omitted.

and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor, to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further; and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defence; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself. Alden v. Blague, Cro. Jac. 99; Kaye v. Waghorne, 1 Taunt. 428; Bayley v. Homan, 3 Bin. N. C. 915. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law in a case free from the technical difficulties above noticed, will do the same thing. Bradly v. Gregory, 2 Camp. 383.

In order, however, to bring a case within these principles, three things are necessary. An agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor. * * *

That the agreement itself imports a consideration, deemed by the law valuable, there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding; the reason being, as expressed in Pinnel's case, (5 Co. R. 117,) that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. Coke's Lit. 212, b; Com. Dig. Accord, B. 2; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95. And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. Bac. Ab. Accord, A; Pinnel's case, 5 Co. R. 117; Booth v. Smith, 3 Wend. (N. Y.) 66; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Steinman v. Magnus, 11 East, 390; Lewis v. Jones, 4 B. & C. 513.

In this case, both these rules apply; for the time of payment was to be anticipated, and specific articles delivered. * * *

The decree of the Circuit Court is affirmed, with costs.[46]

[46] The findings and decree of the Circuit Court were as follows:

The case being heard on bill, amendment, answers, replications, exhibits, and testimony, the court held Very bound by the agreement, and found that Levy had always had sufficient goods on hand ready to be delivered; and directed the master to ascertain the balance due on the bond, and the value of the goods delivered to the receiver.

The master reported the balance due on the 3d March, 1844, to be $2,002.-

promise, by which he released all the balance of his debt. It was founded on the principle of equality—all were to share alike. If the appellants recovered in their action it would be a fraud on the other creditors who were induced to accept the proportion fixed by the agreement on the express stipulation that it was to be entered into by all the creditors, and binding so far as to prevent either from obtaining from the assets of the debtors more than the prescribed proportion. Each creditor for his act "had the undertaking of the rest as a consideration for his own undertaking."

The principle which governed the decision in Aiken v. Price, Dud. 52, applies in full force here.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.[48]

PINNEL'S CASE.

(In the Common Pleas, 1602. 5 Coke, 117a.)

Pinnel brought an action of debt on a bond against Cole, of £16 for payment of £8. 10s. the 11th day of Nov. 1600. The defendant pleaded, that he at the instance of the plaintiff, before the said day, scil. 1 Octob. anno 44. apud W. solvit querenti £5 2s. 2d. quas quidem £5 2s. 2d. the plaintiff accepted in full satisfaction of the £8 10s. And it was resolved by the whole Court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, &c. in satisfaction is good.[49] For it shall be intended that a horse, hawk, or robe, &c. might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff: but in the case at Bar it was resolved, that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material: so if I am bound in £20

[48] In accord: Cohen v. P. E. Harding Const. Co., 41 R. I. 242, 103 Atl. 702 (1918); Paddleford v. Thacher, 48 Vt. 574 (1876).

Where the parties to a pending action at law agree upon a settlement and this is fully performed, there is an accord and satisfaction; in case the plaintiff persists with the action, this can be set up by way of supplementary answer (at common law, a plea puis darrein continuance). **Savage v. Edgar**, 86 N. J. Eq. 205, 98 Atl. 407, 3 A. L. R. 1021 (1916).

[49] Part payment by giving a promissory note secured by a chattel mortgage operates as satisfaction if so agreed. Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 (1891).

to pay £10 at Westminster and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10 it is a good satisfaction for the whole: for the expences to pay it at York, is sufficient satisfaction: but in this case the plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by the law he ought) but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it. And for this cause judgment was given for the plaintiff.

See reader 26 H. 6. Barre 37. in debt on a bond of £10 the defendant pleaded, that one F. was bound by the said deed with him, and each in the whole, and that the plaintiff had made an acquittance to F. bearing date before the obligation, and delivered after, by which acquittance he did acknowledge himself to be paid 20s. in full satisfaction of the £10. And it was adjudged a good bar; for if a man acknowledges himself to be satisfied by deed, it is a good bar, without any thing received. Vide 12 R. 2. Barre 243. 26 H. 6. Barre 37. and 10 H. 7, &c.

SMITH v. JOHNSON.

(Supreme Judicial Court of Massachusetts, 1916. 224 Mass. 50, 112 N. E. 644.)

Action by Isabel S. Smith against Alson T. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

LORING, J. It was held in Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274 that an agreement (endorsed upon an execution) by which a creditor acknowledged satisfaction of the judgment in consideration of the payment of a smaller sum than the amount due thereon, was invalid.

The defendant has tried to take the case at bar out of that decision by reason of the fact that in addition to paying the smaller sum "in full satisfaction" the defendant in the case at bar "agreed to pay the balance of the judgment." But in that contention the defendant is met with the same rule of law which was decisive of the case of Weber v. Couch. The parol promise to pay the balance of the judgment did not impose upon the defendant a less onerous liability than that imposed upon him by the judgment and did not give to the plaintiff a more beneficial right than that given him by it. It follows that the defendant's parol promise to pay the balance of the judgment was neither a benefit to the plaintiff nor a detriment to the defendant and being without consideration was nudum pactum.

The defendant's other contention is that the promise to pay the balance of the judgment comes within the doctrine on which it is

held that a negotiable promissory note given by a debtor is prima facie payment of an open account for which he cites Isley v. Jewett, 2 Metc. 168, 173, and Wood v. Bodwell, 12 Pick. 268. But whether the obligation assumed by the maker of a negotiable promissory note is a more burdensome one than that resting upon one liable upon an open account, the negotiable note is more beneficial than the open account and for that reason there is a valid consideration in that case. And for the matter of that a nonnegotiable note (which is not within the rule invoked see Greenwood v. Curtis, 4 Mass. 93; Maneely v. McGee, 6 Mass. 143, 145, 4 Am. Dec. 105) may be taken in satisfaction. If it is taken as an account stated it is founded on a valid consideration.

The defendant's last contention is that inasmuch as the judgment is satisfied on the record the plaintiff's remedy is by way of scire facias and for this he relies upon Perkins v. Bangs, 206 Mass. 408, 92 N. E. 623, and Perry v. Perry, 2 Gray, 326. But upon the face of the record the judgment was not satisfied. The endorsement upon the execution states that the plaintiff had "received on the within execution $125 in full satisfaction." The $125 being a smaller sum than that due upon the judgment, it is apparent upon the face of the execution that the judgment was not satisfied.

The entry must be: Judgment affirmed.[50]

FULLER v. KEMP.

(Court of Appeals of New York, 1893. 138 N. Y. 231, 33 N. E. 1034. 20 L. R. A. 785.)

Action by Fraser C. Fuller against Edward Kemp, Jr., for balance due for professional services as a physician. From a judgment of the general term (16 N. Y. Supp. 158) affirming a judgment in plaintiff's favor, defendant appeals. Reversed.

MAYNARD, J.[51] The plaintiff has brought suit to recover a balance claimed to be due for his services as a physician, and the defendant relies solely upon the defense of an accord and satisfaction. The parties have agreed upon a statement of facts embracing the entire issue raised by the pleadings, and we are required to determine whether, upon the facts stipulated, the defendant has, as matter of law, established his defense. The plaintiff's demand was unliquidated, but he alleged that his services were worth $670, and rendered a bill for that amount, without specifying any items. The defendant acknowledged the receipt of the bill by letter, and expressed surprise at its magnitude, and his belief that there must be some mistake about it, and requested plaintiff to look into it and send a

[50] Cf. Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 603 (1884).

[51] Part of the opinion is omitted.

corrected bill, as he was anxious to settle the matter at once. The plaintiff then sent an itemized bill, showing 126 visits in 49 days, for each of which a charge of $5 was made, and 4 consultations, at the rate of $10 each, making a total of $670, as originally claimed. The defendant then wrote the plaintiff, inclosing a check for $400, which he stated was in full satisfaction of the plaintiff's claim for professional services against him to that date; and also saying that the deductions he had made were in the instance where five, four, and three visits per day had been charged at full rates; and that he trusted the plaintiff would view the matter in the same spirit which he did, which was to fix a figure which would be entirely just to both parties; and that he had arrived at this conclusion after careful and earnest thought. The plaintiff received the letter and check, indorsed the latter and collected the money upon it, which he retained, and again sent his bill to the defendant, charging $670 for his services, and crediting upon it $400 received by check. The defendant thereupon again wrote the plaintiff, calling his attention to the express condition upon which he had forwarded the check, and that it was sent as payment in full satisfaction of the plaintiff's claim for professional services to date; that he did not recognize the plaintiff's right to retain the amount so offered, and repudiate the condition of the offer; and requesting the plaintiff either to keep the money upon the condition named, or return it to him by first mail. To this letter the plaintiff made no reply, but kept the amount of the check, and after the expiration of nearly a year brought this action for the recovery of $270, the balance of his account after applying the $400 received, in which he has recovered the sum of $170, which it was stipulated upon the trial should be the amount of the judgment if he was entitled to recover at all.

Upon these conceded facts we think it must be held that there was in law an accord and satisfaction of the plaintiff's claim, and that no recovery could be lawfully predicated upon it. It is unquestionably true, as the respondent's counsel contends, and as the general term, in its opinion, very clearly states, that, in order to establish a defense of this character, there must be present in the transaction upon which it rests all the elements of a complete agreement,—a lawful subject-matter, a sufficient consideration, and the aggregatio mentium, or mutual assent, of the parties. The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were reasonably worth. From the very nature of the case a further agreement must be reached by the parties, fixing the value of the services, or else resort must be had to a judicial determination for that purpose. The plaintiff accordingly sent his bill, in which he expressed his own views as to the amount of compensation which he ought to have. Had the defendant retained it without objection, it would in time have become an account stated, which is a species of implied contract, and the

law would have presumed a promise on his part to pay the sum charged in the bill. But the defendant, while not disputing the rendition of the services, objected to the amount of the plaintiff's charges, and declined to pay the bill rendered, but sent a check for $400, stating that it was to be in full satisfaction of the plaintiff's claim, and in substance expressing the hope that the plaintiff would, upon reflection, agree with him that it was the reasonable value of his services.

The plaintiff received and used the check, and, had he remained silent, it would have been conclusively presumed that he assented to the defendant's proposition, and had agreed to receive, and had received, the sum tendered in discharge of his debt. But the tenor of the defendant's letter was such as to invite a reply, and, while the plaintiff kept the check, he sent another bill for the same amount, upon which he credited the amount of the check as a part payment, leaving a balance, which he still claimed to be due. The just inference to be drawn from this communication was that he declined to accept the check in full payment, but had appropriated it as a partial payment of his claim, and the defendant undoubtedly so understood it. Had he then remained silent it might have been presumed that he assented to the use which the plaintiff had made of the check, and in time would have become bound to pay the balance, as upon an account stated; but the defendant at once notified the plaintiff that he had sent the check upon condition that it should be received in full payment of his bill, and that he could not assent to any other application of the money, and that the plaintiff must either keep it upon that condition, or immediately return it. It is of no significance in this case that the remittance was by check. Both parties treated it as money, and upon the receipt of this letter the plaintiff had but a single alternative presented for his action,—the prompt restoration of the money to his debtor, or the complete extinguishment of the debt by its retention. The tender and the condition could not be dissevered. The one could not be taken, and the other rejected. The acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act.

Where the demand is liquidated, and the liability of the debtor is not in good faith disputed, a different rule has been applied. In such cases the acceptance of a less sum than is the creditor's due will not, of itself, discharge the debt, even if a receipt in full is given. The element of a consideration is lacking, and the obligation of the debtor to pay the entire debt is not satisfied. There are many authorities which enforce this proposition, but they have no relevancy to a case like the present, where the debt was unliquidated, and there

was a bona fide disagreement in regard to the extent of the debtor's liability. The law favors the adjustment of such controversies without judicial intervention, and will not permit the creditor to accept and retain money which has been tendered by way of compromise, and then successfully litigate with his debtor for the recovery of a greater sum. There have been some cases in our own courts where this principle has been applied, but in none that we have examined has the question arisen in the exact form here presented. Palmerton v. Huxford, 4 Denio, 166; Looby v. Village of West Troy, 24 Hun, 78; Hills v. Sommer, 53 Hun, 392, 6 N. Y. Supp. 469. In other states there are many decisions directly in point, where the facts were not distinguishable from those appearing in this record. McDaniels v. Lapham, 21 Vt. 222; Preston v. Grant, 34 Vt. 201; Towslee v. Healey, 39 Vt. 522; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 553, 5 Atl. 407; Bull v. Bull, 43 Conn. 455; Potter v. Douglass, 44 Conn. 541; Reed v. Boardman, 20 Pick. 441; Donohue v. Woodbury, 6 Cush. (Mass.) 148, 52 Am. Dec. 777; Hilliard v. Noyes, 58 N. H. 312; Brick v. Plymouth Co., 63 Iowa, 462, 19 N. W. 304; Hinkle v. Railroad Co., 31 Minn. 434, 18 N. W. 275. * * *

To make out the defense, the proof must be clear and unequivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered in case he did not assent to the condition upon which it was offered. The defendant here has brought his case clearly within the rule, and is entitled to have the judgments of the general and special terms reversed, and the complaint dismissed, upon the stipulated facts, without costs to either party in any court, pursuant to the stipulation in the record. All concur.

Judgment accordingly.[52]

WHITTAKER CHAIN TREAD CO. v. STANDARD AUTO SUPPLY CO.

(Supreme Judicial Court of Massachusetts, 1913. 216 Mass. 204, 103 N. E. 695, 51 L. R. A. (N. S.) 315, Ann. Cas. 1915A, 949.)

Action by the Whittaker Chain Tread Company against the Standard Auto Supply Company. On report. Judgment for plaintiff.

LORING, J. The plaintiff sold and delivered to the defendant goods to the amount of $80.03. The defendant undertook to return a part

[52] Cashing the check does not operate as satisfaction, unless the debtor made it clear that it was tendered as a full settlement. Dimmick v. Banning, Cooper & Co., 256 Pa. 295, 100 Atl. 871 (1917); Bogert & Hopper v. Henderson Mfg. Co., 172 N. C. 248, 90 S. E. 208. A claim is not unliquidated where there is no real doubt and no dispute in good faith. Clark v. Summerfield Co., 40 R. I. 254, 100 Atl. 499 (1917).

of the goods sold, of the value of $50.02. The plaintiff disputed its right to do so and refused to receive the goods from the teamster through whom the defendant undertook to make the return. While matters were in this condition the defendant sent the plaintiff a check for $30.01, which was admittedly due and which the defendant stated was in full settlement of the account. The plaintiff cashed the check and on the following day notified the defendant that it had done so, and demanded payment of $50.02, the balance claimed by it to be due after crediting the amount of the check as a payment on account. The judge found that the defendant had no right to return the goods which it attempted to return, and that the plaintiff was entitled to recover the $50.02 due from them unless it was barred by cashing the check.

Cases in which debtors have undertaken to force a settlement upon their creditors by sending a check in full discharge of a disputed account have given rise to more than one question upon which there is a conflict in the authorities.

In Day v. McLea, 22 Q. B. D. 610, it was decided by the Court of Appeal in England that a creditor who cashes a check sent in full settlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account. The ground of that decision was that to make out the defence of accord and satisfaction the debtor must prove an agreement by the creditor to take the sum paid in settlement of the account, and that if the creditor in taking the check notifies the debtor that he accepts it on account and that he refuses to accept it in full settlement, the debtor as matter of law has not proved an agreement on the part of the creditor to accept the check in satisfaction of the claim, but that that question must be decided by the jury. This doctrine is upheld in 17 Harvard Law Review, at page 469, and in the case of Goldsmith v. Lichtenberg, 139 Mich. 163, 102 N. W. 627. See also in this connection Krauser v. McCurdy, 174 Pa. 174, 34 Atl. 518; Kistler v. Indianapolis & St. Louis R. R., 88 Ind. 460.

But the true rule is to the contrary. The true rule is put with accuracy in Nassoiy v. Tomlinson, 148 N. Y. 326, 331, 42 N. E. 715, 716, 51 Am. St. Rep. 695 in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was 'cum onere.' When he indorsed and collected the check referred to in the letter asking him to sign the inclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." And to that effect is the weight of authority.[53] * * *

[53] The court here cited Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695 (1896); Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553 (1889); Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co., 91 Neb. 396, 136 N. W. 65 (1912); Neely

Indeed the decision in Day v. McLea, ubi supra, was explained by the Court of Appeal in the recent case of Hirachand v. Temple, [1911] 2 K. B. 330, and made to rest not on the lack of agreement, but on the lack of consideration.

But in cases (like the case at bar) where there is a dispute as to the amount due under a contract and payment of an amount which he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who under these circumstances accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict. It was held in the following cases that a creditor in such a case is barred: Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117; Treat v. Price, 47 Neb. 875, 66 N. W. 834; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Cunningham v. Standard Construction Co., 134 Ky. 198, 119 S. W. 765; Pollman & Bros. Coal & Sprinkling Co. v. St. Louis, 145 Mo. 651, 47 S. W. 563.[54] See also in this connection Chicago, Milwaukee & St. Paul Ry. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099. But in the following cases it was held that he was not barred: Demeules v. Jewel Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; Seattle, Renton & Southern Ry. v. Seattle-Tacoma Power Co., 63 Wash. 639, 116 Pac. 289; Prudential Ins. Co. v. Cottingham, 103 Md. 319, 63 Atl. 359. See also in this connection Chrystal v. Gerlach, 25 S. D. 128, 125 N. W. 633; Robinson v. Leatherbee Tie & Lumber Co., 120 Ga. 901, 48 S. E. 380; Walston v. F. D. Calkins Co., 119 Iowa, 150, 93 N. W. 49; Weidner v. Standard Life & Accident Ins. Co.,

v. Thompson, 68 Kan. 193, 75 Pac. 117 (1904); Hull v. Johnson, 22 R. I. 66, 46 Atl. 182 (1900); Cunningham v. Standard Construction Co., 134 Ky. 198, 119 S. W. 765 (1909); Canton Union Coal Co. v. Parlin & Arendorff Co., 215 Ill. 244, 74 N. E. 143, 106 Am. St. Rep. 162 (1905); Petit v. Woodlief, 115 N. C. 120, 20 S. E. 208 (1894); Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis, 145 Mo. 651, 47 S. W. 563 (1898); Potter v. Douglass, 44 Conn. 541 (1877); Cooper v. Yazoo & Mississippi Valley R. R., 82 Miss. 634, 35 South. 162 (1903); Barham v. Kizzia, 100 Ark. 251, 140 S. W. 6 (1911); Thomas v. Columbia Phonograph Co., 144 Wis. 470, 129 N. W. 522 (1911); Sparks v. Spaulding Mfg. Co., 158 Iowa, 491, 139 N. W. 1083 (1913). See also in this connection McDaniels v. President, etc., of Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406 (1857); Hutton v. Stoddart, 83 Ind. 539 (1882); Creighton v. Gregory, 142 Cal. 34, 75 Pac. 569 (1904).

See, also, in accord: Beck Electric Const. Co. v. National Contracting Co., 143 Minn. 190, 173 N. W. 413 (1919); Decker v. George W. Smith & Co., 88 N. J. Law, 630, 96 Atl. 915 (1916); Anson v. New York Life Ins. Co., 252 Ill. 369, 96 N. E. 846, 37 L. R. A. (N. S.) 555 (1911).

[54] In accord: Janci v. Cerny, 287 Ill. 359, 122 N. E. 507 (1919); Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., 65 Colo. 587, 178 Pac. 577, 4 A. L. R. 471 (1919).

130 Wis. 10, 110 S. W. 246; Louisville, N. A. & C. Ry. v. Helm & Bruce, 109 Ky. 388, 59 S. W. 323.

The decision in most of these cases was made to turn upon the question whether payment of the amount admitted to be due without dispute did or did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute. If that were the only question involved in the case at bar it would be necessary to consider whether Tuttle v. Tuttle, 12 Metc. 551, 46 Am. Dec. 701, is in conflict with the well-settled law of the commonwealth that a promise to pay one for doing that which he was under a prior legal duty to the promisee to do is not binding for want of a valid consideration. The cases are collected in Parrot v. Mexican Central Ry., 207 Mass. 184, 194, 93 N. E. 590, 34 L. R. A. (N. S.) 261.

Tuttle v. Tuttle, ubi supra, was a case in which the holder of a note made an express agreement to forego a claim which he had made to interest on the note in consideration of payment of the balance of the principal then unpaid. It was a question whether he was entitled to interest, but there was no question of his right to the principal. It was held that this agreement was a bar to any claim for interest on the note. There was no discussion in the opinion as to the lack or validity of a consideration. But the point was involved in the decision.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition and so took the part admittedly due in full discharge of the whole debt. But while the doctrine of election is sound where a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of what he admits to be due conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on the condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant on the seventh month sent the stipulated amount of iron but on condition that the plaintiff should pay double the stipulated price. That is to say, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract

price for the installment sent was void and that the plaintiff under those circumstances is not put to an election but can keep the iron under the contract? There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what admittedly was due a void condition that it be received in full discharge of what was in dispute.

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights and that it has not agreed to accept it in full settlement of the balance of the account. By the terms of the report judgment is to be entered for the plaintiff in the sum of $50.02, with interest from the 20th day of October, 1911; and it is

So ordered.[55]

LEAVITT et al. v. MORROW.

(Supreme Court of Ohio, 1856. 6 Ohio St. 71, 67 Am. Dec. 334.)

To a declaration in assumpsit, containing only the common counts, the defendant filed the following special plea in bar: * * * "And for further plea, the said defendants say, that, after the making of said supposed promises in the declaration mentioned, and after the decease of said Wilson, viz: on the 2d day of June, 1852, Jane Wilson, the widow of said Hans Wilson, deceased, and a devisee and legatee under his last will and testament, at the special instance and request of the said plaintiff, and as an accord and satisfaction of his supposed claim against the estate of said Wilson deceased, at said county, caused and procured to be conveyed by William Kelly and Maria his wife, a part of the south half of Section 11, Township 7, and Range 2, in Jefferson county, to one Benjamin McFarland, a trustee selected by the said David Morrow, to have and to hold the same in trust for the use of the said David Morrow and Rebecca his wife, during their joint lives and the life of the survivor, and at the death of the survivor of the said David and Rebecca, to convey the estate to the heirs at law of said David Morrow, being the persons who would have taken the same by descent, in the case that said David Morrow had died seized and intestate. And the said David Morrow then and there accepted the conveyance in trust, in full accord, satisfaction, and discharge, of his said supposed claim against the estate of the said Hans Wilson, deceased; and this they are ready to verify. Wherefore they pray judgment," etc. * * *

A demurrer to this plea was overruled, and on issue joined the ver-

[55] In accord: Mance v. Hossington, 205 N. Y. 33, 98 N. E. 203 (1912).

That acceptance of a part payment cannot operate as a discharge, where no dispute exists and the entire debt is liquidated, see Foakes v. Beer, ante, p. 320, and note.

dict and judgment were for the plaintiff. The defendant brings writ of error, the lower court having held that settlement by a third person does not operate as a discharge.

BARTLEY, C. J.[56] The main question presented for determination in this case is whether an accord and satisfaction, accepted in discharge of a debt, but coming from a stranger or person having no pecuniary interest in the subject-matter, is a legal defense to an action against the debtor, or his legal representatives. The charge of the District Court to the jury, was in the negative of this proposition; and if the court erred in this, the judgment must be reversed.

It requires powers of discrimination looking far beyond the justice of the case, to see the reason of the rule, that accord and satisfaction, although moving from a stranger, yet accepted by the creditor, and set up in the plea of the defendant, as a discharge of the debt, does not constitute a legal defense to the action. It is said, in some of the early adjudications touching this subject, that the reason of the rule is, that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even as agent of the debtor. But where the creditor has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward, would seem to shock the ordinary sense of justice of every man. It is urged, in support of the rule, that one man can not make another his debtor without his consent; that one man can not make a gift or donation to another, unless the latter consent to receive it; and that it may be possible that a debtor may, on account of cross claims, matters of set-off, or in view of other circumstances, be unwilling that a stranger should step in, and, by voluntary contribution, satisfy the claim of his creditor.

All this may be very true, and not affect the controversy in this case. And it is said, that exceptions may exist to all general rules—indeed, that exceptions sometimes prove the rule. It may be laid down as incontestable, as a general thing, that, where one man is indebted to another, and a third person steps in and pays the debt, in the absence of all circumstances tending to show the contrary, the rational inference would be, that the act done, being for the debtor's benefit, was done with his consent, or, if without his knowledge at the time, that it would, as a matter of course, be ratified by him afterward. If in such a case, the creditor should subsequently bring suit against the debtor, and the debtor should appear in the action, and plead the satisfaction in discharge of his liability, I can not conceive upon what just and rational ground the creditor could be allowed to reply, that his debt was not discharged, because the satisfaction which he had accepted

[56] The statement of facts is abridged and a part of the opinion is omitted.

in discharge of it was without the consent of the defendant. The very fact of the satisfaction being set up in the action, by the defendant, in discharge of the debt, would, of itself, seem sufficient to conclude the plaintiff from denying that it had received the defendant's consent, or ratification.

It is claimed, however, on behalf of the defendant in error, that the question, in this case, depends upon a rule of law which was decided many years ago, and which has been recognized and acquiesced in, by the sages of the law, for nearly two hundred years; that the common law settles the question—which has been fined and refined by an infinite number of grave and learned men, through a succession of ages, until, by long experience, it has grown to such perfection, that, in the language of Lord Coke, "no man of his own private reason, ought to be wiser than the law." It is true, that the doctrine, that an accord and satisfaction, moving from one who was a stranger, and in no sort privy to the condition of the obligation, could not be pleaded in bar by the obligor, which was reported by Croke to have been laid down in Grymes v. Blofield, Cro. Eliz. 541, and which appears to have been affirmed in Edgecomb v. Rodd and others, 5 East's Rep. 294, and recognized as law in some of the other English decisions, as well as in some of the elementary books, and abridgments, has been followed in a number of the reported cases in this county. In the case of Clow v. Borst et al., 6 Johns. (N. Y.) 38, and the case of Stark's Adm'r v. Thompson's Ex'r, 3 T. B. Mon. (Ky.) 303, the rule appears to have been adhered to; and in the case of Daniels v. Hallenback, 19 Wend. (N. Y.) 410, it was recognized with some qualification.

But mere precedent, alone, is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purpose of justice. The maxim communis error facit jus, has a limited application. Otherwise, it could never be said, that law is the perfection of reason, and that it is the reason and justice of the law which give to it its vitality. When we consider the thousands of cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application, we can appreciate the remark of Chancellor Kent in his Commentaries, vol. 1, page 477, that "Even a series of decisions are not always evidence of what the law is." Precedents are to be regarded as the great store-house of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although, at times, they may be liable to conduct us to the paths of error, yet, may be important aids in lighting our footsteps in the road to truth. * * *

From an examination of the whole subject, it appears that the case of Grymes v. Blofield, as reported by Croke, in which the doctrine originated that a plea of accord and satisfaction, moving from a

stranger, was not a good plea in bar, is, to say the least of it, of doubtful authority; and, in the cases in which it has been followed, both in England and in this country, it appears to have been adopted with little or no inquiry into the reason or justice of its application. The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to, or ratified by the defendant. It would seem therefore, that a rule which, in its tendency, is calculated to foster bad faith and defeat the purposes of justice, ought not to be adhered to, simply on account of its antiquity.

We are unanimous in the opinion that there was error in the instructions of the District Court to the jury.

Judgment reversed, and cause remanded for further proceedings.[57]

SIGLER v. SIGLER.

(Supreme Court of Kansas, 1916. 98 Kan. 524, 158 Pac. 864, L. R. A. 1917A, 725.)

Action by Ode Sigler against Joseph Sigler. From the judgment, the plaintiff appeals, and defendant files a cross-appeal. Affirmed.

PORTER, J. The action in the district court was to recover an alleged indebtedness. There were three causes of action, but the error complained of relates to the third cause of action, which was upon a promissory note. The jury returned a verdict in plaintiff's favor and made a number of findings of fact. The court approved the findings, but sustained defendant's motion for judgment on the pleadings, evidence, and findings, and this is the ruling we are asked to review.

The answer admits the execution of the note, but alleges that plaintiff is not the owner or holder of it; that prior to the commencement of the action he had sold, assigned, and delivered to one C. M. Hutchison the note, together with a mortgage given to secure its payment,

[57] In spite of the early decision in Grymes v. Blofield, Cro. Eliz. 541 (1594), a payment by a third person operates as an accord and satisfaction, if so accepted by the creditor and approved later by the debtor. It will so operate even though the debt due is liquidated and the sum paid is less than the sum due. Crumlish's Adm'r v. Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872 (1893); Jackson v. Pennsylvania R. Co., 66 N. J. Law, 319, 49 Atl. 730, 55 L. R. A. 87 (1901); Marshall v. Bullard, 114 Iowa, 462, 87 N. W. 427, 54 L. R. A. 862 (1901); Cunningham v. Irwin, 182 Mich. 629, 148 N. W. 786 (1914); Sigler v. Sigler, 98 Kan. 524, 158 Pac. 864, L. R. A. 1917A, 725 (1916); Ex parte Zeigler, 83 S. C. 78, 64 S. E. 513, 21 L. R. A. (N. S.) 1005 (1909), and note. Contra: Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 N. E. 457, 461 (1921).

If the debtor gives in payment of his debt the note of a third person, the creditor may take this note either as an absolute satisfaction or only as a conditional one. In the latter case, if the note is not paid when due the creditor can maintain suit against his original debtor. Cheltenham Stone & Gravel Co. v. Gates Iron Works, 124 Ill. 623, 16 N. E. 923 (1888).

and that thereafter defendant paid the note, and that the mortgage had been canceled and delivered to him by the holder; that the plaintiff had retained the moneys received by him for the sale of the note and had never tendered or offered to return the same. The reply admitted the execution, delivery, and assignment of the note and mortgage, but alleged that C. M. Hutchison's name was not written in the assignment of the mortgage at the time it was delivered, and that the transfer and assignment were made under the following circumstances: Defendant employed one R. C. Wilson to purchase the note and mortgage for him as cheaply as possible, and agreed to provide a fund amounting to $1,200 or more with which to make the purchase; that thereupon Wilson, concealing from plaintiff the fact that he had been employed by and was acting for the defendant, negotiated with plaintiff for the purchase of the note and mortgage, and falsely and fraudulently represented to plaintiff that they were of very little value and would be difficult to collect; that the plaintiff believed these false representations and relied upon them; and that Wilson, for and on behalf of defendant, paid the plaintiff $400, and that plaintiff under these circumstances executed the assignment and delivered the note and mortgage to Wilson. The reply further alleged that the whole transaction amounted in law to nothing more than the payment of $400 on the note, for which plaintiff in his petition had given defendant credit. It further alleged that Wilson wrote in the name of Hutchison as assignee, in order that Hutchison might make a formal release of the mortgage. The jury found that plaintiff accepted the $400 on Wilson's representations to the effect that the note and mortgage were of very little value and would be very difficult of collection, that Wilson knew at that time that defendant had made arrangements for the payment or purchase of the note, and that plaintiff believed and relied upon the statements.

As already observed the trial court approved these findings of fact, but held that the note had been paid and discharged by the transaction. The plaintiff relies upon the rule that an agreement to accept part in satisfaction of the whole of a liquidated demand is invalid because without consideration. Bridge Company v. Murphy, 13 Kan. 35; St. L., Ft. S. & W. R. Co. v. Davis, 35 Kan. 464, 11 Pac. 421. The reason for the rule is that there is no consideration for the release of the remainder of the debt, as the debtor gives no more than he is bound to give, and the creditor accepts no more than he is entitled to receive. The rule is said to have had its origin in a dictum in the English Court of Common Pleas (Pinnel's Case, 5 Coke's K. B. 117). Although it is universally recognized by courts and text-writers, it has been criticized as technical, artificial, and having no foundation in reasoning. Brooks and Another v. White, 43 Mass. (2 Metc.) 283, 285, 37 Am. Dec. 95; Bolt v. Dawkins, 16 S. C. 198, 214. In a number of states it has been entirely abrogated or modified by statute. Courts generally refuse to apply the rule where the technical reasons

for doing so do not exist (Brooks and Another v. White, supra; Harper v. Graham, 20 Ohio, 105, 115), and have recognized numerous exceptions to it, for instance, the payment of a part before due, or at a place other than that where the obligor was legally bound to pay, or a payment in property, regardless of its value, or by the debtor in composition with his creditors generally by which they agree to accept less than is due them, is held to create a consideration which is sufficient. The rule quite generally followed is that any additional consideration, however small, will support the new agreement, provided only it be such that in law it is sufficient to support an ordinary contract and consist of something which the debtor was not legally bound to do or give. Bryant v. Proctor, 53 Ky. (14 B. Mon.) 451. Thus it has been held that the payment of a debt, or any part of the debt, before it is due is something which the debtor is not under legal obligation to do, and therefore furnishes a legal consideration for a contract to release or cancel a debt; and any new consideration moving from the debtor toward the creditor will take the agreement out of the operation of the rule. 1 C. J. 544, 545. It is well settled that the courts will refuse to inquire into the adequacy of the consideration if there be any that will support an ordinary contract. Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462. It is said that the additional consideration may consist of anything which might be a burden to the one party or a benefit to the other. 1 C. J. 541. One established exception to the rule is that payment by a third person of a sum less than the amount due, with the understanding that it shall be in full payment, is held to be an accord and satisfaction.

A very thorough discussion of the subject of accord and satisfaction will be found in an elaborate note in 100 Am. St. Rep. 390–456. The author of the note, referring to the technical distinction drawn by the earlier cases, says: "The strictness of the rule undoubtedly worked many hardships in preventing a creditor, who needed the money, from making an accord and satisfaction with his debtor or in preventing a debtor who might be temporarily embarrassed from settling with his creditor for less than the fixed amount of his debt. Hence the courts, though bound by precedents, from time to time enlarged the exceptions to the rule, so that now the exceptions might almost be said to form the rule itself." Page 430 of 100 Am. St. Rep.

There was great lack of harmony in the earlier decisions on the question whether part payment made by a stranger to the transaction to which it relates could be pleaded as accord and satisfaction. The English and many of the early American cases held that a satisfaction given by a stranger is not good because he is in no respect a privy to the original contract. The leading English cases to that effect are Grymes v. Blofield, 1 Croke's (39 Eliz.) 541, and Edgcombe v. Rodd and Others, 1 Smith, 515, 5 East, 294. The doctrine of Grymes v. Blofield, was followed in the United States by Clow v. Borst, 6 Johns. (N. Y.) 37, and by a number of other courts. [The court here dis-

cussed Leavitt and Lee v. Morrow, 6 Ohio St. 71, 67 Am. Dec. 334; Jackson v. Pennsylvania R. R. Co., 66 N. J. Law, 319, 49 Atl. 730, 55 L. R. A. 87, and Crumlish's Adm'r v. Cent. Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872.]

No cases have been cited in the brief which involved facts at all similar to the case at bar. Our own research has resulted in finding but two cases which are at all analogous. In Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578, where a judgment debtor furnished the money to a third person to purchase a judgment from the creditor who accepted a less sum than the face of the judgment, it was said in the opinion: "As the sum paid was really the money of the debtor and paid over by his agent it is the same as if paid by himself." Page 508 of 6 Vt., 27 Am. Dec. 578. The court held it to be quite obvious that the act of a debtor in furnishing funds to a third person to buy up his debts at a discount is so far fraudulent as to render the sale voidable at the election of the creditor. This case was decided in 1856.

A case to the contrary is Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606, where the facts were in some respects similar to those in the present case, and it was held that an agreement by a creditor to accept from a third person, in behalf of the debtor, a smaller sum in satisfaction of the whole is valid and binding and will discharge the debt. In the opinion it was said that the consideration is that the creditor gets, or is assured of getting, what perhaps the debtor might never pay, and that "it cannot alter the nature of the case that the debtor repaid the advance." * * *

From the foregoing authorities it seems firmly established that a debtor may authorize and employ a third person as his agent to make a satisfaction of his debt; that where he does so, and the money is advanced by the third party and accepted by the creditor in satisfaction of the debt, it is a good accord and satisfaction. This is so even where the third party makes the payment without the debtor's knowledge, if the latter afterward ratify the action. Did the concealment by Wilson of the fact that he was acting for the defendant destroy the effect of the payment, or, in other words, must there be knowledge on the part of the creditor that the payment is made on behalf of the debtor before it will constitute an accord and satisfaction? It was held that an accord and satisfaction is: "The result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor." Harrison v. Henderson, 67 Kan. 194, 200, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 386. And in Matheney v. El Dorado, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980, it was ruled that: "To constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into

by the parties understandingly and with unity of purpose." Syl. par. 1.

But the extent of the doctrine there declared is merely that the smaller sum must not only have been offered, but it must have been accepted with the understanding that it was in full satisfaction of the larger amount claimed. The plaintiff certainly understood that he was accepting the $400 in full satisfaction of all his interest in the note and mortgage. It is difficult to see how his rights were affected in the slightest by his failure to know and understand that Wilson was acting as the agent of the debtor, because, as we have seen, the weight of authority is that a payment of a part by a stranger, who may have acted without the knowledge or consent of the debtor, will, if accepted by the creditor and afterwards ratified by the debtor, constitute a full accord and satisfaction. * * *

Judgment affirmed.[58]

SECTION 7.—DISCHARGE OF SPECIALTIES

NOYES v. HOPGOOD.

(In the King's Bench, 1622. Cro. Jac. 649.)

Debt upon an obligation for eighty pounds, conditioned for the performance of divers covenants contained in articles of agreement. The defendant pleaded, that it was agreed betwixt the plaintiff and the defendant that he should grant an annuity of five pounds out of such land for life, in discharge of that bond; which grant he made accordingly, and the plaintiff accepted it in discharge of that bond, &c.—Whereupon it was demurred; and, without argument, upon the first motion adjudged for the plaintiff; for it is but a concord and verbal agreement, which can never be a discharge of a specialty.[59]

ALDEN v. BLAGUE.

(In the Common Pleas, 1605. Cro. Jac. 99.)

Covenant. For that the lessee covenanted for him and his assigns to repair and maintain the houses in reparations from time to time during the term; and shews that the lessee assigned all his term to the

[58] Part of the opinion is omitted. The court held that there was no fraud.

[59] In accord: Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 200 (1847), accord and satisfaction not a good plea in an action on a debt of record; Spence v. Healey, 8 Exch. 668 (1853), where Martin B., said: "I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons on which the rule is founded."

defendant; and for default of reparations after the assignment, he brought the action against the assignee. The defendant pleads, that after the decay he made such a concord, that the plaintiff should have thirty shillings and such goods in satisfaction of that destruction, &c. and shews it to be executed. Whereupon it was demurred, and moved for the plaintiff, that it was not any plea; for the action being grounded upon a deed, cannot be discharged unless by deed; as an obligation with a condition cannot be discharged by a contract.

But all the Court held, that the plea was good enough; for it is not pleaded in discharge of the covenant, but only for the damages which are demanded by reason of the breach of the covenant, and the covenant remains: and this plea sounds only in discharge of the defendant, and is not like to the case of an obligation; for there it is a duty certain; and it is not any plea, although it be before or after the day of payment: and in every action where only amends is demanded by way of damages, "accord executed" is a good bar in discharge of them. Vide 3 Hen. 6 pl. 37. 3. Hen. 4. pl. 1. 47 Edw. 3. pl. 12. Dyer, 75. and 201.

Daniel said, that in waste against tenant for years, "accord" is a good plea, but not against tenant for life. And afterward in the principal case it was adjudged accordingly, that it was a good bar.[60]

STEEDS et al. v. STEEDS et al.

(In the Queen's Bench Division, 1889. 22 Q. B. Div. 537.)

WILLS, J.[61] The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favour by the two defendants.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. 1. That in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. 2. That even if it would be so, were the

[60] In accord: Blake's Case, 6 Co. 43b (1605).

[61] The statement of facts and part of the opinion are omitted.

bond made in favour of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1000 the person liable had given property worth £2000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1000 without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of Webb v. Hewitt, 3 K. & J. 438, which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the ratio decidendi of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it. * * * [62]

FORTESCUE v. BROGRAVE.

(In the King's Bench, 1647. Style, 8.)

The plaintiff brings an action for breach of covenant upon a deed. The defendant pleads a parol agreement afterwards, in discharge of the former covenant; but the Court held the plea not good, and took these differences, that a parol agreement before a breach of it, may be discharged by parol, and so pleaded; after a breach it cannot be pleaded in discharge without satisfaction also pleaded: but a discharge may be pleaded by deed be the covenant by parol or by deed after a breach, and without satisfaction.

[62] The court then held that in equity a discharge agreed to by one of two joint obligees did not necessarily operate to discharge the claim of the other obligee.

See, also, Bofinger v. Tuyes, 120 U. S. 198, 205, 7 Sup. Ct. 529, 30 L. Ed. 649 (1886); Savage v. Blanchard, 148 Mass. 348, 19 N. E. 396 (1889).

HERZOG v. SAWYER.

(Court of Appeals of Maryland, 1883. 61 Md. 344.)

ALVEY, C. J., delivered the opinion of the Court.

This action is brought on a sealed instrument, dated the 28th of January, 1881. * * *

The articles of agreement sued on provides, that the plaintiff should serve the defendants as a member of a company organized to give entertainments throughout the United States and the Canadian Provinces, the State of California excepted, for the term of one year, commencing the 7th of March, 1881, and ending March 6th, 1882; that the plaintiff should give his entire entertainment, known as the "Musical Glasses," for the sole benefit and emolument of the defendants, during the term specified, and should at all times hold himself in readiness to perform the duties required. And for the services thus to be performed the defendants covenanted to pay the plaintiff the sum of $25 per week, his board at hotels, or other places, and the expenses of transportation, &c.; the weekly wages to be paid on Monday of each week.

The declaration, after setting forth the terms of the agreement, alleges that the plaintiff entered the service of the defendants under the agreement, at the time specified, and fully and faithfully performed all the duties required of him, until he was, without cause, discharged therefrom, after about five weeks' service; and that the defendants failed and refused to employ him, as agreed in the premises, for the remainder of the term, and failed and refused to pay him as agreed upon for the remainder of the time specified in the agreement, although he, the plaintiff, was at all times ready, able and willing to serve the defendants, and perform all the duties required of him by the agreement; wherefore he says he has sustained great loss, damage, and injury, and he claims, &c.

To this declaration, the defendant Herzog pleaded, 1st. Non est factum; 2d. Payment; 3d. That the contract declared on had been mutually rescinded; and, 4th. That the contract had been abandoned by both plaintiff and defendant. Upon these pleas issues were joined, and the case was tried before the court, without the assistance of a jury.

Evidence was offered by the plaintiff to prove * * * that the undertaking to give the exhibitions contemplated by the agreement was abandoned by the defendants, after about fifteen weeks' service by the plaintiff, and that the latter was discharged from employment without his fault. He also proved that he was ready, able, and willing to perform the agreement on his part, but was prevented by the abandonment of the exhibitions by the defendants.

On cross-examination the plaintiff admitted that, on the 20th of Feb. 1882, he entered into a new engagement with the defendants, to perform the same or similar services for them to those required of him

under the contract sued on, but for different compensation; and that he did perform such services under the contract of Feb. 20th, 1882, and was fully paid therefor.

The defendant offered evidence to prove that the exhibitions had been given up and abandoned upon the suggestion and by the advice of the plaintiff himself, and that all claim by him, under the contract sued on, had been fully adjusted and discharged.

There were several propositions of law submitted to the court; and while those on the part of the plaintiff were accepted, all those on the part of the defendant, except one, were rejected.

The controverted and controlling legal propositions involved, and presented by the prayers, are reducible to two: * * * 2d. Whether it be competent to show by parol evidence, that the contract sued on, being a contract under seal, was abandoned or rescinded by the mutual consent of the parties thereto, or that its performance by the defendants was waived by the plaintiff. * * * [63]

2. As to the second question. It is certainly true, as a general principle, that at the common law, for what would appear to be purely technical reasons, an obligation under seal cannot be discharged before breach by an agreement in parol, or by any instrument not executed with the same solemnity as the original obligation. All authorities, however, agree, that after breach, for the damages occasioned thereby, any agreement or transaction between the parties that would operate as an accord and satisfaction in ordinary cases, may be pleaded in discharge. Harper v. Hampton, 1 Har. & J. 675; Kaye v. Waghorn, 1 Taunton, 428; 1 Chitt. Pl. (16th Ed.) 515, 516. But this distinction is extremely technical, and in many cases it has been found to operate injustice; and, consequently, in many of the courts of this country the rule has been, to a considerable extent, modified. And it has been held repeatedly, that whenever the breach complained of has been superinduced by the action or agreement of the plaintiff, and the matter is properly availed of in defence, he will not be allowed to recover on the technical breach thus produced. The tendency of all courts at this day is to prevent circuity of action, and to discourage the assertion of claims founded upon merely technical grounds; and whenever it is apparent that it would be unjust, and in violation of good faith, to allow the plaintiff to recover by means of a technical advantage, the Courts are always strongly inclined to amplify the scope of the defence to the fullest extent possible, in order to prevent injustice being done. It was from this strong tendency of the courts that we have many well reasoned cases in the reports which go to modify, to a considerable extent, the technical rule of exclusion in question. Of the many cases upon the subject, those most frequently referred to are Fleming v. Gilbert, 3 Johns. (N. Y.) 528; Dearborn v. Cross, 7 Cow. (N. Y.) 48; Langworthy v. Smith, 2 Wend. (N. Y.)

[63] Part of the opinion, not dealing with the second question, is omitted.

587, 20 Am. Dec. 652; and the principle of the decisions in those cases was fully adopted by this court in the case of the Franklin Fire Ins. Co. v. Hamill, 5 Md. 170, 182. * * *

The principle of the decision in Fleming v. Gilbert has not only been fully approved and followed by this Court in 5 Md. 182, but it has been followed in many other cases, and has but recently been cited with approval by the Supreme Court of the United States, in the case of the Chesapeake Co. v. Ray, 101 U. S. 522, 527, 25 L. Ed. 792. That tender of performance, or waiver of performance, of a condition or covenant under seal may be shown by parol evidence, was expressly held in the case in 5 Md. 170; and waiver or abandonment is what was sought to be shown in this case.

If, therefor, it be found that the plaintiff did advise the suspension or abandonment of the entertainments or exhibitions contemplated by the agreement sued on, and that they were so abandoned with the plaintiff's assent; and that the plaintiff afterwards, but within the time covered by the original agreement, made a new engagement with the defendants to perform the same or similar services, on different terms, —such conduct on the part of the plaintiff would amount to a waiver or abandonment of the original agreement, and would constitute a good defence to the action. And it follows that this court is of opinion that there was error in the court below in excluding the parol evidence of such waiver and abandonment; such evidence being pertinent and admissible under the issues joined. The various propositions offered at the trial, inconsistent with the principles herein maintained, should have been rejected. We shall reverse the judgment and award a new trial.

Judgment reversed, and new trial awarded.[64]

[64] A parol contract which undertakes to discharge or vary a specialty is effective if acted upon. Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475 (1830); McCreery v. Day, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793 (1890); McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638 (1890); Stees v. Leonard, 20 Minn. 494, Gil. 448 (1874); Yockey v. Marion, 269 Ill. 342, 110 N. E. 34 (1915). Some jurisdictions uphold the new contract while still executory. Chesapeake & O. R. Co. v. Ray, 101 U. S. 522, 25 L. Ed. 792 (1879); Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462 (1885). But others refuse to give effect to an unexecuted variation of a sealed instrument unless the new agreement is also under seal. McKenzie v. Harrison, supra; McMurphy v. Garland, 47 N. H. 316 (1867).

SECTION 8.—ALTERATION

WOOD v. STEELE.

(Supreme Court of the United States, 1867. 6 Wall. 80, 18 L. Ed. 725.)

Error to the Circuit Court for the District of Minnesota.

Mr. Justice SWAYNE delivered the opinion of the court.

The action was brought by the plaintiff in error upon a promissory note, made by Steele and Newson, bearing date October 11th, 1858, for $3720, payable to their own order one year from date, with interest at the rate of two per cent. per month, and indorsed by them to Wood, the plaintiff.

Upon the trial it appeared that Newson applied to Allis, the agent of Wood, for a loan of money upon the note of himself and Steele. Wood assented, and Newson was to procure the note. Wood left the money with Allis to be paid over when the note was produced. The note was afterwards delivered by Newson, and the money paid to him. Steele received no part of it. At that time, it appeared on the face of the note, that "September" had been stricken out and "October 11th" substituted as the date. This was done after Steele had signed the note, and without his knowledge or consent. These circumstances were unknown to Wood and to Allis. Steele was the surety of Newson. It does not appear that there was any controversy about the facts. The argument being closed, the court instructed the jury, "that if the said alteration was made after the note was signed by the defendant, Steele, and by him delivered to the other maker, Newson, Steele was discharged from all liability on said note." The plaintiff excepted. The jury found for the defendant, and the plaintiff prosecuted this writ of error to reverse the judgment. Instructions were asked by the plaintiff's counsel, which were refused by the court. One was given with a modification. Exceptions were duly taken, but it is deemed unnecessary particularly to advert to them. The views of the court as expressed to the jury, covered the entire ground of the controversy between the parties.

The state of the case, as presented, relieves us from the necessity of considering the questions,—upon whom rested the burden of proof, the nature of the presumption arising from the alteration apparent on the face of the paper, and whether the insertion of a day in a blank left after the month, exonerates the maker who has not assented to it.

Was the instruction given correct?

It was a rule of the common law as far back as the reign of Edward III, that a rasure in a deed avoids it. The effect of alterations

in deeds was considered in Pigot's Case, 11 Coke, 27, and most of the authorities upon the subject down to that time were referred to. In Master v. Miller, 4 Term R. 320, 1 Smith, Lead. Cas. 1141, the subject was elaborately examined with reference to commercial paper. It was held that the established rules apply to that class of securities as well as to deeds. It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The materiality of the alteration is to be decided by the court. The question of fact is for the jury. The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. The fact in this case that the alteration was made before the note passed from the hands of Newson, cannot affect the result. He had no authority to change the date.

The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument, as to the party sought to be wronged.

The rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong, must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business, is unaffected by any latent infirmities of the security, have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other. The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly.

The instruction was correct and the judgment is affirmed.[65]

[65] In Pigot's Case, 11 Coke, 26b (1614) it was held that the interlineation by a stranger of mere descriptive words after the name of the obligee in a bond was an immaterial alteration not affecting the validity of the bond; but it is further said "that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. * * * So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed."

BOWMAN v. BERKEY et al.

(Supreme Court of Pennsylvania, 1918. 262 Pa. 411, 105 Atl. 557.)

Assumpsit on a note by Polly A. Bowman against Jerry Berkey and another Verdict for plaintiff for $3,219.99, and, from a judgment for defendants n. o. v., plaintiff appeals. Affirmed.

PER CURIAM. The addition of a seal after the signature of W. S. Krise to the note involved in the issue below, without his knowledge or authority, was a "material alteration" of the instrument. Bowman v. Berkey et al., 259 Pa. 327, 103 Atl. 49. The seal was added by the admitted agent of the plaintiff, and the learned trial judge in directing the entering of judgment for the defendants n. o. v. properly admitted that their point asking for the direction of a verdict in their favor should have been affirmed.

Judgment affirmed.[66]

JAMES v. TILTON.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 275, 67 N. E. 326.)

Action by James against Tilton. There was a finding for plaintiff, and defendant brings exceptions. Exceptions overruled.

MORTON, J.[67] This is an action to recover upon a promissory note, the plaintiff being the holder, and the defendant the maker. * * *

The principal question is whether there was a material alteration of the note. * * *

The exceptions recite that, as originally drawn, the note was payable to "Irving A. Evans and John C. Watson or order." The copy of the note attached to the amended declaration reads: "Irving A. Evans, John C. Watson (and George B. James) or order." But, from the allegations contained in the declaration, it would seem that this is a mistake, the declaration alleging that "the defendant made a promissory note * * * payable to Irving A. Evans and John C. Watson or order," of which a copy is annexed. It appeared that the plaintiff was a member of a firm consisting of himself and the said Evans and Watson, and that the business of the firm was carried on under the name and style of Irving A. Evans and John C. Watson. The note in suit was given to the firm in part payment of property purchased of the firm, and on a winding up of the partnership was turned over to the plaintiff as part of his share of the assets. At or about the time of his receiving the note the plaintiff, without the knowledge or consent of the defendant, drew a line with ink through the words "Irving A. Evans and John C. Watson," and inserted his own name as payee. Thereafter Watson, at the

[66] In accord: Davidson v. Cooper, 11 M. & W. 778 (1843).

[67] Part of the opinion is omitted.

plaintiff's request, made the following indorsements on the back of the note: "Pay to the order of George B. James. John C. Watson. Pay to the order of George B. James. I. A. Evans, by John C. Watson." This was the condition of the note at the commencement of the action. After the action was begun, the plaintiff, without the consent or knowledge of the defendant, restored the face of the note to its original condition by erasing his own name as payee, and the line that he had drawn through the names of Evans and Watson, and the declaration was amended accordingly. The note as thus restored, with marks and indications of alterations on its face, was offered in evidence and admitted, against the objection of the defendant that it had been materially altered, and that there was marks and indications of alterations on its face.

The court found that the plaintiff was in law and in fact one of the payees of the note, that the alteration was not fraudulent, and that there had not been any material alteration of the note, and refused to rule, as requested by the defendant, either generally that the plaintiff could not recover, or that, if the names of the payees or of either of them was erased after the delivery of the note, or if another name was written in as payee after delivery, he could not recover, or that it was immaterial that the note had been restored by still further erasures, to its original condition.

We think that the rulings and refusals to rule were right. The note as altered, taken in connection with the indorsements by Evans and Watson, expressed no more than the actual legal liability of the defendant at the time of the alteration. The most that can be said is that Evans and Watson were originally named as payees, and that by the alteration the plaintiff became payee, and therefore the effect of the instrument as originally drawn was changed. But the court has found that the alteration was not fraudulent, and that the plaintiff was in law and in fact a payee of the note. It must have found that the alteration was innocently made or was made by mistake. The insertion of his own name simpliciter would not have constituted a material alteration, since it did not change in any respect what was already the legal effect of the note. Aldous v. Comwell (1868) L. R. 3 Q. B. 573. And we are of opinion that, if the plaintiff innocently or by mistake drew a line through the names of Evans and Watson and inserted his own name in place thereof, and neither the defendant nor any third party has suffered any injury in consequence thereof, nor can be injured if the note is restored to its original condition, it could be so restored by the plaintiff, and that the alteration would in that case become immaterial. Lee v. Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; Church v. Fowle, 142 Mass. 12, 6 N. E. 764; Nickerson v. Swett, 135 Mass. 514; Drum v. Drum, 133 Mass. 566; Ames v. Colburn, 11 Gray, 390, 71 Am. Dec. 723; Adams v. Frye, 3 Metc. 103; Nevins v. De Grand, 15 Mass. 436; Horst v. Wagner, 43 Iowa, 373,

22 Am. Rep. 255; Kountz v. Kennedy, 63 Pa. 187, 3 Am. Rep. 541; Rogers v. Shaw, 59 Cal. 260.

The case differs from Stoddard v. Penniman, 108 Mass. 366, 11 Am. Rep. 363, relied on by the defendant. In that case the effect of the alteration was to change the liability of the defendant from that of an indorser to that of an original promisor. So in Fay v. Smith, 1 Allen, 477, 79 Am. Dec. 752, Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92, and Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, the effect of the alteration in each case was to enhance the liability of the defendant.

The alteration having been found to be immaterial, the action was rightly permitted to proceed on the note in its original condition, and the introduction of the note in evidence in its original condition was rightly permitted.

Exceptions overruled.[68]

SECTION 9.—ARBITRATION AND AWARD—MERGER

JOHNSON v. RAWLE.

(At Nisi Prius, before Roll, J., 1648. Aleyn, 90.)

In an action upon a promise, the defendant pleaded a submission of all matters in difference to arbitrament, and an award, &c. the plaintiff denied the submission modo & forma, and issue being joyned thereupon, the evidence was of a submission of all matters touching accompts, and allowed good evidence; and because the plaintiff could not prove that there were other matters in difference, but matters of accompt, he was non-suited. Hale and Mainard being of his counsel.

[68] Alteration by a stranger to the contract, and without the privity of the holder, is now generally held not to operate as a discharge. Gould v. Gould, 99 Wash. 204, 169 Pac. 324 (1917); Clyde S. S. Co. v. Whaley, 231 Fed. 76, 145 C. C. A. 264, L. R. A. 1916F, 289 (1916); Nichols v. Johnson, 10 Conn. 192 (1834); Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210 (1893); 2 Cyc. 151, 152. See N. I. L. § 124.

Alteration by the holder, even though not with fraudulent intent, generally operates as a discharge, if the alteration is material and intentional. There is some variation as to what is material. See Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674 (1832), time of payment accelerated; Master v. Miller, 4 T. R. 320, 1 Sm. L. C. — (1791); Holbart v. Lauritson, 34 S. D. 267, 148 N. W. 19 (1914), with extended note in L. R. A. 1915A, 166, name of payee in a note changed; Burchfield v. Moore, 3 El. & Bl. 683 (1854), place of payment added to an acceptance of a bill of exchange; Gray v. Williams, 91 Vt. 111, 99 Atl. 735, words written on margin of a note reserving a lien on the goods sold. See, further, United States v. Spalding, 2 Mason, 478, Fed. Cas. 16,365 (1822); 2 Cyc. 193–225.

Alteration by accident or mistake does not discharge. Wilkinson v. Johnson, 3 B. & C. 428 (1824); Brett v. Marston, 45 Me. 401 (1858); Russell v. Longmoor, 29 Neb. 209, 45 N. W. 624 (1890); 2 Cyc. 146.

WILLIAMS et al. v. BRANNING MFG. CO.

(Supreme Court of North Carolina, 1910. 153 N. C. 7, 68 S. E. 902, 31 L. R. A. [N. S.] 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954.)

Action by J. T. Williams and others against the Branning Manufacturing Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Civil action for damages for breach of contract in writing in which plaintiffs obligated for certain consideration to operate defendant's lumber plant at Ahoskie, in Hertford county, and to cut into logs the standing timber of defendant and manufacture them into lumber at said plant. In October, 1904, these parties entered into another contract, modifying and changing some of the provisions of the contract of 1901. In the contract of 1904 the following provision is incorporated: "Sec. 9. It is further understood and agreed, in the event of any future misunderstanding or disagreement between the parties hereto as to the contract of March 1, 1901, or as to any modifications of the same herein contained, that the matter shall be settled by arbitrators, to be selected, one by the Branning Manufacturing Company and one by the said J. T. Williams & Bro., and the third by the two, who shall hear and determine the same, and whose award shall be accepted as final between the parties and faithfully performed by each." Disagreements having arisen the matters in controversy were submitted to arbitrators on February 20, 1906, in accordance with the agreements. After the controversy had been heard by the arbitrators, but before they rendered their award, to wit, January 1, 1907, this action was commenced to recover the damages for the breach of the aforesaid contract. It is admitted in the "facts agreed" that the several matters of difference submitted to arbitration are those set out in the complaint in this action, which complaint was not filed until January 18, 1908. It is admitted in the case agreed "(5) that said arbitrators thereafter, on the 25th day of January, 1907, rendered their award, passing on the matters submitted to them, and shortly thereafter the same was sent to plaintiffs and defendant, and which the plaintiffs ignored." The cause was submitted at spring term, 1910, superior court of Hertford county to his honor, Judge Ward, who rendered judgment for plaintiffs. The defendant appealed.

Brown, J. It is unnecessary to review the conclusion of the superior court that the provision in the contract agreeing to submit all matters of difference to arbitration is no bar to this action, for the reason that the plaintiffs and defendant did voluntarily submit such matters to arbitration in manner and form as provided in the contract and the arbitrators in due time rendered their award. It is common learning that a valid award operates as a final and conclusive judgment as be-

tween the parties to the submission, or within the jurisdiction of the arbitrators, respecting all matters determined and disposed of by it.[69]

But it is contended that the fact that a summons in this action was issued some days before the rendering of the award revoked the submission, and deprived the arbitrators of the right to make an award. No other form of revocation is contended for. At common law a submission might be revoked by any party thereto at any time before the award was rendered. Bacon, Abridgement, Arb. B; Comyns, Dig. Arb. D, 5; Vinyors' Case, 8 Coke, 82. Some courts of this country have held to the contrary (Berry v. Carter, 19 Kan. 135, and cases cited), but this court has followed the doctrine of the common law (Tyson v. Robinson, 25 N. C. 333; Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831). The revocation, to be effective, must be express, unless there is a revocation by implication of law, and, in case of express revocation, in order to make it complete, notice must be given to the arbitrators. It is ineffective until this has been done. Allen v. Watson, 16 Johns. (N. Y.) 205; Brown v. Leavitt, 26 Me. 251; Morse on Arb. & Award, p. 231: Vin. Ab. Authority, E. 3, 4; Vinyors' Case, supra; 2 Am. & Eng. 600.

It is contended that commencing an action is a revocation by legal implication. Such revocations arise from the legal effect of some intervening event happening after submission, either by act of God, or caused by the party, and which necessarily puts an end to the busi-

[69] On a later appeal, 154 N. C. 205, 70 S. E. 290, 47 L. R. A. (N. S.) 337 (1911), the court held that the the award was conclusive only as to the matters actually submitted to the arbitrators, and that the original agreement to arbitrate all disputes and differences did not bar this present action insofar as it was to enforce claims not passed upon in the award rendered.

An award of arbitrators, rendered after a proper hearing, is conclusive as to all matters actually submitted and passed upon. It merges the original cause of action in much the same way as does the judgment of a court (but no writ of execution can be obtained without first getting judgment on the award). Smith v. Johnson, 15 East, 213 (1812); Scrivner v. McClelland (Okl.) 168 Pac. 415 (1917); Spencer v. Dearth, 43 Vt. 98 (1870), "an award is as conclusive on the matter included in the submission, as a judgment would be." See 47 L. R. A. (N. S.) 442, note (XXVIII, c.); 5 C. J. 160, 163.

Debt lies upon a valid award, but not upon mutual promises to perform an award. Sutcliffe v. Brooke, 14 M. & W. 855 (1845).

In an action of debt for tolls due (£60), a plea of an arbitration and an award that the sum was only £13, without alleging payment, was held a bad plea. Allen v. Milner, 2 Cr. & J. 47 (1831). This seems to have been because debt was a proper form of action both before the award and after it. The award would limit the recovery to £13. See, also, Second Soc. of Universalists in Town of Boston v. Royal Ins. Co., Limited, 221 Mass. 518, 528, Ann. Cas. 1917E, 491 (1915); Commings v. Heard, L. R. 4 Q. B. 669 (1869).

Where a contract makes a valuation by appraisers a condition precedent and makes it conclusive, such valuation does not operate as an award. It does not discharge or merge the prior claim, for there was no enforceable claim until after the appraisal. Suit thereafter is not upon the appraisal as an award, but must be brought upon the original contract. Garred v. Macey, 10 Mo. 161 (1846). And see Noble v. Grandin, 125 Mich. 383, 84 N. W. 465 (1900); California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839 (1887).

ness. The death of a party or arbitrator, marriago of a feme sole, lunacy of a party, or the utter destruction and final end of the subject-matter are of this description. But whether the bringing of an action for the subject-matter of an arbitration after submission and before award is an implied revocation is a matter about which the courts differ. In New York it is held that it is no revocation in law. Lumber Co. v. Schneider (Com. Pl.) 1 N. Y. Supp. 441; Smith v. Compton, 20 Barb. 262. To same effect are the decisions in New Jersey and Vermont. Knaus v. Jenkins, 40 N. J. Law, 288, 29 Am. Rep. 237; Sutton v. Tyrrell, 10 Vt. 91. The courts of Kentucky, Illinois, Georgia, and New Hampshire hold the contrary. Peters v. Craig, 6 Dana, 307; Paulsen v. Manske, 24 Ill. App. 95; Leonard v. House, 15 Ga. 473; Kimball v. Gilman, 60 N. H. 54. The conclusion of Judge Collamer in the Vermont case is that "the entry and continuance of an action was obviously not an express revocation, nor was it such an act as put an end to the subject-matter of the submission, nor did it prevent the arbitration from proceeding with effect. It occasioned the defendant no cost, and, indeed, it was no more than an ordinary act of caution to keep the action in existence, should the opposite party revoke or decline to attend. This, then, was not a revocation in law." Nevertheless, it is plainly deducible from all the cases that the action when commenced must cover the subject-matter submitted to arbitration; otherwise, it cannot be construed as a revocation or notice to the other party or to the arbitrators. In the case at bar the summons was issued some days before the award was made, but the complaint was not filed until a year after. The summons gave no indication as to the character of the action except that it was a civil action. Until a complaint is filed, the defendant has no legal notice of the cause of action, and the arbitrators had a right to proceed with the pending arbitration and to render their award. Assuming that the bill of particulars furnished upon defendant's demand is notice of the character of the action, that was not furnished until after August 1, 1908, several months after the award had been rendered.

It is further contended that the award is not warranted by the terms of submission. According to the written contract and the terms of the submission, the purpose of the award was to ascertain the damages accruing by reason of: "(1) The percentage of miscuts and stained lumber. (2) As to excess cost of railroading. (3) As to excess cost of handling lumber on the yard. (4) Are J. T. Williams & Bro. responsible for fire which occurred last fall, supposedly originating from sparks from locomotive No. 7? The above items cover all disputes and contentions under said contract to date." In their written award the arbitrators appear to have carefully confined themselves to the questions submitted, and to have confined their findings to the four matters in dispute. But it is unnecessary to discuss that contention further as it is expressly admitted in the case agreed that

to waive any right to revoke does not help the situation. A waiver, to be effectual and beyond recall, must be of some present existing right, conferred by statute or otherwise. When the agreement to waive relates to the future conduct of the party, it is purely executory, and amounts to nothing more than the agreement not to revoke. The difficulty is that, as the arbitrators have no interest in the result of the arbitration, and derive their power to act from the continuing consent of the parties to the agreement, when the agreement, while yet executory, is broken by the refusal of a party to be bound by it or to perform it, the foundation of the arbitrator's power is gone, and they have no more authority over the withdrawing party to bind him by their acts.

The legislature of this state, in enacting section 2383 of the Code of Civil Proceedure, have set at rest any existing conflict in the decisions, and have enlarged the rule as recognized in the previous statutory enactment. 2 Rev. St. p. 544, § 23. By its provisions a submission to arbitration, whether made as prescribed in that title or otherwise, may be revoked at any time before the closing of the proofs and the final submission of the cause for decision. The revocation must be in writing, signed by the parties, and delivered to the arbitrators, and it is competent for one of several parties on a side to effect such a revocation. We perceive no reason for qualifying the force of this section in the way suggested by appellants' counsel, who say that it is only available to a party when revocation is allowable; and as, by express agreements in this submission, the right of revocation was stipulated away, the provisions of the section are inapplicable. We think the language of this section is broad enough to cover all cases of submission, and that the only restriction is as to the time and the mode of the act of revocation. And as to the agreement not to revoke, as we have suggested, like any other agreement relating to the future conduct of parties, it was executory, and, if broken, left the other party helpless thereunder, and under the necessity to seek redress for the breach elsewhere. We have preferred to express our views upon the main question, as to this submission, in view of its importance, and, while doubting the power of the court to compel by writ of mandamus the performance by these arbitrators of their functions, we do not now express any opinion upon that question.

For the reasons expressed we think the order of the general term affirming the order of the special term denying a motion for a peremptory mandamus should be affirmed, with costs. All concur.[70]

[70] See 5 C. J. 53, and 47 L. R. A. (N. S.) 400, note (XVIII), collecting many cases on the power to revoke the power of arbitrators previously appointed. That such a revocation may nevertheless be a breach of duty, giving a right to damages, see the same note, page 408 (XIX) and 5 C. J. 61; the power to revoke may exist without the legal privilege of exercising it. Of course, both power and privilege exist in those cases where the agreement to arbitrate is held invalid as an attempt to oust the courts of jurisdiction.

Statutes exist in some jurisdictions making an agreement to arbitrate irrevocable and providing that a judgment may be entered on the award after

Y. B. 3 HENRY IV, 17, pl. 14.

Action of debt for £20 on a contract.

Reade (for defendant) said that as to £10 the defendant had executed his sealed obligation as to the same contract, and asked judgment. Culpeper (for plaintiff) said: We have sued on a contract, and as to it you have replied nothing, wherefore we demand our debt and damages; to this he alleges no law requiring us to reply, for it might well be that he owes us £10 on an obligation for different reasons, and if it is for the same cause he should wage his law. Reade: You do not deny that the obligation is for the same contract, and by the execution of the obligation we are discharged from the contract; all this we allege, and therefore demand judgment. Culpeper: I suppose that if the obligation should be destroyed or lost, we should nevertheless have an action on the contract.

MARKHAM, J., denied this, and said that it would be adjudged to be your own folly in that you had not taken better care of the instrument.

Culpeper then said that the obligation was executed for another cause and not for the same contract, and did not say for what cause. Reade then alleged that it was for the same cause; and issue was joined.[71]

notice without bringing an action on the award. See Dickie Mfg. Co. v. Sound Construction & Engineering Co., 92 Wash. 316, 159 Pac. 129 (1916). A recent New York statute (Laws 1920, c. 275 [Consol. Laws, c. 72] § 2) "declares a new public policy and abrogates an ancient rule." "A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title 8 of chapter 17 of the Code of Civil Procedure, shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." See Herman Berkovitz v. Arbib & Houlberg, 230 N. Y. 261, 130 N. E. 288 (1921).

"If I am bound by (sealed) obligation to abide by the award of J. S., I cannot revoke this agreement to arbitrate, because I am under obligation; but it is otherwise if it was without (sealed) obligation." Y. B. 5 Edw. IV, 3, 2.

[71] Where the parties and the subject-matter are identical, a simple contract is discharged by a subsequently executed sealed obligation. Higgens' Case, 6 Co. 45b (1605); Holmes v. Bell, 3 M. & G. 213 (1841); Clifton v. Jackson Iron Co., 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621 (1889); Schoonmaker v. Hoyt, 148 N. Y. 425, 42 N. E. 1059 (1896); Slocum v. Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499 (1893); Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. 515 (1891); Stockton v. Gould, 149 Pa. 68, 24 Atl. 160 (1892).

Newton, C. J., said in 1444 (Y. B. 22 Hen. VI, 55, 32): If one buy a horse of me for ten pounds, and deliver me a bond for ten pounds for the contract, it is a good bar in an action of debt, and, as regards the debt, is as strong as a release for all manner of actions." See Thayer on the Parol Evidence Rule, 6 Harv. L. Rev. 330. In a subsequent "action of debt upon the contract the obligor can wage his law with a good conscience because by the taking of the obligation the contract was discharged." Dalison, 53 (1563).

In Brook's New Cases, 47, title Contract, it is said that there is a merger "if the obligation be made for parcell of the contract which is entire. 8 Hen.

VAN VLIET et al. v. JONES et al.

(Supreme Court of New Jersey, 1845. 20 N. J. Law, 340, 43 Am. Dec. 633.)

This was a certiorari to the common pleas of Hudson county to remove certain proceedings, had in that court, under the "Act to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors."

The facts of the case appear in the opinion of the court delivered by

RANDOLPH, J.[72] * * * The case according to the papers, is this: Some time prior to December, 1841, Samuel Bridgart of Hudson county, made an assignment for the benefit of his creditors, amongst whom were the plaintiffs in certiorari, Van Vliet and Wikoff, who filed their account pursuant to law, amounting to $2103; to which Jones and the other defendants in certiorari, who were also applying creditors of Bridgart, filed their exceptions; and this claim and the exceptions thereto coming before the court of common pleas for trial, neither party demanding a jury, the court disallowed the account on the ground that Van Vliet and Wikoff had taken a bond and mortgage of Bridgart for the same account. Although there is much discrepancy as to what was proved before the court, fortunately as to this bond and mortgage, both the statements and affidavits substantially agree; and from these sources it appears to have been proved before the court below, that Bridgart had an account with the plaintiffs for goods bought of them, and that as a collateral security both as to that account and also a further running account all of which is embraced in the present claim, the bond and mortgage were given,—a small note was also included in the account and covered by the security. The mortgage was on a house and lot in Jersey City, being the third in priority, and a bill to foreclose was filed by one of the prior mortgagees and the plaintiffs made parties, who also became the purchasers of the property, on its being sold under a decree, for fifteen dollars less than the amount of the prior incumbrances. There can be no doubt, as a general rule, that the taking of a bond and mortgage or other security of a higher nature extinguishes a debt arising from mere matter of account, yet this

IV, 17. But if a stranger makes an obligation to me, for the same debt, yet the contract remains, because that 'tis by another person, and both are now debtors. 29 Hen. VIII, B. Contract, 29."

In Norfolk R. Co. v. McNamara, 3 Ex. 628 (1849), where a bond with surety was given as collateral security for a pre-existing debt the amount of which was different from that named in the bond, it was held that there was no merger and that action would lie on the parol contract. Parke, B., said: "If this had been the case of a bond or covenant for the identical debt, the plea would have been a good answer without the additional allegation that the instrument was given in satisfaction."

A judgment against one of two or more joint obligors operates as a merger and discharge of all claim against the others. Peters v. Sanford & Read, 1 Denio (N. Y.) 224 (1845); post, p. 1199, and note.

[72] Part of the opinion is omitted.

will depend on the intention of the parties. If the higher security was given as the future evidence of the debt, to which the party was to look for payment, then the less security would merge in the greater; but, if the higher security was to be merely additional or collateral to the less, showing that the intention of the parties was to keep the latter open, to be looked to for payment in any event—then the less is not extinguished by the greater security. This doctrine is familiar, and may be found in most of the elementary works and cases that treat upon this subject, particularly in Chit. Cont. 607, and authorities there cited.

The defendant's counsel admitted the position, but insisted that it must appear upon the face of the instrument itself, that it was an additional or collateral security, and the works that treat on this subject and cases adduced, seem to give countenance to this idea; for in the former it is usually stated as an exception to the general doctrine of merger, that if it appear upon the face of the instrument that it is intended to be a further or collateral security, then the rule of merger does not apply, and the cases referred to by counsel, are of the description where the matter appeared upon the face of the instrument. But these authorities, although they show very clearly that when the matter does so appear the general rule of extinguishment does not apply, yet they do not therefore prove that when it does not so appear the rule does apply; and if such cases do exist the labors of counsel and the researches of the court have failed to produce them. Deciding the case then upon principle rather than precedent, the question of extinguishment or not is one of intention. What did the parties mean by the transaction? Did they intend that the old security should remain open and the new one be merely collateral or additional; or did they intend to extinguish the former? This intention is of course to be collected from the face of the instrument itself, where it so appears; and, if it does not so appear, then from the next best evidence: the only difference being, that in the former case the security itself proves the exception to the rule, and also the intention of the parties, whilst in the latter, the party alleging the exception must prove it. And in this no evil can arise, there is no parol contradiction of a written instrument, but only an explanation as to the object for which it was given. A contrary doctrine would prohibit parol proof of the payment of a collateral security, by the payment of the original claim, unless it appeared upon the face of the collateral that it was such. In this particular the court of common pleas erred, and their proceedings should be reversed.

Judgment reversed.

CHAPTER VI

THIRD PARTY BENEFICIARIES

LEVER v. HEYS.

(In the King's Bench, 1599. Moore, K. B. 550.)

The father of a girl promised the father of a son that if the latter would give his consent to their marriage and assure £40 lands to his son, that he, the father of the girl, would pay £200 to the son upon marriage. The question was whether the son himself or his father should have an action on the case sur assumpsit against the father of the girl if he did not pay the £200. POPHAM and FENNER thought that the son would have the right of action. CLENCH è contra; absente GAWDY.[1]

ROOKWOOD'S CASE.

(In the Court of Common Pleas, 1590. Cro. Eliz. 164.)

Rookwood having issue three sons, had an intent to charge his land with four pounds per annum to each of his two youngest sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds per annum; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an assumpsit.—The whole Court held clearly, that it was well brought, and that it was a good consideration; for otherwise his land had been charged with the rents.[2]

[1] The following cases denied a remedy to the beneficiary, where he was not related by blood to the promisee: Crow v. Rogers, 1 Strange, 592 (1723); Bourne v. Mason, 1 Ventr. 6 (1669); Price v. Easton, 4 B. & Adol. 433 (1833).

[2] S. c. 1 Leon. 192. In accord: Body v. A., Gouldsb. 49 (1587). This rule is generally followed in the United States; the plaintiff being the promisee, although not the one who gives the consideration. Van Eman v. Stanchfield, 10 Minn. 255 (Gil. 197 [1865]); Rector, etc., St. Mark's Church v. Teed, 120 N. Y. 583, 24 N. E. 1014 (1890); Palmer Sav. Bank v. Insurance Co., of North America, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387 (1896). See also Gardner v. Denison, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108 (1914).

In First Nat. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 439, 39 N. E. 331 (1895), the court says: "I do not deem the doctrine of Lawrence v. Fox (1859) 20 N. Y. 268, involved in this controversy. That doctrine applies where no express promise has been made to the party suing, but he claims the right to rest upon a promise between other parties having respect to the debt due to him and as having been made for his benefit. It struggles to obviate a lack of privity upon equitable principles, but is needless and has no proper

ANONYMOUS.

(1646. Style, 6.)

J assumes and promiseth to B that if B will pay £50 to C his son, who was married to D the daughter of J at such a time, that he will pay £100 to D his daughter at such a time; B pays the £50 to C at the time appointed, J fails in payment of the £100 according as was agreed; B dies intestate, and E administers, and brings an action upon the case against J upon this promise made to B the testator; and adjudged that the action did well lie by the administrator, though he should receive no benefit if he did recover.[8]

DUTTON et ux. v. POOLE.

(In the King's Bench, 1677. 2 Lev. 210.)

Assumpsit, and declares that the father of the plaintiff's wife being seized of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, £1,000, and avers that the father at his request forbore, but the defendant had not paid the £1,000. After verdict for the plaintiff upon non assumpsit, it

application where the privity exists, and a direct promise has been made upon which the action may rest." See also De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816 (1917), and the dissenting opinion of Comstock, J., in Lawrence v. Fox, 20 N. Y. 268 (1859).

In England, the rule has been flatly repudiated by the House of Lords. Dunlop v. Selfridge, [1915] A. C. 847.

[8] In accord: Bafield v. Collard, Aleyn, 1 (1646). In this case is the dictum that the beneficiary also may sue, even though it was argued that the defendant would be "doubly charged." The promisee can sue if he has a financial interest in the performance promised. Meyer v. Hartman, 72 Ill. 442 (1874); Tinkler v. Swaynie, 71 Ind. 562 (1880); Baldwin v. Emery, 89 Me. 496, 36 Atl. 994 (1897); Merriam v. Pine City Lumber Co., 23 Minn. 314, 322 (1877); O'Neill v. Supreme Council, American Legion of Honor, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422 (1904); Langan v. Supreme Council, American Legion of Honor, 174 N. Y. 266, 66 N. E. 932 (1903), semble; Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661 (1906). He has sometimes been denied a remedy where he has no pecuniary interest in performance. Levet v. Hawes, Cro. Eliz. 619, 652 (1599); Ayers v. Dixon, 78 N. Y. 318 (1879); Adams v. Union Ry. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273 (1899); Reeves v. State Bank of Bluff City, 63 Kan. 789, 66 Pac. 995 (1901); City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256 (1892); Evans v. Supreme Council of Royal Arcanum 223 N. Y. 497, 120 N. E. 93, 1 A. L. R. 163 (1918). The promisee can always maintain suit in those states denying a remedy to the beneficiary. Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341 (1876); Boardman v. Larrabee, 51 Conn. 39 (1883). The promisor can compel the promisee to pay over the sum collected to the third party beneficiary if the latter holds a mortgage on the promisor's land. Williams v. Fowle, 132 Mass. 385 (1882), semble; Furnas v. Durgin, supra, semble.

was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her. Also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as Yelv. Rippon v. Norton, Hawes v. Leader, Starky v. Milner, 1 Roll. 31, 32, Sty. 296, and a case lately resolved in Com. Banc. inter Norris & Pine, intrat. Hill. 22 and 23 Car. 2, 1538, where the case was, "If you will marry me, I will pay your children so much," and the action being brought by the children, adjudged it lay not. On the other side it was said, if a man deliver goods or money to H. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment, so here the daughter is to have the benefit of the promise. So if a man should say, "Give me a horse, I will give your son £10," the son may bring the action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children, for which cause affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise, and the son had a benefit by this agreement, for by this means he hath the wood and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited 1 Roll. Ab. 31, Oldman v. Bateman, and ibid. 32; Starky v. Meade. Upon the first argument Wylde and Jones, JJ., seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise or consideration. Twysden and Rainsford seemed contra, and afterward two new judges being made, scil Scroggs, C. J., in lieu of Rainsford, and Dolben in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, C. J., said that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and he and Jones remembered the case of Norris & Pine, and that it was adjudged as aforesaid. But Scroggs said he was then and still is of opinion contrary to that judgment. Dolben, J., concurred with him that the daughter might bring the action, Jones & Wylde hæsitabant. But next day they also agreed to the opinion of the Chief Justice and Dolben, and so judgment was given for the plaintiff, for the son hath the benefit by having of the wood, and the daughter

hath lost her portion by this means. And now Jones said he must confess he was never well satisfied with the judgment in Norris & Pine's Case, but being it was resolved, he was loth to give his opinion so suddenly against it. And note upon this judgment error was immediately brought, and Trin. 31 Car. 2 it was affirmed in the Exchequer Chamber.[4]

TWEDDLE v. ATKINSON.

(In the Court of Queen's Bench, 1861. 1 Best & S. 393.)

The declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agree-

[4] Blood relationship between the promisee and the third-party beneficiary appears to have had an operative effect in the following cases: In re Edmundson's Estate, 259 Pa. 429, 103 Atl. 277, 2 A. L. R. 1150 (1918) post, p. 1066; Daily v. Minnick, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840 (1902); Benge v. Hiatt's Adm'r, 82 Ky. 666, 56 Am. Rep. 912 (1885); Schemerhorn v. Vanderheyden, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304 (1806); Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20 (1884); Coleman v. Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517 (1889). Contra, Linneman v. Moross Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528 (1893).

In the following cases, it is believed, the relationship by blood or marriage caused the court to strain the facts and to hold, contrary to the fact, that the beneficiary was also a promisee: De Cicco v. Schweizer, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816 (1917); Gardner v. Denison, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108 (1914); Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511 (1896); Freeman v. Morris, 131 Wis. 216, 109 N. W. 983, 120 Am. St. Rep. 1038, 11 Ann. Cas. 481 (1906). In the following cases such relationship caused the court to hold that the promisee owed the beneficiary a legal or an equitable duty when in fact there was none: Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454 (1899); Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187 (1918), post, p. 1061.

ment in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle made and entered into an agreement in writing in the words following—that is to say:

"High Coniscliffe, July 11, 1855.

"Memorandum of an agreement made this day between William Guy, of, etc., of the one part, and John Tweddle, of, etc., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of £100 to the said William Tweddle, each and severally the said sums on or before August 21st, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified."

And the plaintiff says that afterward and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said August 21st, 1855, A. D., elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of £200 paid by the said William Guy or his executor, yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.

Demurrer and joinder therein.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in Bourne v. Mason, 1 Ventr. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an

action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in § 4 of the Statute of Frauds, 29 Car. 2, ch. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception—namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And Dutton and Wife v. Poole, 2 Lev. 210; 1 Ventr. 318 was cited for this. We cannot overrule a decision of the Exchequer Chamber, but there is a distinct ground on which that case cannot be supported. The cases upon Stat. 27 El. ch. 4, which have decided that, by § 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by § 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for the defendant.[5]

LAWRENCE v. FOX.

(Court of Appeals of New York, 1859. 20 N. Y. 268.)

Appeal from the Superior Court of the City of Buffalo. On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him $300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to

[5] As to the present law in England, see cases cited in note 6 to Lawrence v. Fox, post, p. 1049; also Dunlop Tyre Co. v. Selfridge, [1915] A. C. 847; Les Affreteurs v. Walford, [1919] A. C. 801.

the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff, that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, $344.66, upon which judgment was entered, from which the defendant appealed to the Superior Court, at General Term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

H. Gray, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and, therefore, not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the supreme court of this state—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that court was unanimously affirmed by the court for the correction of errors. Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; s. c. in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleveland a quantity of hay, in consideration of which Cleveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleveland from Moon was a valid consideration for Cleveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defend-

ant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Cleveland delivered to Moon was not to be paid to Farley, but the debt incurred by Cleveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid.

That case has been often referred to by the courts of this state, and has never been doubted as sound authority for the principle upheld by it. Barker v. Bucklin, 2 Denio, 45, 43 Am. Dec. 726; Canal Co. v. Westchester County Bank, 4 Denio, 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the supreme court of this state, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." Schemerhorn v. Vanderheyden, 1 Johns. 140, 3 Am. Dec. 304, has often been reasserted by our courts and never departed from.

The case of Seaman v. White has occasionally been referred to (but not by the courts) not only as having some bearing upon the question now under consideration, but as involving in doubt the soundness of the proposition stated in Schemerhorn v. Vanderheyden. In that case one Hill, on the 17th of August, 1835, made his note and procured it to be indorsed by Seaman and discounted by the Phœnix Bank. Before the note matured and while it was owned by the Phœnix Bank, Hill placed in the hands of the defendant, Whitney, his draft accepted by a third party, which the defendant indorsed, and on the 7th of October, 1835, got discounted and placed the avails in the hands of an agent with which to take up Hill's note; the note became due, Whitney withdrew the avails of the draft from the hands of his agent and appropriated it to a debt due him from Hill, and Seaman paid the note indorsed by him and brought his suit against Whitney. Upon this state of facts appearing, it was held that Seaman could not recover: first, for the reason that no promise had been made by Whitney to pay, and second, if a promise could be implied from the facts that Hill's accepted draft, with which to raise the means to pay the note, had been placed by Hill in the hands of Whitney, the promise would not be to Seaman, but to the Phœnix Bank who then owned the note; although in the course of the opinion of the court, it was stated that, in all cases the principle of which was sought to be applied to that case, the fund

had been appropriated by an express undertaking of the defendant with the creditor. But before concluding the opinion of the court in this case, the learned judge who delivered it conceded that an undertaking to pay the creditor may be implied from an arrangement to that effect between the defendant and the debtor.

This question was subsequently, and in a case quite recent, again the subject of consideration by the supreme court, when it was held, that in declaring upon a promise made to the debtor by a third party to pay the creditor of the debtor, founded upon a consideration advanced by the debtor, it was unnecessary to aver a promise to the creditor; for the reason that upon proof of a promise made to the debtor to pay the creditor, a promise to the creditor would be implied. And in support of this proposition, in no respect distinguishable from the one now under consideration, the case of Schemerhorn v. Vanderheyden, with many intermediate cases in our courts, were cited, in which the doctrine of that case was not only approved but affirmed. Canal Co. v. Westchester County Bank, 4 Denio, 97. The same principle is adjudged in several cases in Massachusetts. I will refer to but few of them. Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154; Hall v. Marston, 17 Mass. 575; Brewer v. Dyer, 7 Cush. (Mass.) 337, 340. In Hall v. Marston the court say: "It seems to have been well settled that if A. promises B. for a valuable consideration to pay C., the latter may maintain assumpsit for the money;" and in Brewer v. Dyer, the recovery was upheld, as the court said, "upon the principle of law long recognized and clearly established, that when one person, for a valuable consideration, engages with another, by a simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement; that it does not rest upon the ground of any actual or supposed relationship between the parties as some of the earlier cases would seem to indicate, but upon the broader and more satisfactory basis, that the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded."

There is a more recent case decided by the same court, to which the defendant has referred and claims that it at least impairs the force of the former cases as authority. It is the case of Mellen v. Whipple, 1 Gray (Mass.) 317. In that case one Rollins made his note for $500, payable to Ellis and Mayo, or order, and to secure its payment mortgaged to the payees a certain lot of ground, and then sold and conveyed the mortgaged premises to the defendant, by deed in which it was stated that the "granted premises were subject to a mortgage for $500, which mortgage, with the note for which it was given, the said Whipple is to assume and cancel." The deed thus made was accepted by Whipple, the mortgage was afterward duly assigned, and the note indorsed by Ellis and Mayo to the plaintiff's intestate. After Whipple received the deed he paid to the mortgagees and their assigns the

interest upon the mortgage and note for a time, and upon refusing to continue his payments was sued by the plaintiff as administratrix of the assignee of the mortgage and note. The court held that the stipulation in the deed that Whipple should pay the mortgage and note was a matter exclusively between the two parties to the deed; that the sale by Rollins of the equity of redemption did not lessen the plaintiff's security, and that as nothing had been put into the defendant's hands for the purpose of meeting the plaintiff's claim on Rollins, there was no consideration to support an express promise, much less an implied one, that Whipple should pay Mellen the amount of the note. That, is all that was decided in that case, and the substance of the reasons assigned for the decision; and whether the case was rightly disposed of or not, it has not in its facts any analogy to the case before us, nor do the reasons assigned for the decision bear in any degree upon the question we are now considering.

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of Felton v. Dickinson, 10 Mass. 287, and others that might be cited are of that class; but concede them all to have been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the cestui que trust, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.[6]

[6] Courts of equity, even in England and Massachusetts, have been very ready to expand the concept of a trust, so as to include a mere contract beneficiary. See Tomlinson v. Gill, Ambler, 330 (1756), before Hardwicke, L. C.; Moore v. Darton, 4 De G. & Sm. 517 (1851); Lloyds v. Harper (C. A.) 16 Ch. D. 290 (1880); Gregory v. Williams, 3 Mer. 582 (1817); Page v. Cox, 10 Hare, 163 (1851); Touche v. Metrop. W. Co., L. R. 6 Ch. 671, 677 (1871); School Dist. of Kansas City ex rel. Koken Iron Works v. Livers, 147 Mo. 580, 49 S. W. 507 (1899); Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955 (1911); Grime v. Borden, 166 Mass. 198, 44 N. E. 216 (1896); Nash v. Commonwealth, 174 Mass. 335, 54 N. E. 865 (1899).

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and, therefore, the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that the plaintiff did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (Berly v. Taylor, 5 Hill, 577–584 et seq.), until his dissent was shown?

The cases cited and especially that of Farley v. Cleveland, established the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff: nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this state, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C. J., and DENIO, J., based their judgment upon the ground that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J. (dissenting). The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case, it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the

defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed that in a case thus situated the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority.

The cases which have sometimes been supposed to have a bearing on this question are quite numerous. In some of them, the dicta of judges, delivered upon very slight consideration, have been referred to as the decisions of the courts. Thus, in Schemerhorn v. Vanderheyden, 1 Johns. 140, 3 Am. Dec. 304, the court is reported as saying: "We are of opinion that where one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on such promise." This remark was made on the authority of Dutton v. Poole, Vent. 318, 332, decided in England nearly two hundred years ago. It was, however, but a mere remark, as the case was determined against the plaintiff on another ground. Yet this decision has often been referred to as authority for similar observations in later cases.

In another class of cases, which have been sometimes supposed to favor the doctrine, the promise was made to the person who brought the suit. while the consideration proceeded from another; the question considered being, whether the promise was void by the statute of frauds. Thus, in Gold v. Phillips, 10 Johns. 412, one Wood was indebted to the plaintiffs for services as attorneys and counsel, and he conveyed a farm to the defendants, who, as part of the consideration, were to pay that debt. Accordingly, the defendants wrote to the plaintiffs, informing them that an arrangement had been made by which they were to pay the demand. The defense was, that the promise was void within the statute, because, although in writing, it did not express the consideration. But the action was sustained, on the ground that the undertaking was original and not collateral. So in the case of Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Id., 9 Cow. 639, the facts proved or offered to be proved were, that the plaintiff held a note against one Moon; that Moon sold hay to the defendant, who in consideration of that sale promised the plaintiff by parol to pay the note. The only question was, whether the statute of frauds applied to the case. It was held by the supreme court, and afterward by the court of errors, that it did not. Such is also precisely the doctrine of Ellwood v. Monk, 5 Wend. 235, where it was held that a plea of the statute of frauds to a count upon a promise of the defendant to the

plaintiff, to pay the latter a debt owing to him by another person, the promise being founded on a sale of property to the defendant by the other person, was bad.

The cases mentioned and others of a like character were referred to by Mr. Justice Jewett, in Barker v. Bucklin, 2 Denio, 45, 43 Am. Dec. 726. In that case the learned justice considered at some length the question now before us. The authorities referred to were mainly those which I have cited, and others upon the statute of frauds. The case decided nothing on the present subject, because it was determined against the plaintiff on a ground not involved in this discussion. The doctrine was certainly advanced which the plaintiff now contends for, but among all the decisions which were cited, I do not think there is one standing directly upon it. The case of Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154, might perhaps be regarded as an exception to this remark, if a different interpretation had not been given to that decision in the supreme court of the same state where it was pronounced. In the recent case of Mellen v. Whipple, 1 Gray (Mass.) 317, that decision is understood as belonging to a class where the defendant has in his hands a trust fund, which was the foundation of the duty or promise on which the suit is brought.

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose. Berly v. Taylor, 5 Hill, 577. If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator of the trust. Thus, in Comyn, Dig. "Action on the Case upon Assumpsit," B. 15, it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an assumpsit lies by A. against him. The case of Delaware & H. Canal Co. v. Westchester County Bank, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain

rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made and not in favor of any one else.

I have referred to the dictum in Schemerhorn v. Vanderheyden, 1 Johns. 140, 3 Am. Dec. 304, as favoring the doctrine contended for. It was the earliest in this state, and was founded, as already observed, on the old English case of Dutton v. Poole, Vent. 318. That case has always been referred to as the ultimate authority whenever the rule in question has been mentioned, and it deserves, therefore, some further notice. The father of the plaintiff's wife being seized of certain lands, which afterward on his death descended to the defendant, and being about to cut £1,000 worth of timber to raise a portion for his daughter, the defendant promised the father in consideration of his forbearing to cut the timber, that he would pay the said daughter the £1,000. After verdict for the plaintiff, upon the issue of non-assumpsit, it was urged in arrest of judgment that the father ought to have brought the action, and not the husband and wife. It was held, after much discussion, that the action would lie. The court said: "It might be another case if the money had been to have been paid to a stranger; but there is such a manner of relation between the father and the child, and it is a kind of debt to the child to be provided for, that the plaintiff is plainly concerned."

We need not criticise the reason given for this decision. It is enough for the present purpose, that the case is no authority for the general doctrine, to sustain which it has been so frequently cited. It belongs to a class of cases somewhat peculiar and anomalous, in which promises have been made to a parent, or person standing in a near relationship to the person for whose benefit it was made, and in which, on account of that relationship, the beneficiary has been allowed to maintain the action. Regarded as standing on any other ground, they have long since ceased to be the law in England. Thus, in Crow v. Rogers, 1 Strange, 592, one Hardy was indebted to the plaintiff in the sum of £70, and upon a discourse between Hardy and the defendant, it was agreed that the defendant should pay that debt in consideration of a house, to be conveyed by Hardy to him. The plaintiff brought the action on that promise, and Dutton v. Poole was cited in support of it. But it was held that the action would not lie, because the plaintiff was a stranger to the transaction. Again, in Price v. Easton, 4 Barn. & Adol. 433, one William Price was indebted to the plaintiff in £13. The declaration averred a promise of the defendant to pay the debt, in consideration that William Price would work for him, and leave the wages in his hands; and that Price did work accordingly, and earned a large sum of money, which he left in the defendant's hands. After verdict for the plaintiff, a motion was made in arrest of judgment, on

the ground that the plaintiff was a stranger to the consideration. Dutton v. Poole, and other cases of that class, were cited in opposition to the motion, but the judgment was arrested. Lord Denman said: "I think the declaration cannot be supported, as it does not show any consideration for the promise moving from the plaintiff to the defendant." Littledale, J., said: "No privity is shown between the plaintiff and the defendant. The case is precisely like Crow v. Rogers, and must be governed by it." Taunton, J., said: "It is consistent with all the matter alleged in the declaration, that the plaintiff may have been entirely ignorant of the arrangement between William Price and the defendant." Patterson, J., observed: "It is clear that the allegations do not show a right of action in the plaintiff. There is no promise to the plaintiff alleged." The same doctrine is recognized in Lilly v. Hays, 5 Adol. & E. 548, and such is now the settled rule in England, although at an early day there was some obscurity arising out of the case of Dutton v. Poole, and others of that peculiar class.

The question was also involved in some confusion by the earlier cases in Massachusetts. Indeed, the supreme court of that state seems at one time to have made a nearer approach to the doctrine on which this action must rest than the courts of this state have ever done. 10 Mass. 287; 17 Mass. 400, 9 Am. Dec. 154. But in the recent case of Mellen v. Whipple, 1 Gray (Mass.) 317, the subject was carefully reviewed and the doctrine utterly overthrown. One Rollin was indebted to the plaintiff's testator, and had secured the debt by a mortgage on his land. He then conveyed the equity of redemption to the defendant, by a deed which contained a clause declaring that the defendant was to assume and pay the mortgage. It was conceded that the acceptance of the deed with such a clause in it was equivalent to an express promise to pay the mortgage debt; and the question was, whether the mortgagee or his representative could sue on that undertaking. It was held that the suit could not be maintained; and in the course of a very careful and discriminating opinion by Judge Metcalf, it was shown that the cases which had been supposed to favor the action belonged to exceptional classes, none of which embraced the pure and simple case of an attempt by one person to enforce a promise made to another, from whom the consideration wholly proceeded. I am of that opinion.

The judgment of the court below should, therefore, be reversed, and a new trial granted.

GROVER, J., also dissented.

Judgment affirmed.[7]

[7] In accord: Bohanan v. Pope, 42 Me. 93 (1856); Joslin v. New Jersey Car Spring Co., 36 N. J. Law, 141 (1873); Barker v. Bucklin, 2 Denio (N. Y.) 45, 43 Am. Dec. 726 (1846); Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427 (1887); Zell's Appeal, 111 Pa. 532, 547, 6 Atl. 107 (1886); Bryant v. Jones, 183 Ky. 298, 209 S. W. 30 (1919); Springs v. Cole, 171 N. C. 418, 88 S. E. 721 (1916); Ballard v. Home Nat. Bank of Arkansas City, 91 Kan. 91, 136 Pac. 935, L.

VROOMAN v. TURNER.

(Court of Appeals of New York, 1877. 69 N. Y. 280, 25 Am. Rep. 195.)

This was an action to foreclose a mortgage.

The mortgage was executed in August, 1873, by defendant Evans, who then owned the mortgaged premises. He conveyed the same to one Mitchell, and through various mesne conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the same to defendant Harriet B. Turner, by deed which contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof."

The referee found that said grantee, by so assuming payment of the mortgage, became personally liable therefor, and directed judgment against her for any deficiency. Judgment was entered accordingly.

ALLEN, J. The precise question presented by the appeal in this action has been twice before the courts of this State, and received the same solution in each. It first arose in King v. Whitely, 10 Paige, 465, decided in 1843. There the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the

R. A. 1916C, 161 (1913), and note. See 25 L. R. A. 257, note; 13 C. J. 705, § 815, citing hundreds of cases.

Where one sells his business, stock in trade, or choses in action, and the buyer undertakes to pay the seller's debts, an action lies against the buyer on this promise, even though the creditor who sues may not have been specifically pointed out. Sherwood & Sherwood v. Gill & Lutz, 36 Cal. App. 707, 173 Pac. 171 (1918); Davidson v. Madden, 89 Or. 209, 173 Pac. 320 (1918); Baker-Hanna-Blake Co. v. Paynter-McVicker Grocery Co. (Okl.) 174 Pac. 265 (1918); Lawrence Coal Co. v. Shanklin, 25 N. W. 404, 183 Pac. 435 (1919); Bradley v. McDonald, 218 N. Y. 351, 113 N. E. 340 (1916); Gibson v. Victor Talking Mach. Co. (D. C.) 232 Fed. 225 (1916).

Where a new partner enters a firm and promises the old members to pay a share of the previous debts, he may properly be sued by the creditors. Arnold v. Nichols, 64 N. Y. 117 (1876); Lehow v. Simonton, 3 Colo. 346 (1877); Dunlap v. McNeil, 35 Ind. 316 (1871); Floyd v. Ort, 20 Kan. 162 (1878); Hannigan v. Allen, 127 N. Y. 639, 27 N. E. 402 (1891); Claflin v. Ostrom, 54 N. Y. 581 (1874); Maxfield v. Schwartz, 43 Minn. 221, 45 N. W. 429 (1890); 13 C. J. 709.

Where a mortgagor insures premises and the policy is made payable to the mortgagee as his interest may appear, the mortgagee can sue the insurer. Union Institution for Savings v. Phœnix Ins. Co., 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas 433 (1907), on theory of agency; Palmer Savings Bank v. Insurance Co. of North America, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387 (1896). Contra: Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236, 51 N. W. 367 (1892).

A very few states still hold that a creditor beneficiary cannot sue in a common-law action. Morgan v. Randolph & Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653 (1900); Mellen v. Whipple, 1 Gray (Mass.) 317 (1854); Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1 (1871); Borden v. Boardman, 157 Mass. 410, 32 N. E. 469 (1892); Minnock v. Eureka Fire & Marine Ins. Co., 90 Mich. 236, 51 N. W. 367 (1892); Edwards v. Thoman, 187 Mich. 361, 153 N. W. 806 (1915).

payment of the bond and mortgage except so far as the same were a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency upon a foreclosure and sale of the mortgaged premises. It was conceded by the chancellor that if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage and to a decree over against the grantees for the deficiency. This would have been in accordance with a well-established rule in equity, which gives to the creditor the right of subrogation to and the benefit of any security held by a surety for the reinforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a quasi surety for the payment of the mortgage debt. Halsey v. Reed, 9 Paige, 446; Curtis v. Tyler, 9 Paige, 432; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327. King v. Whitely was followed, and the same rule applied by an undivided court in Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137, and the same case was cited with approval in Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440.

The clause in the conveyance in Trotter v. Hughes was not in terms precisely like that in King v. Whitely, or in the grant under consideration. The undertaking by the grantees to pay the mortgage debt as recited, was not in express terms or as explicit as in the other conveyances. But the recital was, I think, sufficient to justify the inference of a promise to pay the debt, and so it must have been regarded by the Court. The case was not distinguished by the Court in any of its circumstances from King v. Whitely, but was supposed to be on all fours with and governed by it. Had the grantor in that case been personally bound for the payment of the debt, I am of the opinion that an action would have been sustained against the grantee upon a promise implied from the terms of the grant accepted by him to pay it and indemnify the grantor. It must have been so regarded by this Court, otherwise no question would have been made upon it, and the Court would not have so seriously and ably fortified and applied the doctrine of King v. Whitely. A single suggestion that there was no undertaking by the grantee and no personal liability for the payment of the debt assumed by him, would have disposed of the claim to charge him for the deficiency upon the sale of the mortgaged premises. The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability

to the holder of the mortgage when the grantee is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which Lawrence v. Fox, 20 N. Y. 268, is a prominent example. To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.

It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement.

It is said in Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440, that it is not every promise made by one person to another from the performance of which a third person would derive a benefit that gives a right of action to such third person, he being privy neither to the contract nor the consideration. In the language of Rapallo, J., "to entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited." See, also, Turk v. Ridge, 41 N. Y. 201, and Merrill v. Green, 55 N. Y. 270, in which, under similar agreements, third parties sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties and failed. The courts are not inclined to extend the doctrine of Lawrence v. Fox to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which Lawrence v. Fox and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action adopts his acts, or upon the doctrine of a trust the promisor being regarded as having

received money or other thing for the third party is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.

In Lawrence v. Fox a prominent question was made in limine, whether the debt from Holly to the plaintiff was sufficiently proved by the confession of Holly made at the time of the loan of the money to the defendant. It was assumed that if there was no debt proved the action would not lie, and the declaration of Holly the debtor was held sufficient evidence of the debt. Gray, J., said "All the defendant had the right to demand in this case was evidence which as between Holly and the plaintiff was competent to establish the relation between them of debtor and creditor." In Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327, and Thorp v. Keokuk Coal Co., 48 N. Y. 253, the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the principle of Lawrence v. Fox, Halsey v. Reed, and Curtis v. Tyler, supra. See also Bosworth, J., Doolittle v. Naylor, 15 N. Y. Super. Ct. 225; and Ford v. David, 14 N. Y. Super. Ct. 569. It is claimed that King v. Whitely and the cases following it were overruled by Lawrence v. Fox. But it is very clear that it was not the intention to overrule them, and that the cases are not inconsistent. The doctrine of Lawrence v. Fox, although questioned and criticised, was not first adopted in this State by the decision of that case. It was expressly adjudged as early as 1825 in Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387, affirmed in the Court for the correction of errors in 1827, per totam curiam, and reported in Cleveland v. Farley, 9 Cow. 639. The chancellor was not ignorant of these decisions when he decided King v. Whitely, nor was Denio, J., and his associates unaware of them when Trotter v. Hughes was decided, and Gray, J., in Lawrence v. Fox says the case of Farley v. Cleveland had never been doubted.

The Court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and so much of the judgment as directs her to pay the same must be reversed with costs.

All concur except EARL, J., dissenting.

Judgment accordingly.[8]

[8] Similar decisions were rendered in Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49 (1892); Lorillard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113 (1890); Merchants' Union Trust Co. v. New Philadelphia Graphite Co., 10 Del. Ch. 18, 83 Atl. 520 (1912); Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492 (1908); Georgia State Savings Ass'n v. Dearing, 128 Ark. 149, 193 S. W. 512 (1917).

This case has also been cited with approval in many cases holding that no action lies in favor of a citizen against a water company on the latter's contract with a municipality to supply water to citizens. These cases are collected and discussed in 19 Yale Law Journal, 425 (1910).

NATIONAL BANK v. GRAND LODGE.

(Supreme Court of the United States, 1878. 98 U. S. 123, 25 L. Ed. 75.)

This is an action by the Second National Bank of St. Louis, Mo., against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, October 14th, 1869, adopted the following resolution:

"Resolved, That this Grand Lodge assume the payment of the $200,000 bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid."

The Court below instructed the jury that independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the Court, and judgment having been entered thereon, the plaintiff sued out this writ of error.

STRONG, J. It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract inter partes. It was a contract made for the benefit of the association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong

Ann. Cas. 1918E, 1159. The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of Lawrence v. Fox, 20 N. Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, Contracts for the Benefit of a Third Person, 15 Harvard Law Review, 767; Corbin, Contracts for the Benefit of Third Persons, 27 Yale Law Journal, 1008. The general rule, both in law and equity (Phalen v. United States Trust Co., 186 N. Y. 178, 186, 78 N. E. 943, 7 L. R. A. [N. S.] 734, 9 Ann. Cas. 595), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Lehow v. Simonton, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly on Contracts (2d Ed.) p. 253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 Halsbury's Laws of England, 342, 343; Jenks' Digest of English Civil Law, § 229) that a contract cannot be enforced by or against a person who is not a party (Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1). But see, also, Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Gardner v. Denison, 217 Mass. 492, 105 N. E. 359, 51 L. R. A. (N. S.) 1108.

In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." Farley v. Cleveland, 4 Cow. 432, 15 Am. Dec. 387; Lawrence v. Fox, supra; Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Lorillard v. Clyde, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A. 113; Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731;

Sullivan v. Sullivan, 161 N. Y. 554, 56 N. E. 116. Secondly. To cases where the contract is made for the benefit of the wife (Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539), affianced wife (De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816), or child (Todd v. Weber, 95 N. Y. 181, 193, 47 Am. Rep. 20; Matter of Kidd, 188 N. Y. 274, 80 N. E. 924) of a party to the contract. The close relationship cases go back to the early King's Bench Case (1677), long since repudiated in England, of Dutton v. Poole, 2 Lev. 211. See Schemerhorn v. Vanderheyden, 1 Johns. 139, 3 Am. Dec. 304. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit.[10] "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of Borland v. Welch, 162 N. Y. 104, 110, 56 N. E. 556.

The right of the third party is also upheld in, thirdly, the public contract cases (Little v. Banks, 85 N. Y. 258; Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. [N. S.] 958, 5 Ann. Cas. 504; Smyth v. City of New York, 203 N. Y. 106, 96 N. E. 409; Farnsworth v. Boro Oil & Gas Co., 216 N. Y. 40, 48, 109 N. E. 860; Rigney v. N. Y. C. & H. R. R. R. Co., 217 N. Y. 31, 111 N. E. 226; Matter of International Ry. Co. v. Rann, 224 N. Y. 83, 120 N. E. 153. Cf. German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. [N. S.] 1000), where the municipality seeks to protect its inhabitants by covenants for their benefit; and, fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration (Rector, etc., v. Teed, 120 N. Y. 583, 24 N. E. 1014; F. N. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 439, 39 N. E. 331; Hamilton v. Hamilton, 127 App. Div. 871, 875, 112 N. Y. Supp. 10). It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in Buchanan v. Tilden that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessaries of life. It was, however, the love and affection or the moral sense of the hus-

[10] See, also, Sloss-Sheffield Steel & Iron Co. v. Taylor, 16 Ala. App. 241, 77 South. 79 (1917).

band and the parent that imposed such obligations in the cases cited, rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. De Cicco v. Schweizer, supra. The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in Buchanan v. Tilden, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In Sullivan v. Sullivan, supra, the grandniece lost in a litigation with the aunt's estate, founded on a certificate of deposit payable to the aunt "or in case of her death to her niece"; but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in Durnherr v. Rau, supra, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in Buchanan v. Tilden. Borland v. Welch, supra, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P. J., writing for the court below well said: "The doctrine of Lawrence v. Fox is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case."

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in Gifford v. Corrigan, 117 N. Y. 257, 262, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508, says that the case rests upon that broad proposition; Edward T. Bartlett, J., in Pond v. New Rochelle Water Co., 183 N. Y. 330, 337, 76 N. E. 211, 213, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, calls it "the general principle"; but Vrooman v. Turner, supra, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." 69 N. Y. 285, 25 Am. Rep. 195. As late as Townsend v. Rackham, 143 N. Y. 516, 523, 38 N. E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." Buchanan v. Tilden went further than any case since Lawrence v. Fox in a desire to do justice rather than to apply with

technical accuracy strict rules calling for a legal or equitable obligation. In Embler v. Hartford Steam Boiler Inspection & Ins. Co., 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in Buchanan v. Tilden, to the effect that an employé could not maintain an action on an insurance policy issued to the employer which covered injuries to employés.

In Wright v. Glen Telephone Co., 48 Misc. Rep. 192, 195, 95 N. Y. Supp. 101, the learned presiding justice who wrote the opinion in this case said at Trial Term: "The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case." "The case at bar is decided upon its peculiar facts." Edward T. Bartlett, J., in Buchanan v. Tilden.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff $6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house. Gridley v. Gridley, 24 N. Y. 130; Brown v. Knapp, 79 N. Y. 136, 143; Dinan v. Coneys, 143 N. Y. 544, 547, 38 N. E. 715; Blackmore v. White [1899] 1 Q. B. 293, 304. That would be because the testatrix had in substance bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible, but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. Matter of Edmundson's Estate (1918) 259 Pa. 429, 103 Atl. 277, 2 A. L. R. 1150. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs.

HOGAN, CARDOZO, and CRANE, JJ., concur. HISCOCK, C. J., and COLLIN and ANDREWS, JJ., dissent.

Judgment affirmed.[11]

[11] Action by a sole (and donee) beneficiary was sustained in Rogers v. Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636 (1898), beneficiary of a charitable subscription; City of St. Louis to use of Glencoe Lime & Cement Co. v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695 (1896); Todd v. Weber, 95 N. Y. 181, 47 Am. Rep. 20 (1884), promise to the mother of plaintiff to furnish support; Whitehead v. Burgess, 61 N. J. Law, 75, 38 Atl. 802 (1897); Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539

In re EDMUNDSON'S ESTATE.

(Supreme Court of Pennsylvania, 1918. 259 Pa. 429, 103 Atl. 277, 2 A. L. R. 1150.)

E. R. Edmundson and Ira H. Edmundson appeal from a decree dismissing exceptions to adjudication in the estate of Phebe Edmundson, deceased, and sustaining the findings of the auditing judge. Affirmed.

MESTREZAT, J. This is an appeal from the decree of distribution made by the orphans' court of Allegheny county, allowing a claim against the estate of Mrs. Phebe Edmundson, deceased. In 1892 J. A. Herron purchased a house and lot in the city of Pittsburgh for the consideration of $5,500, and, at his suggestion, the title to the property was taken in the name of his wife, Carrie E. Herron, who was a daughter of Mrs. Edmundson, the decedent. Three thousand six hundred dollars of the purchase money was borrowed on a building and loan association mortgage for that amount on which payments of principal and interest were made at various times by Mr. Herron until July, 1894. In that year Mr. and Mrs. Herron were divorced, and in the autumn of 1895 Mrs. Herron was married to Joseph Stadtfeld. By a deed, dated November 16, 1895, Mr. and Mrs. Stadtfeld conveyed the house and lot in question to Mrs. Edmundson, the consideration stated being $5,500, subject to liens and incumbrances.

At the audit of the account filed by the executor of Mrs. Edmundson, Carrie Herron, now Mrs. Carrie Cotton, daughter of Mrs. Carrie E. Herron, presented for allowance a claim for $3,333.01, alleged to be due her on an oral contract made by the decedent in 1895 with Mrs. Carrie E. Herron, the mother of the claimant. It is alleged that in the autumn of 1895 Mrs. Edmundson agreed to take title to the property in question under an express agreement made with Mrs. Herron that Carrie Herron, then her infant daughter, should receive all that the latter's father, J. A. Herron, had put into the property in case of a sale

(1902); Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504 (1906), promise to a village for the benefit of the inhabitants; Rigney v. New York Cent. & H. R. R. Co., 217 N. Y. 31, 111 N. E. 226 (1916), same; Smyth v. New York. 203 N. Y. 106, 96 N. E. 409 (1911), same; Independent School Dist. of Le Mars v. Le Mars City Water & Light Co., 131 Iowa, 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859 (1906); Doll v. Crume, 41 Neb. 655, 59 N. W. 806 (1894); Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598 (1899); Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003 (1903); Simons v. Bedell, 122 Cal. 341, 55 Pac. 3, 68 Am. St. Rep. 35 (1898), specific performance decreed. See, further, Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492 (1908); Fry v. Ausman, 29 S. D. 30, 135 N. W. 708, 39 L. R. A. (N. S.) 151, Ann. Cas. 1914C, 842 (1912); Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 S. E. 48, 49 L. R. A. (N. S.) 1166, 11 Ann. Cas. 967 (1907). Estate of Youngerman, 136 Iowa, 488, 114 N. W. 7, 15 Ann. Cas. 245 (1907); McBride v. Western Pennsylvania Paper Co., 263 Pa. 345, 106 Atl. 720 (1919).

An action on a life insurance policy can everywhere be maintained by the beneficiary in his own name. In England and Massachusetts this rule is established by statute; in other jurisdictions, by judicial action.

by Mrs. Edmundson during her lifetime, or if the property was not sold by Mrs. Edmundson she would leave to Carrie Herron the full amount invested therein by Mr. Herron at her death. With this understanding and agreement, it is claimed that Mrs. Stadtfeld and her husband executed and delivered the deed for the property, subject to the unpaid balance of the mortgage, to Mrs. Edmundson. While this deed recites a consideration of $5,500, it is contended, and the evidence shows, that Mrs. Edmundson paid nothing to the grantors or to Mr. Herron for the property. Mrs. Edmundson did not sell the real estate, and at her death bequeathed $1,000 to Mrs. Cotton. * * *

The questions raised by the assignments of error are: (a) The right of the claimant to recover on the contract, she not being a party thereto or to the consideration, and having no beneficial interest in the property transferred;[12] (b) the competency of the mother of the claimant as a witness to prove the oral contract; and (c) the sufficiency of the evidence to sustain the claim.

We think Carrie Herron, now Mrs. Cotton, can enforce, by an action or proceeding instituted in her own name, the contract made by her mother with the decedent for the benefit of the claimant. In Howes v. Scott, 224 Pa. 7, 10, 73 Atl. 186, 187, it is said: "At common law no one could maintain an action upon a contract to which he was not a party. This rule is well established in this country, and it is recognized by both the state and federal courts. There are, however, exceptions to the rule which, in this state, are as well settled as the rule itself. For nearly three-quarters of a century, since the decision in Blymire v. Boistle, 6 Watts, 182, the decisions of this court have uniformly recognized and enforced the exceptions whenever the facts of a case required it."

In Adams v. Kuehn, 119 Pa. 76, 85, 13 Atl. 184, 186, Mr. Justice Williams, delivering the opinion says: "Where one person enters into a contract with another to pay money to a third, or to deliver some valuable thing, and such third party is the only party interested in the payment or the delivery, he can release the promisor from performance or compel performance by suit." He then notes some of the exceptions to the general rule at common law that a person could not maintain an action upon a contract to which he was not a party, as follows: "Among the exceptions, are cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that particular purpose. Also where one buys out the stock of a tradesman and undertakes to take the place, fill the contracts, and pay the debts of his vendor. These cases, as well as the case of one who receives money or property on the promise to pay or deliver to a third person, are cases in which the third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good con-

[12] Parts of the opinion, not applicable to question (a), are omitted.

science the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to and in relief of one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor and no title passing to the third person. The beneficiary is not the original creditor who is a stranger to the contract and the consideration, but the original debtor who is a party to both, and the right of action is in him alone.".

Mrs. Edmundson took title to the land, as the court found, under an oral agreement to give Mrs. Cotton, the claimant, the amount of money invested in the land by the claimant's father when the premises might be sold or at the grantee's death. The premises were not sold by the grantee, nor did she make provision by her will for payment of this claim. It is clear, therefore, that she failed to comply with the contract on her part. The claimant was not a party to the contract, and had no beneficial interest in the property conveyed by her mother to the decedent, but she is the only party beneficially interested in enforcing the claim secured by it. Mrs. Herron, the grantor, has no interest in the claim. The deed is absolute, and conveys the property to the decedent without any conditions imposed for the payment of any sum whatever to her. The promise contained in the agreement was not in consideration of the payment of an existing indebtedness due Mrs. Herron, the promisee, and therefore could not be released or enforced by her.[18] This proceeding is on the oral contract to compel payment to the party beneficially interested by its terms, and not to enforce any covenant or condition in the deed in favor of the grantors or promisees therein. Being the only person beneficially interested in the payment of the money secured thereby, the claimant can release the promisor's estate from performance, or compel performance of the terms of the contract by suit. While the deed showed the payment of a consideration of $5,500, there was in fact nothing whatever paid, or agreed to be paid, by the decedent to the grantors for the transfer of the property. This was shown by parol evidence which was competent for the purpose. Sargeant v. Nat. Life Insurance Co. of Vermont, 189 Pa. 341, 346, 41 Atl. 351. We think the facts of this case bring it within the doctrine of our decisions, and that the claimant can recover in an action or proceeding instituted by her against the estate of the decedent. * * *

Decree affirmed.

[18] Cf. Anonymous, Style, 6 (1646); ante, p. 1041, and note.

KNIGHTS OF THE MODERN MACCABEES v. SHARP.

(Supreme Court of Michigan, 1910. 163 Mich. 449, 128 N. W. 786, 33 L. R. A. [N. S.] 780.)

Bill of interpleader by Knights of the Modern Maccabees against Melinda Sharp and John L. Clink, guardian for Lena Sharp and others. Defendant Melinda Sharp appeals. Judgment reversed.

OSTRANDER, J. The issues raised by the answers to complainant's bill of interpleader are sufficiently indicated in the opinion of the learned trial judge, as follows:

"On July 23, 1896, Asa B. Sharp and his first wife, Minnie D. Sharp, lived in the village of Yale, St. Clair county, Mich. At that time he was 30 years of age and his wife 28. They had five small children. He was a laboring man, and his family was dependent on his earnings for support. Some time prior to the above-named date, the husband and wife entered into a contract by the terms of which he agreed he would take out a policy of insurance in complainant order in which his wife should be named as beneficiary and so remain during her life and his, and, in case his wife should die before he did, that their children should always remain the beneficiaries; the wife agreed she would take out a policy of insurance in the Ladies of the Maccabees, a women's fraternal benefit association, in which her husband should be named as beneficiary, and so remain during his life and hers, and, in case her husband should die before she did, that their children should always remain the beneficiaries. The consideration for this agreement on the part of each was the promise made by the other. The object of this mutual agreement was the protection of the children. The testimony of one witness, Grace O'Dell, goes to the extent of tending to show the existence of this contract prior to the time the policies were issued to the husband and wife, as hereinafter stated, while three other witnesses testify to having heard the husband and wife, in the presence of each other, state what their contract in this regard had been after or about the time of the issuance of the policies.

"On July 23, 1896, a policy for $1,000 was issued by complainant association to Asa B. Sharp, in which his wife was named as beneficiary, and on the same date a policy of like amount was issued by the Ladies of the Maccabees to Minnie D. Sharp in which her husband was named as beneficiary. After these policies were taken out, Asa B. Sharp was laid up for a time with sickness, and was unable to earn money to support his family and to keep up his assessments, or his wife's assessments, on these policies of insurance. It appears from the testimony, that during this time, Minnie D. Sharp, relying on the agreement with her husband, as heretofore recited, went out washing, housecleaning, and doing other work in order to obtain money to support the family and to keep up the assessments on these

policies, and it appears that she did for a time, at least, pay some of the assessments on her husband's policy. On January 1, 1902, Minnie D. Sharp deceased, and the proceeds of her policy in the Ladies of the Maccabees was paid to her husband, Asa B. Sharp, who had remained the beneficiary in her certificate since the time it was issued. On August 17, 1904, Asa B. Sharp married Melinda Sharp, now his widow. At this time she was a widow with several children, living on her own farm in Lapeer county, Michigan. On April 19, 1906, Asa B. Sharp signed a paper revoking his former designation of beneficiary in his policy, and designated Melinda Sharp, his wife, as the new beneficiary. At the time he did this he was sufficiently sound in his mind to know who was his former beneficiary, to know to whom payment of benefits would be made in case of his death without any change in his certificate, to know and keep in mind his minor children, who were dependent upon him. He had been sick before this date, and had not fully recovered his physical strength, and perhaps, not his normal mental powers, but he was sufficiently strong and sound mentally to transact and understand ordinary business affairs. Asa B. Sharp surrendered his first certificate, and on May 8, 1906, a new one was issued to him by complainant association in which claimant, Melinda Sharp, was named as beneficiary, and she remained as such designated beneficiary up to the time of her husband's death."

He concludes that each of said mutual promises was good consideration for the other, and that on the death of Minnie D. Sharp the agreement became fully executed on her part and the husband concluded from changing the beneficiary in his policy.

Two questions are presented, being, first, whether the parol agreement alleged to have been made by and between Asa B. Sharp and his first wife, Minnie, was in fact made; and second, whether, if made, Asa was thereby precluded from making a change of beneficiary.[14] * * *

Assuming the mutual promises never to change beneficiaries to have been made as is claimed, upon what theory may the children enforce the contract? No promise was made to them or any of them, no consideration for the promise moved from them. The agreement related to no fund in existence. No trust was created. I find no reason for thinking that the parties were not at liberty, at any time, to revoke their promises. It is true that after the death of the mother there could be no mutual revocation, but, unless some legal interest in the performance of the promise vested in the children when the promise of the father was made, such interest never vested.

It is the general rule in England that a third person cannot become entitled by the contract itself to demand the performance of any

[14] The discussion of the first question is omitted. The court appeared to doubt the correctness of the trial court's finding of fact.

duty under the contract. Pollock, Prin. of Contracts (7th Ed.) 199. The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity. Ibid, 213. In this state the English rule has been followed when the attempted enforcement of the contract by a third person was at law. Pipp v. Reynolds, 20 Mich. 88; Turner v. McCarty, 22 Mich. 265; Hicks v. McGarry, 38 Mich. 667; Hunt v. Strew, 39 Mich. 368; Hidden v. Chappel, 48 Mich. 527, 12 N. W. 687; Edwards v. Clement, 81 Mich. 513, 45 N. W. 1107; Linneman v. Moross' Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528. There is a well-recognized exception to the rule in England as to the provisions contained in a settlement made upon and in consideration of marriage, for the benefit of children to be born of the marriage. Whether there is, in that jurisdiction, any other or further exception may be doubted. Tweddle v. Atkinson, 1 B. & S. 393, 30 L. J. Q. B. 265. See, also, Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Marston v. Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43; and, generally, Pollock, Prin. of Contracts (7th Ed.) chapter 5; Harriman on Contracts (2d Ed.) pp. 212–216; 9 Cyc. pp. 374–385.

The contention of appellees is that the principle underlying the English exception to the rule should be extended, at least in equity, so as to support the enforcement by children of contracts made by their father or mother, with each other or with strangers, for their benefit, and Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 7 Am. St. Rep. 454, is cited and relied upon. The courts of New York do not follow the English rule. In the case cited, a woman was permitted to recover in an action at law a sum of money which defendant had promised her husband to pay to her upon a consideration moving from the husband and others to the defendant and others. The sum of money promised to be paid to the wife was $50,000. The trial court gave her judgment. The appellate division of the Supreme Court reversed the judgment and the Court of Appeals reversed the appellate division by a vote of four to three of the judges. It will be discovered from the opinion that the points involved, and concerning which the judges disagreed, were whether the promise made by the defendant to the third person was upon a valid consideration, and whether the promisee had a legal interest that the contract be performed in favor of the plaintiff. If these things appeared, then, under the rule laid down in Lawrence v. Fox, 20 N. Y. 268, and Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49, plaintiff was entitled to enforce the contract at law. The majority opinion concludes with the statement, that "the case at bar is decided upon its peculiar facts. We do not hold that the mere relation of husband and wife alone constituted a sufficient consideration to enable the plaintiff to maintain this action. We deem it unnecessary to decide that question at this time. What we do hold is that the equities of the plaintiff"—her interest as an adopted child who,

in conscience and equity, but not legally, was entitled to a share of the fund sought to be recovered and which was recovered by defendant with the aid of plaintiff's husband—"were such that, when considered in connection with the duty of her husband to provide for her future, and with that purpose in view the money was procured for the defendant to institute and pursue the necessary litigation to secure the fund to which her equities related, they, all taken together, were sufficient to sustain the plaintiff's action."

It cannot be said that the decision sustains appellees' contention, and we are referred to none in which the general rule in force here is recognized which does sustain it. The general rule in this state is regarded as settled. I see no reason for saying that it is not the same in proceedings at law and in equity. To what extent and under what circumstances an exception to the rule should be recognized in favor of the enforcement by children of contracts (other than those creating trusts), made for their direct or indirect benefit, by persons nearly related to them or by those sustaining the duty to provide for them, is a subject which needs to be considered no further than this, that the mutual promises of a father and mother, who each holds the certificate of a beneficial association in which the other is named as beneficiary, never to change the beneficiaries so named, create no legal or equitable interest of the children in the fund derived on the death of the surviving parent, although, if no such change had been made, they would have been the legal beneficiaries, and although the mutual promises of the parents contemplated that in such case they should be the legal beneficiaries.

The case presented is ruled precisely as it would be ruled if the children, in the lifetime of the father, were seeking specific performance of the alleged contract or an injunction to restrain a threatened change of beneficiaries. It may be added, although the suggestion relates rather to the facts than to the law, that the children, appellees, appear to have no particular claim, as against the appellant, to equitable consideration. It is not claimed that appellant knew of any arrangement between her husband and his former wife about life insurance. His relation to her is a sufficient reason for insuring his life for her benefit. If, instead of pursuing the method of substituting one beneficiary for another, he had refused to pay assessments, thus permitting the original certificate to lapse, and procured one in which appellant was named as beneficiary, it is clear that her right to any fund derived therefrom and from his death, would be unassailable.

The decree below, except as to the provision for costs to complainant, is reversed, and a decree will be entered in this court for the payment of the fund to the appellant, who will recover of the appellees the costs of both courts.[15]

[15] Cf. the late case of Preston v. Preston, 205 Mich. 646, 172 N. W. 371 (1919); Id., 207 Mich. 681, 175 N. W. 266 (1919).

GARDNER v. DENISON.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 492, 105 N. E. 359, 51 L. R. A. [N. S.] 1108.)

Action by Edward Gerrish Gardner, by next friend, against Arthur W. Denison, administrator. Directed verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

RUGG, C. J. The facts upon which the plaintiff seeks to recover are these: His father, who was on friendly terms with the defendant's testator, Edward Gerrish, told the latter, in November, 1900, that the birth of a child was expected in his family. Mr. Gerrish, after several interviews, promised that if a boy should be born and named for him, Edward Gerrish Gardner, he would make some provision for the child. When the child was born, on January 1, 1901, he was named for the defendant's testator. On January 23, 1901, the plaintiff's father, at the request of Mr. Gerrish, wrote at the latter's dictation the following:

"Jan. 23, 1901.

"I, Edward Gerrish, promise to place in trust for Joseph A. Gardner's youngest son, born Jan. 1, 1901, $10,000, for naming his son after me. Edward Gerrish Gardner."

No specific sum of money had been mentioned before. Mr. Gerrish then signed the paper in the presence of the plaintiff's father, who since has had the possession and control of it. Mr. Gerrish later lived in the family of the plaintiff's father and showed special attention to the child, bestowing many gifts upon him and constantly referring to him as "my boy." He died in 1906 at the age of 64 years, leaving an estate of more than $200,000, never having made any provision for the benefit of the plaintiff.

The privilege of naming a child is a valid consideration for a promise to pay money. The child had a direct and immediate interest in his name and is more affected by it than any one else. He loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him. The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. It is a general rule that one who is not a party to a contract cannot bring an action on it even though it be made for his benefit. But the circumstances of the parties respecting the naming of a child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important, and the consequence to the child so vital, that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name. Felton v. Dickinson, 10 Mass. 287, as interpreted by Marston v. Bigelow, 150 Mass. 45, 53, 22 N. E. 71, 5 L. R. A. 43. It was

said in Eaton v. Libbey, 165 Mass. 218, at 220, 42 N. E. 1127, 52 Am. St. Rep. 511, respecting the naming of a child: "The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their own."

This action is brought in the name of the son by his father as next friend. That is a relinquishment of the father's personal rights, as far as they ever might have been antagonistic to the son, and is equivalent to an assertion that whatever he did was done as agent for the son. The writing, signed by the plaintiff, while inartificially expressed, in substance is a declaration by the defendant's testator that he acknowledges himself indebted in the sum of $10,000 for the privilege granted him of having the plaintiff bear his name. The words "in trust" in the absence of any definition of the terms of any trust may be treated as meaning nothing more than the expression of a general purpose that the promise was for the benefit of the plaintiff. No promisee being named in the instrument, all the attendant conditions may be examined for the purpose of determining to whom in fact the promise to pay was made. Such resort to extrinsic circumstances is not for the purpose of changing the writing, but applying it to its proper object. Way v. Greer, 196 Mass. 237, 81 N. E. 1002; Willett v. Smith, 214 Mass. 494, 497, 101 N. E. 1058, and cases cited. Under all the circumstances we are of opinion that the plaintiff was entitled to go to the jury.

Exceptions sustained.[16]

[16] As to the rights of third party beneficiaries in general, Massachusetts decisions have varied. At first, the general rule seemed to be that they could sue at law. Later this rule seemed to be almost totally abandoned. In recent cases, the third person has sometimes won by the use of fiction or by using the terminology and procedure of equity. The following cases will show this development: Felton v. Dickinson, 10 Mass. 287 (1813), sole beneficiary and blood relation; Arnold v. Lyman, 17 Mass. 400, 9 Am. Dec. 154 (1821); Hall v. Marston, 17 Mass. 575 (1822); Fitch v. Chandler, 4 Cush. (Mass.) 254 (1849); Brewer v. Dyer, 7 Cush. (Mass.) 337 (1851), "the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation"; Mellen v. Whipple, 1 Gray (Mass.) 317 (1854); Adams v. Adams, 14 Allen (Mass.) 65 (1867); Exchange Bank of St. Louis v. Rice, 107 Mass. 37, 9 Am. Rep. 1 (1871); Reed v. Paul, 131 Mass. 129 (1881); Paper Stock Disinfecting Co. v. Boston Disinfecting Co., 147 Mass. 318, 17 N. E. 554 (1888); Marston v. Bigelow, 150 Mass. 45, 22 N. E. 71, 5 L. R. A. 43 (1889); Dean v. American Legion of Honor, 156 Mass. 435, 31 N. E. 1 (1892); Borden v. Boardman, 157 Mass. 410, 32 N. E. 469 (1892); Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511 (1896); Palmer Sav. Bank v. Insurance Co. of North America, 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387 (1896); Grime v. Borden, 166 Mass. 198, 44 N. E. 216 (1896); Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955 (1911); New England Structural Co. v. James Russell Boiler Works Co., 231 Mass. 274, 120 N. E. 852 (1918); Codman v. Deland, 231 Mass. 344, 121 N. E. 14 (1918).

THE HOME v. SELLING et al.

(Supreme Court of Oregon, 1919. 91 Or. 428, 179 Pac. 261.)

Action by The Home, a corporation, against Ben Selling and another, executors, and others. Judgment for plaintiff, and defendants appeal. Modified.

The plaintiff and the defendant Emanuel May Investment Company are corporations. Emanuel May, the individual, died during the progress of this litigation, and his personal representatives were substituted.

On November 21, 1910, George E. Jacobs and his wife gave their note to the plaintiff for $40,000, due ten years after date, with "interest thereon quarter yearly at the rate of six per cent. per annum from date until paid." They stipulated therein that, "in case suit is instituted to collect this note or any part thereof," they would pay a reasonable attorney's fee to be determined in the suit. At the same time they gave their mortgage to the plaintiff on certain real property in Portland, Or., and "covenanted and agreed to pay all sums of money, the principal and interest, specified in said promissory note at the time therein designated." On February 25, 1913, they conveyed the premises to Emanuel May by deed duly executed, containing a statement to the effect that the property was subject to the mortgage mentioned, and that "the grantee herein in part consideration for this conveyance assumes payment of the $40,000 unpaid balance of the first of said mortgages and the interest accrued and to accrue thereon." Afterwards May conveyed to the investment company by deed which referred to the premises and the mortgage and contained the following words: "And Emanuel May, the grantor above named, does covenant to and with Emanuel May Investment Company, the above-named grantee, its successors and assigns that he is lawfully seized in fee simple of the above-granted premises, that the above-granted premises are free from all incumbrances except the following mortgages, which are as a part of the purchase price, assumed by Emanuel May Investment Company. * * * Mortgage of $40,000.00 in favor of The Home, a corporation, on the north half of lot 6 and the south half of lot 7, block 2, city of Portland."

This action was brought against Emanuel May, the grantee of Jacobs and his wife and against the investment company, May's grantee, to recover the interest on the note from November 21, 1915, to February 21, 1917, amounting to $3,000, and the plaintiff claims $300 as a reasonable attorney's fee. A demurrer to the complaint * * * was overruled. [The defendants then pleaded that they had never made any contract with the plaintiff and that they had offered to convey the mortgaged premises to him.] The court sustained a demurrer to each of these further and separate defenses.

The action was then tried, resulting in findings of fact substantially as stated, with the addition that the court found that $200 is a reasonable sum to be allowed as attorney's fee in the circuit court for the collection of the interest, and the sum of $75 to be a reasonable amount to be allowed as attorney's fee in the Supreme Court, and rendered judgment against the defendants, the investment company directly, and the others in their respective capacities, for $3,-000 and for the attorney's fees as indicated above. The defendants appeal.[17]

BURNETT, J. (after stating the facts as above). One of the principal questions to be determined is whether or not the defendants contracted to pay the mortgage, and whether the mortgagee can maintain an action directly against them.

According to the decisions in this state, where one accepts a deed which not only recites the mortgage, but adds that the grantee assumes it, he becomes personally liable to pay the mortgage. Miles v. Miles, 6 Or. 266, 269, 25 Am. Rep. 522; Walker v. Goldsmith, 7 Or. 161, 181; Haas v. Dudley, 30 Or. 355, 48 Pac. 168; Farmers' National Bank v. Gates, 33 Or. 388, 54 Pac. 205, 72 Am. St. Rep. 724; Hoffman v. Habighorst, 49 Or. 379, 391, 89 Pac. 952, 91 Pac. 20. It is plain, therefore, that the acceptance of the deeds mentioned, containing the clauses already quoted, made May and the investment company personally liable to pay the mortgage debt.

The original general rule was that one who is not a party to a contract cannot bring an action on it in a court of law, although he might be benefited by its fulfillment. The leading case cited by the defendants is Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667. [This case was then stated and distinguished.]

In later cases, notably Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210, the principle was applied that the law of the forum governed the remedy, and that as the litigation in that suit was commenced in the District of Columbia the remedy would be in equity, although in New York, where the contract was made, an action at law would lie by the mortgagee against the grantee in such instances. Afterwards, in Union Life Insurance Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118, the court recognized the condition that in various states the law, based upon the decisions of the local courts, was that an action could be maintained under such circumstances, and that it was not necessary to resort to equity to enforce the right mentioned. It was applied to the contention there in the following manner: Under the law of Illinois, a mortgagee could sue the grantee directly at law. The corollary to this proposition was that the grantee became the principal debtor and the mortgagor from whom he had received the ti-

[17] The statement of the case and the opinion of the court have been abbreviated.

tle was the surety, so that when the mortgagee extended the time in which the grantee might pay the debt, it released the mortgagor, who stood as a surety only. We draw from these decisions, cited by the defendants here, this doctrine, that when the grantee of a mortgagor agrees to pay the mortgage, a right at once arises in favor of the mortgagee, and that it is enforceable according to the remedy afforded by the lex fori. The effect of the law of the place on the remedy is discussed in Gibson v. Victor Talking Machine Co. (D. C.) 232 Fed. 225.

Oregon precedents are numerous to the effect that, on a contract properly made for the benefit of a third person, he can bring an action directly against the promisor. The early case of Baker v. Eglin, 11 Or. 333, 8 Pac. 280, recognized the liability of the promisor to the third person, so as to exonerate the former from being held as a garnishee in the action of other creditors of the promisee. The case does not make any ruling upon the remedy by which the third person might enforce his interest in that contract, but in the following cases the doctrine is recognized that an action at law would lie: Hughes v. O. R. & N. Co., 11 Or. 437, 5 Pac. 206; Schneider v. White, 12 Or. 503, 8 Pac. 652; Chrisman v. State Insurance Co., 16 Or. 283, 18 Pac. 466; Washburn v. Interstate Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Feldman v. McGuire, 34 Or. 309, 55 Pac. 872; Miles v. Bowers, 49 Or. 429, 434, 90 Pac. 905; Hoffman v. Habighorst, supra; Oregon Mill & Grain Co. v. Kirkpatrick, 66 Or. 21, 133 Pac. 69; Baker City Mercantile Co. v. Idaho Cement Pipe Co., 67 Or. 372, 136 Pac. 23.

It is said in 13 C. J. 705, § 815: "In most of the states the English doctrine that where a person makes a promise to another for the benefit of a third person the latter cannot maintain an action on it is not recognized to the full extent, but it is held, subject to the qualifications hereafter stated, that the action may be maintained. This is now the prevailing doctrine in the United States"—citing a wealth of authorities.

But it is not every agreement to discharge an obligation to a third party that will support an action at law by the latter. The principle is thus stated by Mr. Chief Justice Bean in Washburn v. Interstate Investment Co., 26 Or. 436, 441, 38 Pac. 620, 621: "The prevailing doctrine in this country undoubtedly is that, where one person, as a consideration or part consideration for an executed contract, promises another, for a consideration moving from him, to pay or discharge some legal obligation or debt due from such other to a third person, the latter, although a stranger to the consideration, and not an immediate party to the contract, may maintain an action thereon, if it was made directly and primarily for his benefit."

In Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, the following language was used, and approved in Kansas City Sewer Pipe

Co. v. Thompson, 120 Mo. 218, 25 S. W. 522: "To give a third party who may derive a benefit from the performance of the promise an action, there must be: First, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally."

The present case comes within the doctrine thus announced, which, we think, is well settled by the authorities. The stipulation to pay the mortgage was for the benefit of the holder thereof, directly. There was a privity between the mortgagor, who is the promisee, and the holder of the mortgage, resulting from that instrument. There was an obligation from the original mortgagor to the mortgagee to pay; hence, when the mortgagor conveyed his property to May, who assumed the mortgage, at once an obligation arose which, under our precedents, considering the lex fori, could be enforced by an action at law.

The defendants cite Parker v. Jeffery, 26 Or. 186, 37 Pac. 712, Washburn v. Interstate Investment Co., supra, and Brower Lumber Co. v. Miller, 28 Or. 565, 43 Pac. 659, 52 Am. St. Rep. 807. Parker v. Jeffery was a case in which a contractor had given a bond to the city of Portland to pay for all labor and materials used in the construction of a sewer. This occurred before our present statute on that subject was enacted. No particular claim of any individual was required to be paid. In Washburn v. Interstate Investment Co. the defendant had agreed to advance to a certain concern money to pay the latter's debts, without specifying them, and not to exceed a certain amount. Similar circumstances were present in Brower Lumber Co. v. Miller. In each of these cases nothing passed to the promisor from the promisee in which the third party had any interest or to which he had any claim. This element, which otherwise would furnish a common bond or quasi privity among the three parties, was absent. This circumstance differentiates these cases from the present contention and those like it. The mortgaged property, passing from the mortgagor to his grantee, in which the third party has an interest by virtue of his mortgage, puts the instant case in the class recognized by the quoted language of this court in the Washburn Case.

One reason given by the courts which refuse to enforce such an obligation except in equity is that the immediate parties to the agreement could annul the same, but that matter is controlled by this doctrine, that such a contract cannot be rescinded by the parties thereto after it has been acted upon or accepted by the third party. Davis v. Calloway, 30 Ind. 112, 95 Am. Dec. 671; Dodge v. Moss, 82 Ky. 441; Pecquet v. Pecquet, 17 La. Ann. 204; Mitchell v. Cooley, 5 Rob. (La.) 240; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756,

6 L. R. A. 610, 15 Am. St. Rep. 508; Putney v. Farnham, 27 Wis. 187, 9 Am. Dec. 459.

Bringing an action by the mortgagee on the contract for his benefit is an acceptance thereof by him. Taylor v. Ingersoll, 18 Colo. App. 272, 71 Pac. 398; McCoy v. McCoy, 32 Ind. App. 38, 69 N. E. 193, 102 Am. St. Rep. 223; Motley v. Manufacturers' Insurance Co., 29 Me. 337, 50 Am. Dec. 591; Warren v. Batchelder, 16 N. H. 580; Zwietusch v. Becker, 153 Wis. 213, 140 N. W. 1056; Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 102 N. W. 20. If the rescission of the contract by Jacobs had been mooted here, it is foreclosed by the institution of this action, which makes it impossible now to abrogate it without the consent of the plaintiff. * * *

The second defense, to the effect that neither May nor the investment company ever entered into any contract or agreement with the plaintiff to pay it any sum of money whatever, is sham, in the legal sense, because, as the record discloses, the acceptance of the deed drawn in the form stated amounts to a contract to pay the mortgage to the holder thereof. Again, the offer pleaded in the third separate answer to convey to the plaintiff the property in satisfaction of the deed cannot be sustained as a defense, because that is not according to the terms of the contract. The agreement is for payment, which means the delivery of money to the payee in discharge of the debt. The plaintiff cannot be compelled to accept the land in satisfaction of its claim, any more than it could be required to accept municipal bonds or a band of cattle. The demurrer to these three separate defenses was properly sustained. * * *

In assuming the payment of the mortgage the covenant therein as distinguished from the separate personal note was the measure of the grantee's duty. The obligation assumed by him must be construed according to its terms, and is not to be enlarged beyond them. The present grantees did not agree to respond directly to the conditions of the note, but only to the mortgage, which latter instrument does not directly bind them to pay more than the principal and interest of the note; hence the attorney's fee must be laid out of the case, although the note itself is quoted in the complaint. * * *

On the authority of Hicks v. Hamilton, 144 Mo. 495, 46 S. W. 432, 66 Am. St. Rep. 431, the contention is made that the investment company is a remote grantee, and as such is not liable here. In that case the mortgagor conveyed his land merely "subject to the mortgage," without requiring his grantee to assume or pay the incumbrance. The latter in turn deeded the tract to another by an indenture which required that grantee to "assume and pay the mortgage." Thus the continuity of personal liability was interrupted so that its chain did not unite the original mortgagee with the ultimate grantee, and for this reason it was held that the latter was not directly liable to the former. The case at bar is different because the clause assuming and agreeing to pay the mortgage is common to

both successive conveyances, which constitutes an unbroken sequence of personal liability from the original mortgagors down to the last grantee. Of course there can be but one satisfaction of the demand, although both grantees are liable.

The result is that the judgment is modified by allowing the plaintiff to recover from the defendants the sum of $3,000, without any attorney's fees.[18]

FRY v. AUSMAN et al.

(Supreme Court of South Dakota, 1912. 29 S. D. 30, 135 N. W. 708, 39 L. R. A. [N. S.] 150, Ann. Cas. 1914C, 842.)

Action by Uriah S. Fry against L. E. Ausman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

The deed to the grantor contained the following clause: "The same are free from all incumbrances, except a first mortgage of $5,000;" but contained no statement that she assumed the mortgage. The deed from the grantor to the grantee contained the following clause: "The same are free from all incumbrances, except a first mortgage of $5,000 and interest from April 26, 1908, at 6 per cent. which second party agrees to assume." The mortgage was foreclosed, and, the proceeds being insufficient to satisfy it, this action was brought to recover the deficiency.

WHITING, J. The sole question presented by this appeal is whether one holding a note secured by a mortgage upon real estate can recover upon such note against a party other than the mortgagor, where such party had taken a deed to said mortgaged premises, and in such deed had assumed such mortgage indebtedness, the grantor in such deed being in no manner bound to pay such mortgage indebtedness, and there being no evidence, other than such deed, to show an intent on the part of the grantor and grantee in such deed to contract for the benefit of the owner of the note and mortgage. The trial court held there could be no recovery.

[18] In accord: Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508 (1889); Thorp v. Keokuk Coal Co., 48 N. Y. 253, 257 (1872); Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327 (1861); Gay v. Blanchard, 32 La. Ann. 497 (1880); Pope v. Porter (C. C.) 33 Fed. 7 (1887); Urquhart v. Brayton, 12 R. I. 169 (1878); Carver v. Eads, 65 Ala. 190 (1880); Allen v. Bucknam, 75 Me. 352 (1883); Figart v. Halderman, 75 Ind. 567 (1881); Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504 (1875); George v. Andrews, 60 Md. 26, 45 Am. Rep. 706 (1882); Barnes v. Jones, 111 Miss. 337, 71 South. 573 (1916); Farrell v. Steward, 134 Ark. 605, 204 S. W. 423 (1918); Cooper v. Foss, 15 Neb. 515, 19 N. W. 506 (1884). Contra in the Virginias, where by statute only a sole beneficiary can sue. Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. 890 (1897); King v. Scott, 76 W. Va. 58, 84 S. E. 954 (1915). A later Code is reported to have changed this in Virginia.

See, further, cases cited in 13 C. J. 707, § 816. In Michigan and Connecticut a mortgagee beneficiary can sue by virtue of a special statute. Mich. Comp. Laws, 1897, § 519; Corning v. Burton, 102 Mich. 86, 62 N. W. 1040 (1894); Conn. Gen. St. 1918, § 5610.

Respondent contends that, disregarding the other question involved herein, appellant cannot recover because of a lack of privity of contract between appellant and respondent. It is true that, under what is known as the English rule and which is followed in several of the states, appellant would not be the proper party plaintiff, and it would be necessary that the action be brought in the name of the grantor in the deed; but there early arose in this country what is known as the American rule allowing the real party in interest to sue in his own name upon a contract made for his benefit. The so-called "Code" states have many or all adopted, many by statutory enactment, the American rule. This state adopted such rule by section 1193, Civil Code, which reads: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." [19] * * *

Pomeroy at section 1207 of the third edition of his work on Equity Jurisprudence notes that the courts, holding that there can be no liability upon the part of the grantee where there was none on the part of the grantor, also hold that the liability, when any does exist, results only from an application of the doctrine of subrogation, and that, unless there was a liability or obligation on the part of the grantor so that, as between the grantor and grantee, the grantee became the principal debtor and the grantor but a surety, there would be nothing upon which the creditor could base a right of subrogation. Pomeroy also notes that the courts holding the grantee liable where the grantor was not liable base the right of recovery solely upon the contract, taking the position that, where a contract is made for the benefit of one not a party thereto, he may treat the promise as though made to himself, and may sue in his own name thereon.

The federal Supreme Court has adopted the subrogation theory of liability as appears by the following from the case of Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667: "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person who is admitted to be the creditor's debtor stands at the time of receiving the security in the relation of surety to the person from whom he receives it,

[19] A review of several cases is here omitted.

it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled in equity to be substituted in his place for the purpose of compelling such principal to pay the debt."

For a general discussion of this question and a review of the numerous authorities bearing upon the different phases thereof, we refer to the very exhaustive notes pages 176 to 207 of 71 Am. St. Rep. These notes call particular attention to the two elements required under the New York decisions in order that there may be a recovery: (1) There must be an intent to benefit the third party; and (2) the promisee must owe some obligation to the third party. It is very apparent that the decisions from those states which have adopted the English rule above referred to are of no authoritative value upon the question before us. Among these states seem to be Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont, Virginia, and Wyoming. We therefore cite cases from those states only which recognize the American rule allowing suit by real party in interest.

Among the authorities supporting the New York rule and denying a right of recovery under the facts in this case are the following:[20] * * *

Supporting the other rule we find:[21] * * *

[20] King v. Whitely, 10 Paige (N. Y.) 465 (1843); Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195 (1877); Wilbur v. Warren, 104 N. Y. 192, 10 N. E. 263 (1887); Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49 (1892); Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618 (1893); Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925, 22 L. R. A. (N. S.) 492 (1908); Clement v. Willett, 105 Minn. 267, 117 N. W. 491, 17 L. R. A. (N. S.) 1094, 127 Am. St. Rep. 562, 15 Ann. Cas. 1053 (1908); Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58 (1896); New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987 (1896); Young Men's Christian Ass'n of Portland v. Croft, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568 (1898); Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274 (1900); Ward v. De Oca, 120 Cal. 102, 52 Pac. 130 (1898).

[21] Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 474 (1882); Harts v. Emery, 184 Ill. 560, 56 N. E. 865 (1900); Birke v. Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474 (1885); Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 199 (1897); McGregor v. Easter Bldg. & Loan Ass'n, 5 Neb. (Unof.) 563, 99 N. W. 509 (1904); Hare v. Murphy, 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851 (1895); Merriman v. Moore, 90 Pa. 78 (1879); Brewer v. Maurer, 38 Ohio St. 543, 43 Am. Rep. 436 (1883); McKay v. Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623 (1899); Enos v. Sanger, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 864, 65 Am. St. Rep. 38 (1897); Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003 (1903); Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435 (1906).

Also in accord: McDonald v. Finseth, 32 N. D. 400, 155 N. W. 863, L. R. A. 1916D, 149 (1915); Casselman's Adm'x v. Gordon & Lightfoot, 118 Va. 553,

We would call particular attention to the Utah case owing to the very exhaustive dissenting opinion found therein. There are many other authorities which in principle support one or the other of the two theories mentioned herein, but we have confined our citations to those where the facts passed upon were the same as here, namely, where the grantee in a deed had assumed a mortgage debt for which his grantor was not liable.

While we think it must be conceded that, in case the second element required under the New York decisions does exist, it may, from that fact, be presumed that the first element is also present, and therefore the party for whose benefit the contract is made be entitled, under the subrogation theory, to recover of the party who has rendered himself the principal debtor; yet it seems equally clear to us that, whenever two parties enter into an agreement that appears to have been made expressly for the benefit of a third party, and such agreement has a good and sufficient consideration, the agreement itself creates all the privity there need be between the person for whose benefit the agreement was entered into and the party assuming the obligation, and an action at law should lie regardless of whether there was any obligation existing between the other party to the agreement and the third party. But, before the third party can adopt the agreement entered into and recover thereon, he must show clearly that it was entered into with the intent on the part of the parties thereto that such third party should be benefited thereby. This intent might, in a given case, sufficiently appear from the contract itself, but it must frequently be shown by other proof. While the cases sustaining a recovery have few, if any of them, expressly recognized the necessity of the existence of the first element (the intent to benefit the third party), yet an examination of the decisions will reveal the fact that such element was clearly established in nearly all such cases.

We concur heartily in the following words of Chief Justice Bartch of Utah in his dissenting opinion in McKay v. Ward, 20 Utah, 149, 57 Pac. 1024, 46 L. R. A. 623: "My conclusion is that the rule which exempts a grantee, who has merely in a deed of conveyance assumed and agreed to pay the mortgage in case his immediate grantor is not personally liable for the payment of the mortgage debt, from liability to the mortgagee, or owner of the mortgage, is not only founded in reason and principle, but is sustained by an overwhelming weight of authority. I do not intend to hold, however, that the grantee of mortgaged premises, whose grantor is under no personal obligation to pay the mortgage debt, cannot render himself liable to the mortgagee for a deficiency judgment upon foreclosure and sale by accepting a deed containing an assumption clause with knowledge of such contents, and

88 S. E. 58 (1916); Llewellyn v. Butler, 186 Mo. App. 525, 172 S. W. 413 (1915); Allen v. Traylor (Tex. Com. App.) 212 S. W. 945 (1919); Title Guaranty & Trust Co. v. Bushnell (Tenn.) 228 S. W. 699 (1921). See review of cases in 22 L. R. A. (N. S.) 492.

which clause contains apt words showing that the grantor intended to bestow a benefit upon the mortgagee. The rule cannot be thus extended; for doubtless a grantor may direct the payment of the purchase price as he chooses, and may, if he so wishes, contract with a grantee that the latter will pay a certain sum to a stranger, or a mortgagee, or any person upon whom the grantor chooses to confer a benefit, and in such cases the beneficiary may enforce the contract. Where, however, as in the case at bar, the grantor is not personally liable, the assumption clause ought to be construed as a mere indemnity to the grantor, unless there is something to show a different intention by the contracting parties. In this case there appears to be nothing which indicates any other intention, on the part of the grantor, than that of indemnity to himself. There are no words in the deed, nor any evidence of facts or circumstances, which indicate that the grantor had any interest in protecting the mortgagee, to whom he was under no personal obligation. Doubtless, in general, the greatest interest a grantor has is in effecting a sale of the premises, and it cannot be assumed that he would hazard the chances of such a sale by insisting on that which would not benefit him. The circumstances of this case disclose no intention to benefit the mortgagee, and therefore he is not entitled to a deficiency judgment against the promisor; the assumption in the deed being intended merely to indemnify the promisee. If the intention of the contracting parties had been otherwise, the respondent could easily have shown it by placing the vendor, McDonald, upon the stand, and interrogating him upon the subject. This he failed to do, although, under the great weight of authority, the burden was upon him to show that the contract was intended for his benefit, or that the vendor was under some legal obligation to him respecting the debt. The respondent not having done this, why should the appellate court assume that as a fact of which there is no proof?"

We think also that the very terms of our statute determine this question in favor of respondent. Recovery can only be had in case the contract was "made expressly for the benefit of a third person." The state of California has identically the same statute, and in Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100, the Supreme Court of that state said: "It is not necessary that the parties for whose benefit the contract has been made should be named in the contract. It must appear, however, by the direct terms of the contract, that it was made for the benefit of such parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit." See, also, Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

From both reason and authority we conclude: That inasmuch as the provision in the deed before us merely provided that the grantee assumed the mortgage debt, and there being no other evidence of the intent of the parties to such deed, we should construe such provision as a mere agreement or contract to indemnify the grantor, and therefore

insufficient as the basis of an action founded upon the doctrine of subrogation—there being no obligation on part of grantor to the third person—and also insufficient, as the basis of an action under section 1193, Civil Code, it not appearing that the said agreement or contract was entered into "expressly for the benefit of a (the) third person."

The judgment of the trial court is affirmed.

MEECH v. ENSIGN.

(Supreme Court of Errors of Connecticut, 1881. 49 Conn. 191, 44 Am. Rep. 225.)

Civil action upon a promise of a grantee in a conveyance of an equity of redemption to pay the mortgage debt; brought to the Superior Court in Middlesex County. The case was tried to the court and the following facts found:

On the 10th of November, 1873, John H. Poindexter of Hartford made two promissory notes of that date, each for the sum of $1,378.12, and payable to the order of Michael E. Griffin, executor, one two years and the other four years after date, and to secure their payment mortgaged to Griffin as executor certain real estate situate in Middletown in this state, the same being the first mortgage upon the real estate. On the 12th of December, 1873, Griffin, as executor, endorsed the notes and assigned the mortgage to the plaintiffs.

On the 20th of January, 1875, Poindexter, by his deed of that date, conveyed the real estate to the defendant, subject to the mortgage, the deed containing the following paragraph:

"And furthermore, I, the said grantor, do by these presents bind myself and my heirs forever to warrant and defend the above granted and bargained premises to him the said grantee, his heirs and assigns, against all claims and demands whatsoever, except a mortgage to Michael E. Griffin, executor, as appears on record, amounting to the sum of $2,756.25, and taxes assessed or laid in October, 1874, with the interest thereon which has accrued from May, 1874; all of which the said Ensign assumes and agrees to pay as part of the consideration of this deed."

Soon after this conveyance the plaintiffs, then the owners of the notes, were informed of the same by Poindexter and told by him that the defendant had assumed the payment of the notes; and the defendant, on the 5th of February, 1875, called upon the plaintiffs and paid the interest then due upon the notes, amounting to $96.47, and told them that he was the person who was to pay the notes, and that he should pay the interest promptly as it fell due, and should pay the principal of the notes as they matured.

The defendant in fact paid the interest on the notes from the 5th of February, 1875, up to the 10th of May, 1877. About the 19th of November, 1875, soon after the first note matured, the plaintiffs applied to him to pay it. He said that he had not then the money to pay it with, but would pay it as soon as he could. Being urged afterward

from time to time to pay the principal of the overdue note, the defendant, on the 15th of November, 1876, said to the plaintiffs that he could not then pay it but that he would endorse both the notes and that they could then raise the money upon them. The plaintiffs assented to this proposal, and thereupon the defendant endorsed the notes, writing his name on the back of each of them under that of Griffin.

When each of the notes became payable, Poindexter, the maker, was, and ever since has been, without any property which could have been levied upon for the security of the same, and insolvent. No demand for the payment of either of the notes has ever been made upon him.

The plaintiffs brought a petition to foreclose the mortgage to the superior court for the county of Middlesex at its November term, 1878, upon which a decree was passed at that term limiting the defendant's right to redeem to the first Monday of February, 1879, and he failing to redeem the complete title to the mortgaged premises then vested in the plaintiffs.

Upon the rendition of the decree the court appointed appraisers of the property, pursuant to the statute, who on the 6th of February, 1879, made their certificate appraising the property at $1,200, which is found to have been its value at the expiration of the time limited by the decree for redemption.

On the 5th of February, 1879, Poindexter executed an instrument in writing, purporting to release the defendant from his undertaking to pay the notes.

Upon these facts the case was reserved for the advice of this court.

CARPENTER, J.[22] The plaintiffs held a mortgage on real estate. The defendant purchased the equity of redemption, agreeing with the mortgagor to pay the mortgage debt. Subsequently the mortgage was foreclosed—the property then being worth less than the mortgage debt—leaving a balance unpaid. This action is brought to recover the balance. The promise was not assigned to the plaintiffs but was discharged by the mortgagor before suit brought. The question of the defendant's liability is reserved for the advice of this court.

The case differs from the other cases on this subject that have heretofore been before this court. We now have the naked question whether the owner of a debt secured by mortgage may maintain an action on the promise made by the purchaser of the equity of redemption to the mortgagor to pay the debt without an assignment of the right of action which that promise gives.[23] As a rule actions on contracts can be brought only by him with whom the contract was made and from whom the consideration moved. The legal title is deemed to be in him alone and strangers to the contract cannot sue. The rule is a salutary one

[22] Part of the opinion is omitted.

[23] If the mortgagee, or other creditor beneficiary, obtains an assignment from the mortgagor (the promisee) he can everywhere maintain suit on the contract. Hyland v. Crofut, 87 Conn. 49, 86 Atl. 753 (1913); Foster v. Atwater, 42 Conn. 244 (1875); Reed v. Paul, 131 Mass. 129 (1881).

and should not be departed from except for good reasons. There are however some exceptions to it. Actions of assumpsit may be maintained in some instances where there is no express contract with the plaintiff and where the consideration does not move from him. If A receives money from B to be paid to C, C may maintain an action against A. These cases however are exceptions only in appearance. They in fact recognize the general rule and are really within it; for the action is not brought on the express promise by A to B, but on an implied promise by A to pay the money to C.

Another class of exceptions is where the contract has for its object a benefit to a third party and is made with that intent. Some early English cases in which promises were made to a father or uncle for the benefit of a child or nephew are instances of this class. There may also be cases in which a third party may have some peculiar equity in the subject matter of a contract which will enable him to maintain a bill in equity to enforce it.

Does this case fall within any exception recognized by authority and supported by principle?

Before alluding to decided cases let us examine the case with some care in the light of the circumstances, for the purpose of discovering just what the intention of the parties was and precisely what the defendant promised to do; for courts always in enforcing contracts intend to give effect to the intention of the parties; and when that intention is discovered in respect to a legal and valid contract it is the inflexible and imperative law of the case. And it is a necessary part of the rule itself that the courts will not so construe and enforce a contract as to bring about a result not expressed in the contract and not intended by the parties.

What was the transaction? It was not a sale of a piece of land for a fixed price, equal to the value of the land, so as to create a debt for that sum; but was simply a sale of the equity of redemption. The distinction between the land, unincumbered, and the equity of redemption, is obvious enough, and is an important one, as on it depend in a great degree the rights and obligations of the parties. The defendant purchased the equity of redemption. The finding is that the mortgagor "conveyed to the defendant said real estate subject to said mortgage." So that the only debt brought into existence by the transaction was the price agreed to be paid for the equity of redemption. The mere purchase raised no debt to the mortgagor which the defendant was to discharge by paying the incumbrance. By the contract of assumption he obliged himself to the mortgagor to pay the mortgage debt. Whether that raised any personal obligation to the mortgagee is the question in the case. If the probable intention of the parties is to govern it is difficult to find any such liability in the transaction. The mortgagee was not a party to it, no part of the consideration moved from him, and he was in no worse condition because of it. He still had the security of the land and the personal responsibility

of the mortgagor, and that is all he contracted for or required. The parties contracted with reference to their own interest, not his; to benefit themselves, not him. He had no legal or equitable interest in the contract and there is no room for the presumption that it was intended for his benefit.

There was no agency express or implied. The mortgagor would doubtless be surprised at the suggestion, should it be made, that he was acting as the agent of the mortgagee. There was no substitution or novation, for that requires three parties, and here were only two; besides the original debtor was not discharged.

It was not the object of the parties to give the mortgagee additional security; and to interpret it in that sense is to give it a force and meaning never contemplated by the parties, and is, in effect, making a contract for them. The only contract which they made was simply this—the defendant agreed that he would pay the mortgagor's debt. The promisee alone had the legal and equitable interest. It follows that he alone can enforce it unless he imparts that right to others. That he may sue will not be disputed. If the mortgagee has that right by force of the contract, then two persons wholly independent of each other have an equal right. If either may sue both may, and a suit by one will not abate or bar a suit by the other; and a discharge by one for any cause short of a fulfillment will not discharge the contract. Thus the promisor may be harassed with two suits at the same time on the same contract, and if he would compromise with the promisee he must obtain the consent of a stranger. If this is the law it is an anomaly, for another instance of the kind is hardly to be found in the whole range of jurisprudence.

We are aware that there are decisions from courts of the highest authority, and whose opinions are entitled to the highest respect, which hold that the creditor may sue on such contracts; perhaps it is not too much to say that the prevailing current of authority in this country is in that direction; but believing as we do that they are not founded in good reason or sound policy we cannot accept them as law. The question is an open one in this state, and principle, rather than precedents not founded in principle, should determine it.

We cannot undertake to examine in detail the cases alluded to; we can only refer in a general way to the reasoning by which they are supported. It is interesting to note the various grounds on which they stand, some of which are not only weak in themselves, but fail to strengthen the others. It is an argument of no little weight against the correctness of decisions that they seem to require disconnected and inharmonious reasons to sustain them.

Some of the cases seem to proceed "upon the broad principle that if one person makes a promise to another, for the benefit of a third person, that third person may maintain an action on the promise;" and that without regard to the question whether the benefit to a third person was the principal thing intended or was a mere incident. Lawrence

v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Davis v. Calloway, 30 Ind. 112, 95 Am. Dec. 671.

In cases of this class the reasoning is not uniform. In some it is suggested that from the express promise to the promisee the law implies a promise to the third person. In others the principle of agency is invoked and the mortgagor in making the contract is treated as the agent of the mortgagee. The difficulty with this last position is that it is contrary to the facts.

In Urquhart v. Brayton, 12 R. I. 169, Durfee, C. J., holds the defendant liable to a third person on the ground of a novation, while Potter, J., in the same case places the liability on the ground of money had and received. There seem to be several difficulties in treating it as a novation; first, it changes the nature of the contract; second, it requires a third party, and here are but two; and third, an essential element of a novation is wanting—the discharge of the original debtor.

In other cases the transaction is treated as a sale of the land irrespective of the mortgage and a retention by the purchaser of a portion of the purchase money, to be paid to the mortgagee. Hoff's Appeal, 24 Pa. 200; Urquhart v. Brayton, 12 R. I. 169, supra; Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478. When the circumstances will warrant that view of the facts there is no difficulty. In such cases the debtor actually places or leaves the money in the hands of the promisor to be paid to the creditor, and the action for money had and received may be maintained—not on a promise to the debtor but on an implied promise to the creditor.

Other cases, and this class includes a large number, resort to the doctrine of suretyship. Blyer v. Monholland, 2 Sandf. Ch. (N. Y.) 478, supra; Curtis v. Tyler, 9 Paige (N. Y.) 432; King v. Whitely, 10 Paige (N. Y.) 465; Bissell v. Bugbee, 7 Reporter, 550, Fed. Cas. No. 1445; Crowell v. Currier, 27 N. J. Eq. 152. We agree that that ground would be tenable, in equity at least, if that was the real contract between the parties; that is, if the parties really intended by the transaction to furnish additional security to the creditor. If not, it seems to us difficult to support the decisions upon that ground. In order to do so the court must assume without reason and contrary to the fact that such was the object and purpose of the contract. We have already endeavored to show that it was not. Let us examine the subject a little further. There is no express contract of suretyship. Whatever element of suretyship there is results by operation of law from the position in which the parties place themselves. The defendant agreed with the debtor that he would pay the debt. As between themselves he thereby became the principal debtor. The original debtor not being discharged he was also liable to the creditor. If compelled to pay he was a surety only in this, that he had a right to call on the defendant to indemnify him. But all this did not affect the creditor and he is not a

party to it. What interest has he in the transaction? And in what consists his equity? To make that relationship available to him it is necessary not only to bring him into contract relations with the other parties, but also to reverse the positions of the principal and surety and make the purchaser the surety instead of the principal. Upon what principle can that be done? By what process of reasoning can it be vindicated? Again, there is no implication of suretyship as between the creditor and the other parties, as no such implication is necessary in order to give full effect to the intention of the parties.

We come, now, to a class of cases which constitute an important exception to the rule we are considering—that suits must be brought by the party making the contract and from whom the consideration moved. We refer to those cases in which the parties confessedly contracted for the benefit of third persons, not incidentally but as the principal object. Some of the cases cited by the plaintiffs are cases of this description and are not applicable to the case at bar. There may be cases however in which this principle is invoked to sustain actions by the mortgagee against the purchaser of the equity of redemption.

The principle itself is best illustrated by a brief reference to a few of the leading cases. In Dutton v. Poole, 1 Ventris, 318, the defendant promised the father to pay the daughter a sum of money as a marriage portion. It was held that the daughter might sue on the promise. The relation of the father to the daughter and his obligation to give her a marriage portion seem to be adopted as a substitute for privity of contract. Some of the decisions in the state of New York have taken a similar view and treat the obligation of the mortgagor to the mortgagee as a "substitute for privity" or "privity by substitution," to connect the mortgagee with the contract. Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195, and cases cited. Dutton v. Poole in modern times in this country would be upheld on the ground that the promise was intended for the benefit of the daughter as its object.

In Felton v. Dickinson, 10 Mass. 287, the defendant promised the father of a minor son to pay the son a sum of money for his services. After performing the service it was held that the son might maintain an action in his own name. In Farley v. Cleveland, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387 (same case in error, 9 Cow. 639,) the defendant bought hay of the debtor, in consideration of which he promised to pay the debt due the plaintiff. The plaintiff maintained a suit in his own name. In Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855, the defendant promised A that if he would sign a bail bond he would give him a bond of indemnity. A and B signed the bail bond and it was held that they could jointly maintain an action on the promise. In these cases there is no difficulty in discovering an intention to benefit the third person.

And yet this exception seems not now to be recognized in England. Tweddle v. Atkinson, 1 Best & Smith, 393. Even in Massachusetts

the tendency is to narrow the exception and adhere more rigidly to the rule. Exchange Bank v. Rice, 107 Mass. 39, 9 Am. Rep. 1. It seems to us that the exception to the rule is a reasonable one and should prevail.

The question then recurs—is the case at bar within the exception? We have already expressed our views as to the nature of the contract and the real intent of the parties. If we are right it is clear that the question must be answered in the negative.

That the incidental advantage to the creditor, (if it is an advantage to have his debt paid by one man rather than another) is not such a benefit as the exception contemplates, is apparent from a consideration of the possible and even probable consequences of holding it to be so. The case before us affords a good illustration. The debtor is insolvent, and the property mortgaged has largely depreciated, so that it fails to pay the debt. Now if the plaintiffs may recover the balance of the defendant, they have a security for their debt which they did not originally have, which they never contracted for, and which the contracting parties did not intend that they should have. It in effect makes him the absolute guarantor of the debt. * * *

We advise the Superior Court to render judgment for the defendant.[24]

JOHN HORSTMANN CO. v. WATERMAN.

(Supreme Court of Washington, 1918. 103 Wash. 18, 173 Pac. 738.)

PARKER, J.[25] The plaintiff, John Horstmann Company, a corporation, seeks recovery from the defendant, S. K. Waterman, balances due upon the purchase price of goods sold and delivered by it and its assignor to the Lithocrete Company, a corporation; recovery being sought upon the theory that the defendant has become liable to the plaintiff for the payment of such balances under her guaranty contract. Trial in the superior court for King county, without a jury, resulted in findings and judgment awarding to the plaintiff recovery as prayed for, from which the defendant has appealed to this court.

Prior to and on November 27, 1913, H. S. Waterman was the owner of all of the capital stock of the Lithocrete Company, except suf-

[24] A review of certain New York cases is omitted.

Anticipating this decision, the Connecticut Legislature, in 1881, provided by statute (Gen. St. 1918, § 5610) that the mortgagee may sue the grantee "in his own name upon such promise, without obtaining an assignment thereof from the grantor of said premises." In Colchester Savings Bank v. Brown, 75 Conn. 69, 52 Atl. 316 (1902), this statute was held to give the mortgagee a right, not only against the immediate grantee of the mortgagor, but also against any subsequent grantee, in case each grantee in the chain had assumed the debt.

[25] Part of opinion is omitted.

ficient shares thereof to enable others to hold office in the company. On that day he sold all of his stock in the company to A. J. Weiffenbach, the then president of the company, at the same time entering into a written contract with Weiffenbach and the company as follows:

"This contract, made this November 27, 1913, by and between H. S. Waterman, first party, A. J. Weiffenbach, second party, and the Lithocrete Company, a corporation of the state of Washington, third party witnesseth: That whereas, Waterman has this day sold and transferred to Weiffenbach all of the capital stock of the Lithocrete Company, for the sum of $3,500.00, retaining however certain assets of the company below mentioned: Now, therefore, in consideration of the premises and of the mutual promises hereinafter contained, the parties hereto agree as follows:

"I. It is agreed by all the parties hereto that Waterman shall retain as his own individual property the following property heretofore owned by the company: All office furniture and office equipment, all the bills and accounts receivable, claims, and choses in action of the company, and ten tons of Styrian Magnesite; and the company agrees to execute and deliver to Waterman, upon demand, a proper written assignment of any or all of said bills and accounts receivable, claims, and choses in action.

"II. Said Waterman agrees that he will within one year from the date hereof pay or settle all of the bills and accounts payable of said company and all obligations and debts of said company now outstanding, except any commissions owing by the company on account of unexecuted contracts for laying lithocrete which have been entered into by said company, which commission the company is to pay; and said Waterman agrees to indemnify said company against the payment of any and all debts of the company contracted prior to this date, with the exception above noted, and to reimburse the company for all costs, attorney's fees, and damages which it may incur or suffer by reason of any claim or action taken against it based on any existing debt or obligation of the company. * * *

"V. Said Waterman agrees not to engage directly or indirectly in the business of manufacturing, selling, or laying any composition flooring or similar substance in the state of Washington for a period of five (5) years from the date hereof.

"[Signed] H. S. Waterman.
"A. J. Weiffenbach.
"Lithocrete Company,
"By A. J. Weiffenbach, Pres.
"Howard Waterman, Secy."

At the same time, to secure the performance of this contract by H. S. Waterman, appellant entered into a written contract with Weiffenbach and the company as follows:

"This contract, made this November 27, 1913, by and between the Lithocrete Company, a corporation of the state of Washington, and

A. J. Weiffenbach, first parties, and S. K. Waterman, second party, witnesseth: That whereas, at the time of making this contract, A. J. Weiffenbach is about to purchase from H. S. Waterman the capital stock of the Lithocrete company: Now, therefore, in consideration of the first parties hereto entering into a certain contract with H. S. Waterman, a copy of which is hereto attached, the second party guarantees the performance by H. S. Waterman of all of the conditions of said contract to be performed by him, and in particular guarantees the payment or settlement by H. S. Waterman within one year from this date of all the debts and obligations of said Lithocrete Company now existing, except the commissions on unexecuted contracts of said company. The second party further agrees to indemnify and save harmless the first parties hereto against all claims based on existing debts or obligations of said company, and against all damages, costs, and attorney's fees which first parties may suffer or incur on account of such claims.

"[Signed] A. J. Weiffenbach.
"S. K. Waterman.
"Lithocrete Company,
"By A. J. Weiffenbach, President.
"Howard Waterman, Secretary."

At the time of entering into these contracts the Lithocrete Company was indebted to respondent and its assignor for goods sold and delivered by them to it some time prior thereto, for which indebtedness the judgment here appealed from was rendered against appellant. It is contended in behalf of appellant that her guaranty contract was not made for the benefit of respondent, but for the sole benefit of the Lithocrete Company and Weiffenbach, that no privity of contract was thereby created between her and respondent, and that therefore respondent has no right of recovery against her. There is thus presented the much-discussed question, concerning which the authorities are seemingly quite out of harmony, as to the right of a third person to recover upon a contract the performance of which by the obligor will result in benefit to such third person. It is conceded by counsel for appellant that the exceptions to the general rule that only parties to a contract can sue thereon would enable respondent to recover against H. S. Waterman under his contract with the Lithocrete Company and Weiffenbach, because of the express promise of H. S. Waterman to pay the existing debts of the company, and the taking over by him of a considerable portion of the property of the company. We are to remember, however, that appellant, S. K. Waterman, is one step further removed from respondent than H. S. Waterman; that she has only guaranteed to the Lithocrete Company and Weiffenbach the performance by H. S. Waterman of his promise to pay the indebtedness of the Lithocrete Company; that she has not promised unconditionally to pay such debts, but her promise in effect goes no further than that she will

pay those debts if H. S. Waterman does not pay them; and that she has not received, under her guaranty contract, any property or funds which respondent had a right to look to for the satisfaction of its claims against the Lithocrete Company.[26] * * *

Our own early decisions may not be wholly harmonious upon the question of the right of a party to recover upon a contract to which he is not a party; but the following later decisions, we think, call for the conclusion, in harmony with the decisions above quoted from, that the guaranty contract of S. K. Waterman, entered into by her with Weiffenbach and the Lithocrete Company, was not intended for the benefit of respondent or other creditors of that company, but was for the exclusive benefit of Weiffenbach and the Lithocrete Company, and that therefore respondent cannot recover thereon, though it would be benefited by the performance of the obligations of S. K. Waterman thereunder: Spokane, etc., v. Pac. Surety Co., 86 Wash. 489, 150 Pac. 1054; Rust v. United States Fidelity & G. Co., 87 Wash. 93, 151 Pac. 248; Dupont De N. Powder Co. v. Nat. Surety Co., 90 Wash. 227, 155 Pac. 1050. Among other decisions supporting our conclusion we note Am. Exchange Nat. Bank v. N. P. Ry. (C. C.) 76 Fed. 130; German State Bank v. N. W. Water & L. Co., 104 Iowa, 717, 74 N. W. 685; Sweeney v. Houston, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543.[27] The two last cited cases show the disposition of the courts

[26] The court here quoted from Second National Bank v. Grand Lodge, 98 U. S. 123, and Washburn v. Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620.

[27] Other cases in accord: Pennsylvania Steel Co. v. New York R. Co., 117 C. C. A. 503, 198 Fed. 721 (1912); Durnherr v. Rau, 135 N. Y. 219, 32 N. E. 49 (1892); Wheat v. Rice, 97 N. Y. 296 (1884); Campbell v. Lacock, 40 Pa. 448 (1861); Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184 (1888); Miller v. Winchell, 70 N. Y. 437 (1877); Case v. Case, 203 N. Y. 263, 96 N. E. 440, Ann. Cas. 1913B, 311 (1911); Lockwood v. Smith, 81 Misc. Rep. 334, 143 N. Y. Supp. 480 (1913); Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218 (1898); Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88 (1895); Wilson v. Shea, 29 Cal. App. 788, 157 Pac. 543 (1916); Hollister v. Sweet, 32 S. D. 141, 142 N. W. 255 (1913); Kenfield Pub. Co. v. Baumgartner, 189 Ill. App. 413 (1914); Sweeney v. Houston, 243 Pa. 542, 90 Atl. 347, L. R. A. 1915A, 779 (1914).

Where a promisor agrees to pay money, or to do other service, directly to a third party, the latter is sufficiently indicated as a beneficiary and can maintain suit. Faust v. Faust, 144 N. C. 383, 57 S. E. 22 (1907); Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659 (1909); Miller v. Farr, 178 Ind. 36, 98 N. E. 805 (1912); Waterhouse v. Waterhouse, 29 R. I. 485, 72 Atl. 642, 22 L. R. A. (N. S.) 639 (1909); Union Machinery & Supply Co. v. Darnell, 89 Wash. 226, 154 Pac. 183 (1916); Spear Min. Co. v. Shinn, 93 Ark. 346, 124 S. W. 1045 (1910); Concrete Steel Co. v. Illinois Surety Co., 163 Wis. 41, 157 N. W. 543 (1916); Silver King Coalition Mines of Nevada v. Silver King Consol. Min. Co. of Utah, 122 C. C. A. 402, 204 Fed. 166, Ann. Cas. 1918B, 571 (1913).

This is true, a fortiori, if the defendant received assets out of which the debt was to be paid. Burson v. Bogart, 49 Colo. 410, 113 Pac. 516 (1911); Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955 (1911), in equity; Barry v.

not to extend the doctrine here contended for by counsel for respondent to new and doubtful cases, and also to resolve doubts as to the intent of the parties executing a contract against third parties claiming under it. * * *

The judgment is reversed, and the action dismissed.

FORBURGER STONE CO. v. LION BONDING & SURETY CO. et al.

(Supreme Court of Nebraska, 1919. 103 Neb. 202, 170 N. W. 897).

Action by the Forburger Stone Company against the Lion Bonding & Surety Company and others. Judgment for plaintiff, and the Surety Company appeals. Affirmed.

SEDGWICK, J. 1. A building contractor entered into a contract to construct a building, and gave a bond for the faithful performance of the contract. This defendant was surety on the bond. The plaintiff furnished material to the contractor which was used in the construction of the building, and he brought this action against the surety on the bond to recover the value of the material. The bond required the contractor to perform all of the conditions of his contract, and one of the conditions of his contract was that he should pay for all the materials which he used in the building. Therefore this contractor's bond contained an agreement for the benefit of this plaintiff, and it has been frequently held by this court that, under such circumstances, a party for whose benefit the contract was made can maintain an action directly against the party who has contracted for his benefit. Doll v. Crume, 41 Neb. 655, 59 N. W. 806, and cases cited. And various other decisions of this court are to this effect.

2. This bond contained the following provision: "That the said surety shall be notified in writing of any act on the part of said principal, which shall involve a loss for which the said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the duly authorized representative or representatives of the obligee herein, who shall have the supervision of the completion of said contract."

It is conceded that no notice was given the surety as provided in the bond, and the serious, and perhaps difficult, question in this case is whether the third person, who is a beneficiary under this contract, can recover without having given the notice specified. In Doll v. Crume,

Jordan, 116 Minn. 34, 133 N. W. 78 (1911); Bradley v. McDonald, 218 N. Y. 351, 113 N. E. 340 (1916); Collier v. De Brigard, 80 N. J. Law, 94, 77 Atl. 513 (1910).

In New Orleans St. Joseph's Ass'n v. Magnier, 16 La. Ann. 338 (1861), the plaintiff was denied a remedy because performance of the defendant's primary contractual duty would not have benefited the plaintiff, although the plaintiff was expressly named as beneficiary of a penalty clause. This decision should not be followed.

supra, it was held: "That the contract between the city and Davis [the contractor] and his sureties, and the promises and liabilities of the latter thereon, were of a dual nature—a promise to the city that Davis should perform the work in the time and manner he had agreed, and a promise, in effect, to Crume to pay him for the labor he should perform for Davis."[*] This proposition of law is discussed at length in the opinion.

In Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573, it was held that under a similar contract the beneficiary could not recover without having given the notice provided for in the contract. The note in the L. R. A. is exhaustive, in which it is said: "A contractor's surety bond to a public corporation is dual in its nature, being for the benefit and protection of the obligee against loss or damage from a failure of the contractor to perform his contract, and also for the benefit of laborers and materialmen who do work and furnish materials in the performance of the contract. And when the rights of the latter are once fixed, no act of the corporation will destroy or impair them"—and cites our case of Doll v. Crume, supra, and other authorities upon this proposition.

In Doll v. Crume, supra, the contract was with a public corporation, but the opinion does not consider that fact as material, as would be seen from a reading of the opinion, in which it is said: "Suppose that Davis [the contractor] had borrowed $100 for 90 days from a bank, and given his note therefor, which note had been signed by the plaintiffs in error as sureties. Now, if the bank, without the knowledge of the plaintiffs in error, had extended the time of the payment of this note, then such extension would have released the sureties from liability thereon; but in the case supposed, if at the time Davis borrowed the money plaintiffs in error had promised the bank that, in consideration of its lending the money to Davis, they would pay a debt of $10 which he owed to C., then any agreement between Davis and the bank for an extension of the time of payment of the note would not affect C."

That is to say, the surety on the contractor's bond has agreed that the contractor will pay the materialman. The contractor, of course, was under obligation to pay the materialman, and the contract, being for the benefit of the materialman, is distinct, according to the authority of this decision, from the contract that the contractor shall perform his work as he agreed to do. There are two contracts—one that the materialman shall be paid, and the other that the contractor shall perform his contract with the owner of the property. The entering into the contract with the contractor by the owner is the consideration for the agreement to pay the materialman for the material. In the L. R. A. note, above referred to, it is said that the decisions are not unanimous, and "a majority incline to hold that such conduct [conduct of the nominal obligee] does not and cannot affect them [the materialman] after their rights become fixed." The rights of laborers

and materialmen to be paid for their labor and material are "fixed" when they have faithfully performed the labor or furnished the material; and, under these decisions, no failure of the contractor thereafter can invalidate the right so fixed. That the duty to give the specified notice is placed entirely upon the obligee named in the contract, and relates only to his performance of the work he has contracted to do, appears from the words of the contract. The surety is to be notified "of any act on the part of said principal * * * immediately after the occurrence of such act shall have come to the knowledge of" the representatives of the obligee "who shall have the supervision of the completion of said contract." This plaintiff did not have any representative in this business, and neither the plaintiff nor any one for him had supervision of the completion of the contract. The plaintiff could not know when some act of the contractor came to the knowledge of the owner of the building. It would be impossible for the plaintiff to give the notice to the surety. Laborers and materialmen are in the same position with respect to such contracts. If a laborer who has performed a few days' work for the contractor would be in danger of losing his wages unless he keeps himself posted as to the doings of the contractor and the owner of the building, and sees that they perform their respective duties, he would not be protected as perhaps sound public policy would require.

As said in Des Moines Bridge & Iron Works v. Marxen & Rokahr, 87 Neb. 684, 128 N. W. 31: "It is better that the law with respect to contracts should be certain than that it should in all particulars conform to the views of the courts of some of our sister states. The defendants in the case at bar must have contracted with reference to the law as announced in the cited cases, and the defendant bonding company must have known that it was assuming an obligation to pay the subcontractors and materialmen, as well as the laborers and mechanics engaged in constructing the courthouse referred to. The plaintiff, in contracting to furnish material for the courthouse, also had a right to rely upon the law repeatedly stated by this court, and should not be deprived of the defendants' obligation to pay for that material because a like bond could not be enforced in the state of New York. We are not convinced that we should overrule a long line of our decisions, and shall not do so in the instant case."

That was an action for material furnished a contractor for a public building, and was before the statute making the contractor's bond responsible for materials (Laws 1913, c. 170), and yet it is said that—"the defendant bonding company must have known that it was assuming an obligation to pay the subcontractors and materialmen, as well as the laborers and mechanics engaged in constructing the courthouse referred to."

We think that, under our former decisions, the parties interested must know that the surety on a contractor's bond in which it is agreed that the contractor will pay laborers and materialmen, is directly li-

2. It is quite immaterial, if the defendant's covenant to pay his father's debts was afterwards rescinded by mutual agreement between the parties to it. Before that was done, the plaintiffs had been informed of the covenant, and made no objection thereto; indeed, the fair inference from the testimony is, that the plaintiffs fully assented thereto. Whether it was or was not competent for the parties to the covenant to rescind it before such notice to and assent by the plaintiffs, we need not here determine. Certainly after such notice and assent, the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent.

To support the position that it was competent for the defendant and his father to rescind the contract, and thus defeat the plaintiffs' right of action against the defendant, the learned counsel for the defendant cites two New York cases: Kelly v. Roberts, 40 N. Y. 432, and Kelly v. Babcock, 49 id. 318. These cases do not sustain the position. In the first, it was held that an agreement, upon no new consideration, between debtor and creditor, that the debtor shall pay the amount of his debt to a third person, to whom the creditor is indebted, is not, in the absence of any notice or acceptance of or assent to the arrangement by such third person, irrevocable by the creditor. In the latter case, it was held that "an agreement in a bill of sale or instrument of transfer of personal property, that a portion of the purchase money of the goods sold may be paid to and among the creditors of the vendor, without a consent or agreement on the part of the vendee thus to pay, creates no trust; the balance unpaid is a debt due the vendor, and can be reached by and held under an attachment against his property." In this case, the defendant covenanted to pay his father's debts; there was a new and valid consideration for such covenant; and the plaintiffs were notified that it had been made, and gave their assent thereto. Thus we find here all the conditions essential to the plaintiffs' right of action, which were wanting in those cases. We conclude that the testimony offered to show a rescission of the covenant was properly rejected.[53] * * *

Judgment affirmed.

[53] A discharge by the promisee is not effective as against the beneficiary, if made after knowledge of and reliance upon the contract by the latter; he is not required to give notice of his assent. Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508 (1889); New York Life Ins. Co. v. Aitken, 125 N. Y. 660, 26 N. E. 732 (1891); Hill v. Hoeldtke, 104 Tex. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672, with note (1912); Zwietusch v. Becker, 153 Wis. 213, 140 N. W. 1056 (1913).

"The person who has made the stipulation cannot revoke it if the third party has declared that he wished to take advantage of it." French Civil Code, § 1121. See, also, Civ. Code Cal. § 1559; Civ. Code S. D. § 1193; Rev. Laws Okl. 1910, § 895.

Before any knowledge and reliance by the beneficiary, the promisee may have the power to discharge the promisor. See International Trust Co. v. Keefe Mfg. & Inv. Co., 40 Colo. 440, 91 Pac. 915 (1907); Trimble v. Strother, 25 Ohio St. 378 (1874); Berkshire Life Ins. Co. v. Hutchings, 100 Ind. 496 (1884); Commercial Nat. Bank v. Kirkwood, 172 Ill. 563, 50 N. E. 219

SEDGWICK v. BLANCHARD et al.

(Supreme Court of Wisconsin, 1919. 170 Wis. 121, 174 N. W. 459.)

Action by Edith Sedgwick against Ernest B. Blanchard and another. From judgment for plaintiff, defendants appeal. Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.

On the 31st day of December, 1903, H. C. Blanchard, an aged widower, was the owner of a farm, consisting of 160 acres, in Dunn county, Wis. On that day he entered into a contract with his son, E. B. Blanchard, whereby the son agreed to at once take possession of said premises and personal property, till the farm, and provide the said H. C. Blanchard with support and maintenance. The father agreed "to give to said first party by deed or otherwise, to take effect at the death of said second party," the east 80 acres of said farm, and to Edith Sedgwick (plaintiff herein and daughter of H. C. Blanchard) the west half of said farm. It was further agreed in said contract that any failure on the part of the son to keep and perform any of the conditions thereof on his part to be performed should render said contract null and void, and that thereupon, on demand, said son should at once deliver to said father possession of said premises as well as the personal property. The said H. C. Blanchard died March 23, 1915. This action was commenced by Edith Sedgwick, daughter of H. C. Blanchard, to compel the conveyance to her by E. B. Blanchard and wife of the west 80 acres of said farm. * * *

OWEN, J.[84] * * * The court found that, within a few days after the execution of the contract alleged in the complaint, the defendant E. B. Blanchard and his wife entered into possession of the premises and personal property described in the contract, and for a year and a half faithfully performed the conditions of the contract; that on or about July 8, 1905, the said E. B. Blanchard and his wife,

(1898); Gilbert v. Sanderson, 56 Iowa, 349, 9 N. W. 293, 41 Am. Rep. 103 (1881). This is undoubtedly true, even after assent by the beneficiary, in the case of a bilateral contract, where the promisor's duty is conditional on performance by the promisee and they mutually rescind. Hartman v. Pistorius, 248 Ill. 568, 94 N. E. 131 (1911).

Where the consideration is executed, and the third party is sole beneficiary, the promisee has been held to have no power to discharge even before notice to the beneficiary. Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509, 96 Am. St. Rep. 1003 (1903); Wetutzke v. Wetutzke, 158 Wis. 305, 148 N. W. 1088 (1914). The right of the beneficiary of a life insurance policy is generally held to be irrevocable by the insured, even prior to any knowledge or assent by the beneficiary, unless the power of revocation is reserved in the policy. Such a power may of course be reserved. See Roberts v. Northwestern Nat. Life Ins. Co., 143 Ga. 780, 85 S. E. 1043 (1915).

A sole beneficiary has the power of discharge, even against the will of the promisee. Meyer v. Walker-Smith Grocer Co., 60 Tex. Civ. App. 462, 127 S. W. 1118 (1910).

[84] Part of the statement of facts and part of the opinion are omitted.

Elizabeth, having become dissatisfied with the terms of the contract, voluntarily breached the same, left and abandoned said premises, and left the father, H. C. Blanchard, in exclusive control thereof; that about a month later the father, upon promise of making better terms with them, induced them to return to the premises, and on August 8, 1905, they did return to the premises, and continued to work and farm the same, and to support and maintain the father down to the time of his death, March 23, 1915; that on March 11, 1915, the father executed a deed to the son, whereby he conveyed the entire farm to him upon condition that he provide support and maintenance for the father during the remainder of his life, and upon his death pay to the plaintiff, Edith Sedgwick, the sum of $1,000. * * *

Whatever right the plaintiff, Edith Sedgwick, has to a conveyance of the 80 acres claimed by her, is referable to the contract of December 31, 1904. As we have seen, the terms and conditions of that contract were never executed. The contract was breached by E. B. Blanchard, who left the premises, refused to further perform the conditions thereof, and the father, H. C. Blanchard, was restored to the exclusive possession of the farm and personal property. The contract itself provided that the failure of the said E. B. Blanchard to keep or perform any of the conditions thereof should render the contract null and void. It is difficult to perceive why, in view of that provision in the contract itself, the breach thereof on the part of E. B. Blanchard, coupled with a re-entry on the part of the father, did not effectually put an end to the contract and all rights created by it. It is true that this court has gone a great ways in sanctifying contracts made for the benefit of third parties. In Wetutzke, v. Wetutzke, 158 Wis. 305, 148 N. W. 1088, in a similar transaction between father and son, where the son agreed to pay certain sums to third parties, and executed a mortgage to secure such payments, it was held that the relation of debtor and creditor was established between the son and such beneficiaries, which relation could not be changed by agreement between the father and son without the consent of the beneficiaries, and the mortgage executed by the son was enforced against the premises, notwithstanding the fact that the premises had been reconveyed to the father when it became apparent that the original arrangement could not be agreeably carried out. That case probably marks the limit to which this court will go in enforcing contracts of an executory nature made for the benefit of third parties.

In the Wetutzke Case there was no provision in the contract that in case of a breach thereof it should be null and void, nor was there a re-entry pursuant to a breach, which facts distinguish that case from this. It seems plain that the rights of plaintiff in and to the premises, a conveyance of which she seeks, were put at an end upon the termination of the contract by its own terms upon the occasion of the breach thereof by E. B. Blanchard July 8, 1905, fol-

lowed by a re-entry on the part of the father, and that she cannot compel a conveyance thereof.

It is argued by respondents that the defendants should not be permitted to profit by their own breach of the original contract. We fail to appreciate the force of this argument. Upon the breach of the contract the father was in a position where he was compelled to negotiate with some one relative to the management of the farm in such a way as would assure him his future support and maintenance. It is quite plain that, if he had entered into an arrangement with a third party, plaintiff would have had no claims upon such third party. We know of no reason why his right in this respect should be limited to third parties, nor why he and his son might not enter into a new arrangement, with the same force and effect that would be accorded an agreement between the father and a third person. The first contract was at an end, and had no more existence than as though it had never been executed. Being at an end, it could constitute no barrier to the right of the father and son to enter into the new arrangement. It follows, from what has been said, that the judgment should be reversed.

Judgment reversed, and cause remanded, with directions to enter judgment dismissing plaintiff's complaint.[85]

[85] Where the promisor's duty to the promisee is subject to an express or implied condition precedent, it is generally true that his duty to the third party is subject to the same condition. Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573 (1909); Jenness v. Simpson, 84 Vt. 127, 143, 78 Atl. 886 (1910); Shockley v. Booker (Mo. App.) 204 S. W. 569 (1918); American Loan & Mortgage Co. v. American Nat. Bank (Tex. Civ. App.) 205 S. W. 146 (1918); Osborne v. Cabell, 77 Va. 462 (1883); Davis v. Dunn, 121 Mo. App. 490, 97 S. W. 226 (1906); Supreme Council of Royal Arcanum v. Behrend, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182, 1 A. L. R. 966 (1918); Mutual Aid Union v. Wadley, 125 Ark. 449, 188 S. W. 1168 (1916).

If the contract is void or voidable as against the promisee, on grounds of fraud, mistake, or infancy, it is so likewise against the third party. Stevens Inst. of Technology v. Sheridan, 30 N. J. Eq. 23 (1878), mistake; Union City Realty & Trust Co. v. Wright, 145 Ga. 730, 89 S. E. 822 (1916), fraud and nonperformance; Arnold v. Nichols, 64 N. Y. 117 (1876), the usual rules as to rescission for fraud concerning the return of the consideration, etc., apply; Cohrt v. Koch, 56 Iowa, 658, 10 N. W. 230 (1881); Crowe v. Lewin, 95 N. Y. 423 (1884); Dunning v. Leavitt, 85 N. Y. 30, 39 Am. Rep. 617 (1881); Green v. Turner (C. C.) 80 Fed. 41 (1897); Id., 86 Fed. 837, 30 C. C. A. 427 (1898).

Special suretyship rules, by which a surety is discharged by certain voluntary acts of the creditor and promisee, have not been applied in favor of the surety as against a third party beneficiary who was himself innocent of such acts. Equitable Surety Co. v. United States, to use of W. McMillan & Son, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394 (1914); School Dist. of Kansas City ex rel. Koken Iron Works v. Livers, 147 Mo. 580, 49 S. W. 507 (1899); Victoria Lumber Co. v. Wells, 139 La. 500, 71 South. 781, L. R. A. 1916E, 1110, Ann. Cas. 1917E, 1083 (1916); Cowles v. United States Fidelity & Guaranty Co., 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838 (1903); Conn v. State ex rel. Stutsman, 125 Ind. 514, 25 N. E. 443 (1890); Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302 (1889).

JONES v. COMMONWEALTH CASUALTY CO.

(Supreme Court of Pennsylvania, 1917. 255 Pa. 566, 100 Atl. 450.)

Assumpsit by Mary A. Jones on a beneficial society certificate against the Commonwealth Casualty Company, reinsurer. Verdict for plaintiff for $5,393.33, and judgment thereon, and defendant appeals. Reversed and new trial granted.

FRAZER, J. Plaintiff sued to recover the amount due under a membership certificate in a beneficial society which provided for payment to the beneficiary of a sum of money in case of death of the member through external, violent, and accidental means. At the trial defendant offered in evidence the application for membership and the bylaws of the society. These, however, were excluded for the reason they were not attached to the certificate of membership. The question whether the death of the deceased was the result of an injury received by him about a month previous thereto was submitted to the jury, and a verdict rendered in favor of plaintiff. Defendant appeals, the questions raised being whether there was sufficient evidence to show death was due to the injury complained of to warrant submission of the case to the jury and whether the court erred in excluding deceased's application for membership and also the by-laws of the society.[36] * * *

Deceased held a certificate of membership in the Fraternities Accident Order, a beneficial corporation organized under the laws of this state. The certificate was issued in 1898, subject to the "condition that the statements and representations made by him in the application for membership * * * are true, and that said application and the laws of the order as now in force, or as hereafter enacted by the grand council, be made a part of this contract," deceased was constituted a fifth rate member, and the order promised "to pay out of its benefit fund to Mary A. Jones, wife, a sum not exceeding $5,000 in accordance with and under the provisions of the laws governing said order and fund upon satisfactory evidence of the death of said member through external, violent, and accidental means." In 1906 the defendant, a corporation organized under the laws of Pennsylvania as a corporation of the second class, took over the obligations of the Fraternities Accident Order, including the policy or certificate of deceased, by attaching to the certificate the following memorandum: "For value received the Commonwealth Casualty Company hereby agrees to assume all the covenants and agreements of the Fraternities Accident Order contained in the certificate of membership of the Fraternities Accident Order to which this agreement is attached issued to the above-named member under and subject to the stipulations and conditions therein contained to be performed by said member."

[36] Part of the opinion, dealing with the first question, is omitted.

Defendant alleges that deceased, subsequent to the date of the certificates, changed his occupation so as to increase the risk, and thereby was taken out of the "preferred list" class and was not entitled to hold membership or receive benefits as such, and, in support of this contention, offered in evidence the application for membership and by-laws of the order. This evidence was objected to and excluded for the reason above stated that the application and by-laws were not attached to the certificate, as required by the act of May 11, 1881 (P. L. 20). Had this action been founded on a policy of insurance issued by defendant there can be no doubt but that the provisions of the act would be applicable, as its provisions have been held to apply to accident insurance companies. Pickett v. Pacific Mutual Life Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618. The act does not, however, apply to beneficial societies, and the application and by-laws of an association of this class may be received in evidence though not attached to the certificate of membership. Dickinson v. Ancient Order United Workmen, 159 Pa. 258, 28 Atl. 293; Marcus v. Heralds of Liberty, 241 Pa. 429, 88 Atl. 678; Lithgow v. Supreme Tent of Knights of Maccabees of the World, 165 Pa. 295, 30 Atl. 830. Although as was decided in Marcus v. Heralds of Liberty, supra, the mere form of the organization is not conclusive, if it is in fact carrying on an insurance business rather than that of a benevolent association, there is no contention here that the certificate as issued by the Fraternities Accident Order was a policy of insurance within the meaning of the act. Only by virtue of the taking over of the contract by the Commonwealth Casualty Company, the defendant, is the argument made that the policy is brought within the Act of 1881.

When defendant took over the contract it did not issue a new policy, it merely assumed "all the covenants and agreements of the Fraternities Accident Order" under the certificate issued by the Society, subject to the "stipulations and conditions therein contained to be performed by said member." This did not effect a novation; the original contract remained as before, the proceeding being more in the nature of a transaction of a third person guaranteeing the carrying out of a contract as made. There was no agreement to release the Fraternities Accident Order from liability; neither was a new contract created.

The essentials of a novation are the displacement and extinction of a former contract, the substitution of a new agreement, a sufficient consideration therefor and consent of the parties thereto. Wright v. Hanna, 210 Pa. 349, 59 Atl. 1097; Curtin v. People's Nat. Gas Co., 233 Pa. 397, 82 Atl. 503.

The burden is upon one who alleges a novation to establish it by proper proof; and, in absence of an agreement that the original obligation should be extinguished, and a new one substituted, and the original debtor relieved, the mere acceptance of the obligation of a

third person will be considered as additional security.[37] McCartney v. Kipp, 171 Pa. 644, 33 Atl. 233. The transaction in the present case was merely an undertaking by defendant to assume the obligations of the beneficial society under its certificate for a consideration moving between themselves. So far as the member was concerned, the original undertaking remained in force, and no new agreement was substituted, nor is there evidence of an agreement on the part of the member to release the society from its obligation. The certificate remained the obligation of the beneficial society, and defendant merely undertook to carry out its terms. The certificate or policy, not being within the act of 1881, when originally issued, did not come within its provisions by the undertaking on the part of defendant to carry out its terms. Defendant stood in the same position as the beneficial society, succeeded to its rights and privileges under the contract, and became liable only to the same extent as the society was liable. Deceased's application for membership and the by-laws of the society should have been received therefore for the purpose of accurately determining the extent of defendant's liability. As these documents are not included in the record before us, the case must be sent back for retrial.

The second assignment of error is sustained, the judgment reversed, and a new trial granted.[38]

[37] This is the better rule. Fischer v. Hope Mut. Life Ins. Co. of New York, 69 N. Y. 161 (1877); Rodenbarger v. Bramblett, 78 Ind. 213 (1881); Davis v. Hardy, 76 Ind. 272 (1881); Gay v. Blanchard, 32 La. Ann. 497, 505 (1880), "true, there was no novation of the debt; there was simply an additional obligor bound for it"; Feldman v. McGuire, 34 Or. 309, 55 Pac. 872 (1899); Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476, 2 L. R. A. (N. S.) 783, 110 Am. St. Rep. 911 (1905); Leckie v. Bennett, 160 Mo. App. 145, 141 S. W. 706 (1911). See, also, Poe v. Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713 (1899).

This is necessarily true in mortgagee beneficiary cases, where the court bases the mortgagee's right against the grantee who has assumed the debt upon the doctrine of subrogation. See Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868 (1895).

But there are cases holding that the third party must elect between his former debtor and the new promisor, and that a suit against either one will bar any action against the other even though it does not result in collection. Bohanan v. Pope, 42 Me. 93 (1856); Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427 (1887); Warren v. Batchelder, 16 N. H. 580 (1845). See, also, Aldrich v. Carpenter, 160 Mass. 166, 35 N. E. 456 (1893).

[38] Where an insurance company reinsures its risk, the contract of reinsurance may be so worded as to create a right in the policy holder against the new company. See Federal Life Ins. Co. v. Barnett (Ind. App.) 125 N. E. 522 (1919).

CHAPTER VII

ASSIGNMENT

MOWSE v. EDNEY.

(In the Queen's Bench, 1600. Rolle's Abr. 20 pl. 12.)

If A is indebted to B by bill and B indebted to C, and B in payment of his debt to C assigns A's bill to him, and before the day for the payment of the money A comes to C and promises him that if he will forbear to enforce the payment of the money then he, A, will pay him; upon which C forbears. Still there is no consideration to maintain any action on this promise, because notwithstanding the assignment of the bill, still the property of the debt remains always in the assignor.[1]

HARVEY v. BATEMAN.

(About 1600. Noy, 52.)

That if a man assign an obligation to another for a precedent debt due by him to the assignee, there, that is not maintenance; but if he assign it for a consideration then given by way of contract, that is maintenance.[2] Ve. 34 H. 6, 30.

CASE OF BRADSHAW et al.

(In the Common Pleas, 1605. Cro. Jac. 105.)

Divers debts were assigned to the plaintiffs, being creditors, by the commissioners upon the statute of 13 Eliz. c. 7, of Bankrupts, and they

[1] Cf. Barrow v. Gray, Cro. Eliz. 551 (1597). Even when Rolle was making this statement, the assignee could sue in the courts of common law in the name of the assignor, acting in accordance with a written power of attorney or in accordance with a power to be inferred from the mere fact of the assignment itself. Soon after this, the Court of Chancery recognized and enforced the rights of an assignee, allowing him as matter of course to sue in his own name. See Fashion v. Atwood, 2 Cas. in Ch. 36 (1680); Crouch v. Martin, 2 Vernon, 595 (1707); Row v. Dawson, 1 Ves. Sr. 331 (1749).

[2] The reason why choses in action were not assignable in early law was probably the fact that people were unaccustomed to doing business except by transferring physical articles. It was not due to the subsequently developed theories concerning illegal maintenance of suits. These later theories tended for a time to support the rule of nonassignability when it was being undermined by modern business practice; but they play little part in the law of assignment to-day. See Ames, "The Inalienability of Choses in Action," III Essays Anglo-Amer. Legal Hist. 580; Fitzroy v. Cave, [1905] 2 K. B. 364, 5 Brit. R. C. 601.

sued an action in their own names for those debts.—And it was ruled, that it well lies; for it is a debt transferred by Parliament.

Being upon a contract, the defendant gaged his law, and was admitted thereto; for although the Parliament transferred the debt, yet it is not any debt of record; but as he might have gaged his law against the bankrupt, so he may against the plaintiffs.[3]

REDFIELD v. HILLHOUSE.

(Superior Court of Connecticut, 1774. 1 Root, 63.)[4]

Scire facias against him, as agent and factor to Isaac Colton, an absconding debtor.

The case was—Isaac Colton assigned a note he had against one Hull, to William Colton, with a power of attorney; William puts it into the hands of Mr. Hillhouse to collect, and he collected the money upon it; Redfield instituted an action against said Isaac as an absconding debtor, and served Mr. Hillhouse with a copy; he recovered a judgment and execution against Isaac and the execution was returned non est inventus, and thereupon he brings this scire facias against Mr. Hillhouse; and the defendant pleads that he never was agent, factor or attorney to said Isaac, etc.

The only question upon this issue, was—Whether the property of this money was in Isaac, the promisee, or in William, the assignee of the note?

THE COURT decided the property to be in the assignee, and that said Hillhouse was not agent, factor or attorney to said Isaac.[5] * * *

WINCH v. KEELEY.

(In the King's Bench, 1787. 1 Term R. 619, 99 Eng. Rep. 1284.)

Indebitatus assumpsit for work and labour, money paid, laid out, and expended, money lent, and on an account stated.

Pleas, 1st, non assumpsit. 2dly, that after the day of making the promises, etc. the plaintiff became a bankrupt, etc. and that his commissioners assigned over his effects to the assignees, etc. by virtue of which he the defendant is chargeable to pay the sums of money mentioned in the declaration to the assignees, etc. 3dly, set-off for goods sold and delivered, money paid, laid out, and expended, money lent, and for money due on an account stated.

The replication admitted the matters contained in the 2d plea to be true; and as to all the promises in the declaration mentioned, and all

[3] See, also, Baker v. Edmonds, Aleyn, 28 (1646).

[4] Part of the report is omitted.

[5] In accord: St. John v. Smith, 1 Root (Conn.) 156 (1790).

the sums therein contained, except as to £73. 12s. 9d. parcel, etc. the plaintiff acknowledged that he would not further prosecute. Then the replication proceeded as follows: And as to that sum, he says that, before the time that the plaintiff became a bankrupt in manner and form as the defendant hath in his said plea alleged, the said defendant was indebted to him the said plaintiff in the several sums of money in the said declaration mentioned, and that he the said plaintiff was also indebted to the said defendant in certain other large sums of money; and that upon an account fairly and justly taken between the said plaintiff and the said defendant there was then due and owing from the defendant to him the said plaintiff, on the balance of such account, the sum of £73. 12s. 9d. for and on account of the several sums of money in the third and fourth counts of the said declaration mentioned, over and above all sums of money whatsoever due and owing from the said plaintiff to the said defendant, that is to say, at Westminster aforesaid; and the said plaintiff farther saith, that he the said plaintiff, before the time that he became and was a bankrupt in manner and form as in the said plea mentioned, to wit, on the 20th of October 1785, at Westminster aforesaid, in the said county, became and was justly indebted to one Joseph Searle in a large sum of money, to wit, in the sum of £73. 12s. 9d. And, being so indebted, he the said plaintiff afterwards, to wit, on the day and year last aforesaid, and before he became a bankrupt, to wit, at Westminster aforesaid, in the county aforesaid, by his certain deed poll, sealed with the seal of him the said plaintiff, which said deed he the said plaintff brings here into Court, the date whereof, etc. in consideration of the said sum of money so as aforesaid due and owing from him the said plaintiff to the said Joseph Searle, did bargain, sell, assign, and transfer to the said Joseph Searle the said sum of £73. 12s. 9d. parcel of the money in the said declaration mentioned; to hold the same to the said Joseph Searle from thenceforth to his own proper use, under a certain proviso therein and hereinafter mentioned; and did thereby constitute and appoint the said Joseph Searle his true and lawful attorney irrevocably, and did give and grant unto him, his executors and administrators, full power and authority in his name, to the only proper use and behoof of the said Joseph, to ask, demand, and sue for, the aforesaid sum of £73. 12s. 9d. Provided always, that if he the said plaintiff, his executors or administrators, should well and truly pay, or cause to be paid, unto the said Joseph the said sum of £73. 12s. 9d. so due and owing to him as aforesaid, within two calendar months after the date of those presents, then the said deed-poll, and every article and clause therein contained, should be void; as by the said deed-poll, relation being thereunto had, may more fully appear. And the said plaintiff further saith, that he did not, at any time within the space of two calendar months after the date of the said deed, pay to the said Joseph the said sum of £73. 13s. 9d. so due and owing to him as aforesaid, but that the same hath from thence hitherto remained due and unpaid from the

said plaintiff to the said Joseph; and that the original writ in this suit was sued out in the name of him the said plaintiff for and on the behalf of the said Joseph Searle, and for the purpose of enabling the said Joseph Searle to receive the said sum of £73. 12s. 9d. parcel of the said sums in the said declaration mentioned, according to the form and effect of the said deed poll, and not for the benefit, use, or behoof, of the said plaintiff, that is to say, at Westminster aforesaid, in the county aforesaid; and this he is ready to verify, wherefore he prays judgment, etc. as to the said £73. 12s. 9d. To this replication there was a general demurrer and joinder.

Morgan in support of the demurrer, contended that this debt, being a chose in action, could not be assigned. Co. Litt. 214a. 2 Rol. Abr. 45, F. 6. Although the King by his prerogative may assign a chose in action, yet his grantee cannot. Cro. Eliz. 180. Bills of exchange are assignable by the law of merchants; but promissory notes can only be assigned under the 3 & 4 Ann. c. 9, which shews that at common law they could not. That being the law generally, that inconvenience will result from permitting persons subject to the bankrupt laws to assign over their effects to particular creditors on the eve of a bankruptcy.

Lawrence, contra, did not dispute the general principle; and admitted that if the action had been brought in the name of Searles, those cases would have applied; and that this assignment could not have been supported if it had been fraudulent. But he observed that the question here was, whether a chose in action can be assigned for an antecedent debt, so that the assignee may recover on it in the name of the assignor. The cases cited only prove that the action cannot be maintained by the assignee. It cannot now be disputed that Courts of Equity will protect a chose in action when assigned; and Courts of Law have frequently permitted the assignee to sue in the name of the assignor. A Court of Equity has held such an assignment to be good, even though the assignor afterwards became a bankrupt. Unwin v. Oliver, cited by Lord Mansfield, in 1 Burr. 481. Ex parte Byas, 1 Atk. 124. If then such an assignment be good in a Court of Equity, the only question is, whether or not this Court will take notice of such a trust. Now Courts of Law have taken notice of trusts in many instances. In the case of Bottomley v. Brooke, M. 22 G. 3, C. B. (Vide 2 Black. Rep. 1271), which was debt on bond, the defendant pleaded that the bond was given for securing £100. lent to the defendant by one E. Chancellor, and was given by her direction to the plaintiff in trust of her, and that E. Chancellor, before the action brought, was indebted to the defendant in more money than the amount of the bond; to this there was a demurrer, which was withdrawn by the advice of the Court. So that the Court there did not look to the person legally entitled, but to her who was beneficially interested in the bond. The authority of this case was afterwards recognized in that of Rudge

v. Birch, M. 25 G. 3, B. R., in this Court, where, to debt on bond the defendant pleaded, that the bond was given to the plaintiff in trust for A. for a debt due from the defendant to A.; and that A. at the time of exhibiting the plaintiff's bill was indebted to the defendant in more money. The plaintiff demurred, and the Court, on the authority of the case of Bottomley v. Brooke, held this to be a good plea. It has likewise been since recognized in Webster v. Scales, M. 25 Geo. 3, where it was held by the Court that a bankrupt's interest as a trustee was not assignable by the commissioners. Immediately on this assignment the plaintiff became a mere trustee; if so, this case falls within the principle of that of Webster v. Scales. For by the 1 Jac. 1, c. 15, § 15, the commissioners are only empowered to assign those things which are for the benefit of the bankrupt. Therefore this debt could not pass under the assignment from the bankrupt's commissioners to his assignees; because, when recovered, it cannot be applied to the bankrupt's benefit.

Morgan in reply. There is no doubt but a chose in action may be assigned in equity; but the question here is, whether it can be so assigned in a Court of Law. In Bottomley v. Brooke, the parties had only done what they lawfully might; the bond was originally given to the plaintiff for the benefit of Mrs. Chancellor; and on an account between her and the defendant she would have been found indebted to him: but no question there arose concerning the assignment of a chose in action. In the case of Rudge and Birch the plaintiff was a trustee: but here the plaintiff is not to be considered in that light; because he was the original debtor, and unless he could assign a chose in action, his interest in the bond is now vested in his assignees.

Ashhurst, J. The cases which have been cited by the plaintiff's counsel go a great way in determining this question. It is true that formerly the Courts of Law did not take notice of an equity or a trust; for trusts are within the original jurisdiction of a Court of Equity: but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this Court will take notice of a trust, and consider who is beneficially interested; as in Bottomley v. Brooke, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her. The only difference between that case and this is, that there the plaintiff himself was not originally interested in the debt, but this plaintiff was: but that does not make any essential difference, because if it be once established that this Court will take notice of trusts, it is immaterial whether the person who sues were

originally a trustee or afterwards becomes so. Nor is it material at what time they became a trustee; for whether he became such by the assignment, or was so originally, it is sufficient to say that he is a trustee now, and as such has a right to maintain this action. If this had been a fraudulent assignment, it would have raised a different question: but on these pleadings it must be taken to have been assigned for a valuable consideration. The case of Webster and Scales is in point; and on the authority of that and on the other cases cited, I am of opinion that the plaintiff may recover.

BULLER, J. This action is brought in the name of the assignor of this bond; and therefore it does not involve in it the question whether a chose in action may be so assigned as to give a legal title to the assignee. The plea only says, that the plaintiff is become a bankrupt, and that this debt is transferred to his assignees; the answer to that is, that this is a debt due in form to the plaintiff, but in substance to a third person; and therefore it is not such a debt as passed under the commission; if not, it is still in the plaintiff, and he is entitled to maintain this action. The statute of the 1 Jac. 1, c. 15, only says that such debts are to be assigned as are for the benefit of the bankrupt. This construction was put upon the statute soon after it passed in a case in March, 38; where it was held that such things as the bankrupt held as trustee did not pass under the commission. Here it must be taken on these pleadings that this debt did not pass under the commission; therefore it remained in the bankrupt, and he may maintain this action.

Judgment for the plaintiff.[6]

CAMP v. TOMPKINS.

(Supreme Court of Errors of Connecticut, 1833. 9 Conn. 545.)

This was an action of assumpsit, brought by Tompkins against Henry L. Camp. The declaration comprised four counts, the three first being special, and the last general, for money had and received to the plaintiff's use. In the former, the plaintiff averred, that in November 1829, Lyman C. Camp, being indebted to him in a large sum of money, delivered to him a promissory note, signed by Henry Hoyt, dated October 1st, 1829, for 61 dollars, 62 cents, payable to the order of Henry L. Camp, on demand; which the plaintiff received in part payment of his debt, and gave notice thereof to Hoyt; that Lyman C. Camp then was, and ever since has been, insolvent; that this note, by mistake and inadvertence, was made payable to the defendant, instead of Lyman C. Camp, who, at that time, and at the time of transferring the note, was, with the assent of the defendant, the holder thereof, and entitled to the money due thereon; that the de-

[6] In accord: Parsons v. Woodward, 22 N. J. Law, 196 (1849).

fendant, knowing the premises, but intending to defraud the plaintiff, on the 8th of February, 1830, obtained payment of said note from Hoyt, and gave him a discharge therefrom; and by means of the premises, defendant became liable to pay, and in consideration thereof, promised to pay, &c.

On the trial, before the city court of the city of Middletown, on the general issue, the plaintiff claimed to have proved the facts alleged in the special counts, but offered no evidence of any express agreement by the defendant, or of any other facts than those stated in the special counts, in support of the general count. The defendant insisted, that these facts, if proved, did not entitle the plaintiff to a verdict; and prayed the court so to instruct the jury. The court instructed the jury, that if they should find the facts as claimed by the plaintiff, the defendant thereupon became liable, and the law implied a promise on his part, to pay to the plaintiff the sum specified in Hoyt's note, with the interest. The jury returned a verdict for the plaintiff, on which judgment was rendered. * * *

WILLIAMS, J. * * * But if it is admitted, that this plaintiff cannot maintain a suit, in his own name, on the note, it must, I think also be admitted, that he might maintain a suit in the name of the promisee, for the benefit of the bona fide owner, as well as in any other case where the legal interest is not transferred. Tompkins, upon the facts presented in this case, must have all the rights that the assignee of a chose in action not negotiable could have had.

What, then, are these rights? It is well known, that an entire revolution in opinion has taken place upon that subject. The antipathy, which formerly existed against the assignment of a chose in action, has gradually yielded to sentiments more congenial to the demands of commerce and the state of society. The history of this change is given by Judge Buller, in his able opinion in the case of Master v. Miller, 4 T. R. 320, 341. He there held, that the courts of law in that country, had, on that subject, adopted all the principles of a court of equity, except that they would not allow a suit in the name of the assignee; and he did not hesitate to say, that he saw no use in preserving the shadow, when the substance was gone. And in pursuance of that opinion, the courts in that country have refused to suffer a defendant, who had notice of an assignment of a chose in action, to plead a discharge from the assignor obtained after such assignment. Legh v. Legh, 1 Bos. & Pull. 447.

Such also is the law of New York.

And our legislature, in May, 1822, enacted, that such a discharge, admission, &c. should have no effect other than it would have in a court of equity. Stat. vol. 2, p. 19.

Our courts also early decided, that after assignment and notice, the debt could not be taken, by foreign attachment, as the property of the debtor, (Willes v. Pitkin, 1 Root, 47; Redfield v. Hillhouse,

1 Root, 63; Fobs v. Brewster & al., 1 Root, 234; Tudor Woodbridge & Co. v. Perkins, 3 Day, 364,) and that an action at law will lie against the promisor for taking, or the promisee for giving a discharge, after assignment and notice, if a loss accrues thereby. Coleman v. Wolcott, 4 Day, 28, 29.

They have also held, that such assignee is so far the real creditor, that if the debtor petition for an act of insolvency, the assignee, and not the assignor, is to be notified as the creditor, as he alone could receive payment. Colbourn v. Rossiter, 2 Conn. 503, 508. In that case, it is said, by Smith, J., that "whenever any collateral injury is done to the debt, such as obliterating, destroying, or converting the note wrongfully to the use of another; or any injury to process on the note, such as rescous or escape; the action may, and ought to be, brought in the name of the assignee;" and Gould, J., says, "in such actions, the rights of the assignee are a proper subject of averment, and courts of law recognize and protect them;" and Hosmer, J., says, "the whole beneficial interest is in him, and of this a court of law is authorized to take cognizance." And in Lyon v. Summers, 7 Conn. 400, 406, Daggett, J., says: "This title will be recognized in a court of equity, and also in a court of law, and fully protected. It must be sued in the name of the promisee; and is liable to all the equity, which subsisted between the original parties."

The rule, then, I understand to be established, in this State, that the assignee of a chose in action not negotiable, has all the rights of the assignor, except that of commencing a suit in his own name. And if so, it would seem to follow, that whenever the action was not upon the obligation itself, it might be brought in the name of him who had the beneficial interest; and that in this case, when the debt was paid, the payment must be considered as made for the benefit of him who had the beneficial interest.

It is, however, objected, that there was no privity of contract between this plaintiff and defendant. This must depend upon the right of the plaintiff; for if he has a right to this note, by the assent of this defendant, this objection cannot prevail. There is always a supposed privity of contract between the person whose money it lawfully is and the person who has received it. Kitchen & al. v. Campbell, 3 Wils. 304, 307. And in the case of the Eagle Bank v. Smith, 5 Conn. 71, 75, 13 Am. Dec. 37, it was held, that in this action no privity was necessary. And the court say, this doctrine of privity in the action for money had and received, is in direct opposition even to the common cases in which the action is sustained.

The case of Williams v. Everett & al., 14 East, 582, differs entirely from this, as there was an express dissent.

In connection with this, it was also once insisted upon, that this action was founded upon a tort, and was not within that class of cases where the tort could be waived. But the cases of Lightly v. Clouston, 1 Taun. 112, and Foster v. Stewart, 3 M. & S. 191, shew,

that this objection is not tenable; and in Smith v. Jameson, 5 T. R. 601, 603, Buller, J., in answer to the objection that a breach of trust may not be the ground of an action of assumpsit, says, there is not an abridgement in the law, which does not contradict that proposition.

The great objection, however, is, that the plaintiff has only an equitable, and not a legal interest, and so ought to seek redress in a court of equity. The principle of the case cited above as to the assignment of choses in action, is in direct hostility to this claim—Whose was this note? Had it been lost, who could have maintained an action for it? Had it been discharged, who could have maintained an action for giving or receiving such discharge? Had the assignor and assignee both absconded, whose effects would this money have been, under our foreign attachment law? In short, whose was the beneficial interest? This question must be considered as settled. If so, it seems to me to follow, of course, that the moment the money was paid by Hoyt, it became the money of Tompkins; and that he had as good right to it, as if it had been paid to his attorney or a sheriff on an execution. Courts of law now treat a mortgagor as the real owner of the land, as well as courts of equity, although he has not a legal title; and why the same principles should not apply to this case I cannot see. * * *

The note then, was the note of the plaintiff; and although he might not have been able to enforce the collection, by a suit in his own name, yet when the money was paid, that technical difficulty does not exist, and the money is to be considered as his own; and a suit may be brought in his own name against the person who detains it.

I am further of opinion, that whether the right to this money is either an equitable or a legal right, the plaintiff may sustain this action. This action for money had and received is in nature of a bill in equity, and the gist of the action is, that the party is obliged by the ties of equity and natural justice, to refund the money. * * *

It seems to me, that in this case, there can be no difficulty, even if the plaintiff's interest is considered a mere equitable interest. When this defendant received this money, the fair inference, and the only inference consistent with his integrity, is, that he received it for the use of the plaintiff; and if so, the law will imply an obligation in him to refund it. And I can say, with Ch. J. Willes, when the equity of the case is clearly with the plaintiff, I will always endeavour, if I can, and if it be any way consistent with the rules of law, give him relief at law.

I can, therefore, see no error in the charge of the city court, or in the judgment of the superior court.

The other Judges were of the same opinion.

Judgment affirmed.[7]

[7] Storrs, for the defendant, argued that "Lyman C. Camp had only an equitable interest, and so could transfer only an equitable interest to the plaintiff, whose remedy is in equity only"; also that "the action for money had and

JEMISON v. TINDALL.

(Supreme Court of New Jersey, 1916. 89 N. J. Law, 429, 99 Atl. 408.)

Action by Margaret R. Jemison against Enoch N. Tindall. From a judgment for plaintiff, defendant appeals. Affirmed.

PARKER, J. The appellee, plaintiff below, employed appellant, Tindall, and two other men, named Miller and Cohen, to sell her farm, and agreed in writing to pay them $300 commission, which they earned by effecting a sale. Mrs. Jemison then paid the commission to Tindall, who receipted both for himself and the others, but concealed from them the fact of payment. Later they learned of it, and, instead of bringing suit against Tindall for their shares of the commission, sued Mrs. Jemison jointly and recovered judgment against her for $200 as for their shares in the amount earned. The propriety of that judgment is not in question here. Mrs. Jemison paid the judgment, at the same time taking from Miller and Cohen an assignment by parol of their claim against Tindall, and then sued him to recover back so much of the commission as her assignors were entitled to have on a settlement between them and Tindall. This the trial court found was $150 and gave her a judgment for that amount and interest, from which Tindall appeals.

The principal point urged for the appellant is that the parol assignment was invalid, or, at most, enforceable only in equity; but neither branch of this proposition is sound. A chose in action arising out of contract is assignable by parol (Hutchings v. Low, 13 N. J. Law, 246; Allen v. Pancoast, 20 N. J. Law, 68; Sullivan v. Visconti, 68 N. J. Law, 543, 549, 53 Atl. 598; New Jersey Produce Co. v. Gluck, 79 N. J. Law, 115, 74 Atl. 443), in which last case the subject of assignment was a right of action on book account. And by section 19 of the Practice Act of 1903 (P. L. p. 540), choses in action arising on contract are assignable at law, and the assignee may sue thereon in his own name. This is applicable to suits in district courts. C. S. p. 1977, § 68.[8]

received lies only where the plaintiff has a legal title to the money sought; the effect of maintaining this action would be, to make choses in action assignable at law to all intents."

The argument of counsel and part of the opinion of the court are omitted.

If an assignor receives payment, the debtor having no notice, he holds the money in trust for the assignee. See Garrott v. Jaffray, 73 Ky. (10 Bush) 413 (1874); Brown v. Brown (N. Y. Gen. T.) 40 Hun, 418 (1886); Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149 (1914).

[8] By statute everywhere in this country contract rights and other choses in action have been made assignable, so that in an ordinary action at law the assignee may (and very generally must) sue in his own name. He, and not the assignor, is "the real party in interest." See Stimson, Amer. Stat. Law, §§ 4031, 4032; N. Y. Code Civ. Proc. § 449; Personal Property Law, § 41 (Consol. Laws, c. 41).

Mass. Rev. Laws, c. 173, § 4, requires the assignment to be in writing to enable the assignee to sue in his own name, but very informal writings may

The other grounds of appeal are either irrelevant or without merit, and the authorities cited in support of them need not be particularly noticed.

The validity of the parol assignment being clear, Mrs. Jemison acquired thereby the rights that Miller and Cohen jointly or severally had to recover from Tindall such part of the commission as they were entitled to under their arrangement with Tindall; or if it be assumed that Tindall had no right to collect the whole commission in the name of the three, and that Mrs. Jemison still remained liable to Miller and Cohen for their shares, she was then entitled to recover back such amount as Tindall was overpaid.

In either event, the judgment should be affirmed.

LEGH v. LEGH.

(In the Court of Common Pleas, 1799. 1 Bos. & P. 447.)

On a former day Shepherd, Serjt., shewed cause against a rule Nisi obtained by Le Blanc, Serjt., for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this: Frances Legh having given a bond to Sarah Legh to secure £75, Sarah assigned it to John Legh as a security for the payment of a lesser sum, of which Frances had notice: John having brought an action on the bond against Frances in the name of Sarah, Sarah gave a release to Frances by whom she had been satisfied her debt, and this release was pleaded.

EYRE, C. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER, J. There are many cases in which the Court has set aside

suffice. See New England Cabinet Works v. Morris, 226 Mass. 246, 115 N. E. 315 (1917). This requirement does not generally prevail. See 4 Cyc. 96–98.

"The ancient prejudice against assigned rights of action having worn itself out, the only practical consequence left is in the manner of naming the plaintiff. * * * The act [Pennsylvania statute] requires two witnesses to an assignment. If the assignment has but one witness, it does not pass legal title, and suit is brought in the name of the assignor to the use of the assignee. Either assignment is good to all intents and purposes. One is a legal assignment; the other is an equitable one; but one is as good as the other." In re Hawley Down-Draft Furnace Co. (D. C.) 233 Fed. 451 (1916).

a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

Shepherd on this day stated that the Defendant objected going before the prothonotary, upon which the Court said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the Statute to plead several pleas, the Court had no discretion.

EYRE, C. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the Court. And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER, J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the Defendant consented to go before the prothonotary.[9]

WELCH v. MANDEVILLE.

(Supreme Court of the United States, 1816. 1 Wheat. 233, 4 L. Ed. 79.)

Error to the Circuit Court for the District of Columbia for Alexandria County. This was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville and Jamieson. The suit abated as to Jamieson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this Court arises, states, that, on July 5th, 1806, James Welch impleaded Mandeville and Jamieson, in the Circuit Court of the District of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterward, to wit, at a session of the Circuit Court, on December 31st, 1807, "the said James Welch came into Court and acknowledged that he would

[9] If the assignor's release to his debtor is effective, because the debtor had no notice of the assignment or for other reason, the assignee has an action against the assignor. Franklin Fire Ins. Co. of Philadelphia v. Weinberg, 108 Misc. Rep. 500, 178 N. Y. Supp. 539 (1919); People ex rel. Stanton v. Tioga Common Pleas, 19 Wend. (N. Y.) 73 (1837), semble. The law recognized this right against the assignor even before it acknowledged that the assignee had a right against the debtor. Deering v. Farrington, 1 Mod. 113, 3 Keb. 2 (1674); Caister v. Eccles, 1 Ld. Raym. 683, Salk. 68 (1702).

not farther prosecute his said suit, and from thence altogether withdraw himself." The plea then avers, that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville and Jamieson, in the former suit, are the same persons who are defendants in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into Court and acknowledge that he would not farther prosecute the said suit and from thence altogether withdraw himself; and avers that James Welch, being indebted to Prior, in more than $8,707.09, and Mandeville and Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in $8,707.09, to Welch, he, Welch, on September 7th, 1799, by an equitable assignment, assigned to Prior, for a full and valuable consideration, the said $8,707.09, in discharge of the said debt, of which assignment the replication avers Mandeville and Jamieson had notice. The replication further avers, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication farther avers, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, that the said James Welch had no authority from Prior to agree or dismiss said suit. The replication farther avers, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers, that the said Prior did not know that the said suit was dismissed until after the adjournment of the Court at which it was dismissed; and, farther, that the supposed entry upon the record of the Court in said suit, that the plaintiff voluntarily came into Court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covin, collusion, and fraud; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words: "This suit is dismissed, agreed," and that this entry was made by the clerk without the order of the Court, and that there is no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.

STORY, J., delivered the opinion of the Court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covinous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a retraxit; and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is bona fide, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the Court, that the judgment of the Circuit Court, overruling the replication to the second plea of the defendant, is erroneous, and the same is reversed, and the cause remanded for further proceedings.

Judgment reversed.[10]

[10] After notice of the assignment, given to the debtor, the assignor has no power to discharge the debtor, either by a release, or by receiving payment, or by accord and satisfaction: Carrington v. Harway, 1 Keb. 803 (1676); McCullum v. Coxe, 1 Dall. (Pa.) 139, 1 L. Ed. 72 (1785); Andrews v. Beecker, 1 Johns. Cas. (N. Y.) 411 (1800); Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258 (1801); Littlefield v. Storey, 3 Johns. (N. Y.) 425 (1808); Hackett v. Martin, 8 Greenl. (Me.) 77 (1831); Colbourn v. Rossiter, 2 Conn. 503 (1818); Jones v. Witter, 13 Mass. 304 (1816); Duncklee v. Greenfield S. M. Co., 23 N. H. 245 (1851); Jenkins v. Brewster, 14 Mass. 291 (1817); Dawson v. Coles, 16 Johns. (N. Y.) 51 (1819), a judgment in favor of the assignor does not discharge the assignee's claim by merger; Briggs v. Dorr, 19 Johns. (N. Y.) 95 (1821), release by assignor invalid; Field v. Mayor, etc., of City of New York, 6 N. Y. 179, 57 Am. Dec. 435 (1852), debtor not discharged by payment after notice; Brice v. Bannister, 3 Q. B. D. 569 (1878), same; Swan v. Maritime Ins. Co., [1907] 1 K. B. 116; St. Johns v. Charles, 105 Mass. 262 (1870), payment in advance of the time when payment was due.

See Cook, "The Alienability of Choses in Action," 29 Harv. Law Rev. 816; Y. B. 22 Lib. Ass. pl. 91.

Payment to the assignor by the debtor extinguishes the debt, if the debtor had no notice of the assignment. Such was also the rule of the Roman law. Dig. II, 15, 17.

CARTER & MOORE v. UNITED INS. CO. of NEW YORK.

(Court of Chancery of New York, 1815. 1 Johns. Ch. 463.)

The bill was filed by the plaintiffs, as assignees of a policy of insurance, underwritten by the defendants, for William Titus and George Gibbs, on which the plaintiffs claimed payment for a total loss. The insurance was on 500 barrels of flour from Newport to St. Jago de Cuba, on board the Spanish brig Patriota, which was captured by a Carthagena privateer. On the 21st of December, 1814, the policy was assigned by Titus & Gibbs to the plaintiffs, in trust, for themselves and other creditors of Titus & Gibbs. The bill charged that the defendants refused to pay the loss, alleging, among other things, that the plaintiffs had no title to the property insured, which, in fact, belonged to one J., a Spaniard, and not to Titus & Gibbs. The bill prayed that the defendants might answer the matter charged in the bill, and be compelled to pay the plaintiffs the amount insured as for a total loss.

To this bill the defendants demurred on the following grounds: that it appeared by the bill that the plaintiffs' demand, or cause of action, was properly cognizable in a Court of Law; as it is not alleged that Titus & Gibbs refused to let the plaintiffs make use of their names, in a suit at law; or that they are, in any way, hindered from prosecuting at law; or that they stood in need of any discovery to aid them in such action.

THE CHANCELLOR [KENT]. The demand is properly cognizable at law, and there is no good reason for coming into this Court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor, in the analogous case of Dhegetoft v. The London Assurance Company, Mosely, 83, that, at this rate, all policies of insurance would be tried in this Court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. 3 Bro. P. C. 525. The bill, in this case, states no special ground for equitable relief; nor is any discovery sought which requires an answer.

Bill dismissed, with costs.[11]

[11] In accord: Dhegetoft v. London Assur. Co. Mosely, 83, affirmed 4 Bro. P. C. 436 (1730); Cator v. Burke, 1 Bro. Ch. 434 (1785); Hammond v. Messenger, 9 Sim. 327 (1838); Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596, 615 (1848); Walker v. Brooks, 125 Mass. 241 (1878); Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271 (1882); New York Guar. & T. Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484 (1882); Booth v. Warner (1797), reported in Coleman v. Wolcott, 4 Day (Conn.) 6, 18 (1809).

WHITING v. GLASS.

(Court of Appeals of New York, 1916. 217 N. Y. 333, 111 N. E. 1082.)

Action by Myron W. Whiting against Allie J. Glass. From a judgment of the Appellate Division (160 App. Div. 915, 145 N. Y. Supp. 1149), unanimously affirming a judgment (81 Misc. Rep. 402, 142 N. Y. Supp. 512), entered upon a verdict directed by the court in favor of plaintiff, defendant appeals. Reversed, and judgment granted, dismissing the complaint.

HISCOCK, J.[12] This action was brought to recover the value of various articles of personal property claimed to have been sold and delivered by respondent to appellant. The sale originated in a verbal contract for the exchange of this property owned by the former for a farm owned by the latter and which contract it is alleged the appellant was unable or unwilling to complete, although he had received respondent's property.

It is unnecessary to consider all the various objections urged by appellant's counsel to the recovery which has been directed in the action, for in our opinion there was developed on the trial one very simple and effective bar to the right to recover. This was the circumstance that prior to the commencement of the action respondent had transferred to a third party his title to any claim which he held. He executed an instrument which in its substantial features, so far as concerns the present question, was a general assignment and which specifically covered and included any claim which he had against the appellant springing out of the transaction referred to, and such transfer defeated his right to bring this action. Foster v. Central Nat. Bank of Boston, 183 N. Y. 379, 76 N. E. 338.

It is urged by the respondent that after the transfer the assignee was the trustee of an express trust and both by law and by express provision of the assignment was authorized to bring an action in the name of the assignor. Without considering this proposition broadly, it is sufficient to say that there is nothing to indicate that the assignee had anything whatever to do with bringing the action or that it was anything other than an action brought by an assignor after he had fully and completely transferred to another the title to the cause of action. * * *

Under the circumstances, instead of directing a verdict for the respondent the trial court should have directed a nonsuit for the appellant, and inasmuch as the facts which bar the former's right of recovery cannot be changed on a new trial, not only should the judgment appealed from be reversed, but judgment should be granted dismissing the complaint, with costs to the appellant in all courts.[13]

[12] A small part of the opinion is omitted.

[13] In accord: Looney v. District of Columbia, 113 U. S. 258, 5 Sup. Ct. 463, 28 L. Ed. 974 (1885).

Where the assignment is merely as security for the payment of a previous

CROUCH v. MARTIN & HARRIS et al.

(In Chancery, 1707. 2 Vern. 595.)

The plaintiff lent Arthur Harris, late husband of the defendant, £100 on Bottom-Rhea; and as a farther security assigned to the plaintiff the wages that would become due to him in the voyage to the Indies, as chirurgeon of the ship at £4.10s. per month; the ship returned safe to London, and £145 became due on the Bottom-Rhea bond. Arthur Harris died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her £400 if she survived him, she confessed judgment thereon, and insisted that judgment ought to be first paid, and the wages due to the husband applied to that purpose.

PER CURIAM. Seamen's wages are assignable, and the assignment specifically binds the wages; and in truth the advancing the £100 on the credit of the wages is, as it were, paying the wages beforehand; and the seaman or his widow must not have his wages twice.

It is a chose en action, being due by contract, although the service not then done,[14] and a chose en action is assignable in equity upon a consideration paid.

TAYLOR v. BARTON-CHILD CO.

(Supreme Judicial Court of Massachusetts, 1917. 228 Mass. 126, 117 N. E. 43.)

Suit by Violet I. Taylor against the Barton-Child Company, defended by Forest F. Collier, trustee in bankruptcy of defendant. Reserved for determination of full court upon bill of complaint, amended answer, replication, and master's report. Bill dismissed, without costs.

RUGG, C. J. This is a suit in equity to enforce rights of the plaintiff under an assignment of book accounts made to her assignor by the defendant corporation as security for a loan. It is undisputed that on December 3, 1910, one McCarthy, who is the assignor of the plain-

debt due to the assignee, the assignor still has an interest, and suit can be maintained in his name. Beach v. Fairbanks, 52 Conn. 167 (1884); New Haven Trust Co. v. Fitzpatrick, 74 Conn. 317, 50 Atl. 725 (1901). Although a statute provides that the assignee may sue in his own name, a suit by such assignee in the name of the assignor will be sustained. Lowndes v. City Nat. Bank, 79 Conn. 693, 66 Atl. 514 (1907); Michigan Sugar Co. v. Moffett, 183 Mich. 589, 149 N. W. 1025 (1914).

[14] Where there is an existing employment, the right to wages or earnings to become due in the future is assignable, even as against the assignor's subsequent creditors; and this is so even though the employment is for an indefinite term and is subject to termination at the will of either party. Rodijkeit v. Andrews, 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564, 6 Ann. Cas. 761 (1906); Duluth, S. S. & A. R. Co. v. Wilson, 200 Mich. 313, 167 N. W. 55, L. R. A. 1918E, 763 (1918); Field v. Mayor, etc., of City of New York, 6 N. Y. 179, 57 Am. Rep. 435 (1852); Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242 (1891); Hawley v. Bristol, 39 Conn. 26 (1872); Augur v. New York Belting & Packing Co., 39 Conn. 536 (1873).

tiff, lent to the defendant $5,000 and received its seven notes with different due dates, the most remote being June 3, 1913. As security for and in consideration of the loan, on the same day the defendant executed and delivered to the plaintiff's assignor an instrument which, it is contended, was an assignment of its present and future book accounts. Some of the notes were extended, some have been paid and a balance remains unpaid. This bill was filed on February 2, 1914. An injunction respecting the book accounts was issued on February 13, 1914. The defendant was adjudicated a bankrupt on February 13, 1914. Its trustee in bankruptcy is defending this cause.

At the time of the loan the defendant was engaged in dealing at wholesale in butter, eggs and similar products and needed the money borrowed of the plaintiff's assignor for carrying on its business, and used it for that purpose. The book accounts at the time of the assignment were between $25,000 and $30,000, some of which were due, but the greater part of them would become due within the next 60 days.

The crucial question is whether the assignment of book accounts, which are to come into existence in the future in connection with an established business, will be enforced in equity against a trustee in bankruptcy.

It is a well recognized principle of the common law that a man cannot sell or mortgage property which he does not possess and to which he has no title. The vendor must have a vested right in personal property in order to be able to make a sale of it. "A man cannot grant or charge that which he hath not." Jones v. Richardson, 10 Metc. 481, 488; Moody v. Wright, 13 Metc. 17, 46 Am. Dec. 706; Leverett v. Barnwell, 214 Mass. 105, 109, 101 N. E. 75.

The ground of our decisions may be stated shortly. There can be no present conveyance or transfer of property not in existence, or of property not in the possession of the seller to which he has no title. A sale of personal chattels is not good against creditors unless there has been a delivery. Manifestly there can be no delivery of chattels not in existence. In order that after-acquired chattels may be brought under the lien of a mortgage, or of hypothecation, there must be some act of the parties subsequent to the time when such chattels come into existence and into the ownership and possession of the mortgagor. The mortgage is held not to have the effect of changing the title to after-acquired chattels without some further act of the parties.

There is an exception at the common law to the effect that one may sell that in which he has a potential title although not present actual possession. The present owner might sell the wool to be grown upon his flock, the crop to be harvested from his field or the young to be born of his herd, or assign the wages to be earned under existing employment. Kerr v. Crane, 212 Mass. 224, 229, 98 N. E. 783, 40 L. R. A. (N. S.) 692; St. Johns v. Charles, 105 Mass. 262; Farrar v. Smith, 64 Me. 74, 77; McCarty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262; Dugas v. Lawrence, 19 Ga. 557. But see now Sales Act, St.

1908, c. 237, § 5 (3). That principle of the common law has never been carried so far as to include the case at bar. The catch of fish expected to be made upon a voyage about to begin cannot be sold. Low v. Pew, 108 Mass. 347, 11 Am. Dec. 357. There can be no sale of the wool of sheep, the crop of a field, or the increase of herds not owned but to be bought, and there can be no assignment of wages to be earned under a contract of employment to be made in the future. Eagan v. Luby, 133 Mass. 543; Citizens' Loan & Trust Co. v. Boston & Maine R. R., 196 Mass. 528, 531, 82 N. E. 696, 14 L. R. A. (N. S.) 1025, 124 Am. St. Rep. 584, 13 Ann. Cas. 365.

It is also the established doctrine in this commonwealth that a mortgage of future acquired property will not be enforced in equity before actual possession taken by the mortgagee as against persons subsequently acquiring an interest therein for value and having possession. That has long been settled although the contrary rule prevails more widely. Federal Trust Co. v. Bristol County St. Ry. Co., 222 Mass. 35, 45, 46, 109 N. E. 880, where cases are collected. It would be anomalous for a court governed by these principles as to sales and mortgages of future acquired goods and chattels to hold that there could be an assignment of future acquired book accounts valid and enforceable under circumstances where a like attempt to hypothecate future acquired chattels would be held unenforceable.

A book account is a chose in action. It is "a right not reduced into possession" which "can only be reduced into beneficial possession by an action or suit." Haskell v. Blair, 3 Cush. 534, 535. It is property. While some of its incidents differ from those of a tangible thing, these are not sufficient to warrant the application to it of principles of law different in the respect here involved from those governing transactions concerning property with a physical and tactile body. Where it is reasonably practicable, it is desirable in the development of an harmonious system of jurisprudence that the same general rules of law should be applicable to the same classes of facts and that exceptions having their foundation more upon appearances than upon differences of substance should not be multiplied.

Practical difficulties of no small consequence would be encountered in the operation of the contrary doctrine. Assignments of book accounts do not require recording or any public act for their validity. Marsh v. Woodbury, 1 Metc. 436; Gilligan Co. v. Casey, 205 Mass. 26, 91 N. E. 124. Notice need not be given in order that they be valid against third persons. Thayer v. Daniels, 113 Mass. 129; Cropper v. Gorham, 221 Mass. 119, 125, 109 N. E. 161. Merchants and manufacturers well might acquire a considerable credit upon the supposed strength of book accounts which later might turn out to have been assigned long before they came into existence. A door would be opened for the accomplishment of fraud in business.

There are decisions by the courts of other jurisdictions where a contrary result has been reached. Union Trust Co. v. Bulkeley, 150 Fed.

510, 80 C. C. A. 328; In re Macauley (D. C.) 158 Fed. 322; Tailby v. Official Receiver, 13 App. Cases, 523.[15] These decisions follow naturally from Holroyd v. Marshall, 10 H. L. C. 191, Central Trust Co. v. Kneeland, 138 U. S. 414, 419, 11 Sup. Ct. 357, 34 L. Ed. 1014, and other cases holding that mortgages of future acquired personal property are enforceable in equity. But as has been pointed out, that is not the law of this commonwealth.

The principles and spirit of our jurisprudence have been that owners of personal property ought not to acquire any false credit by creating incumbrances more or less secret and unknown to the world upon property of which they are to come into possession in the future as ostensible owners in absolute right. Blanchard v. Cooke, 144 Mass. 207, 223, 227, 11 N. E. 83; Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959; Schlatter v. Young, 197 Mass. 36, 38, 83 N. E. 2; Chick v. Nute, 176 Mass. 57, 57 N. E. 219; Wilson v. Russell, 136 Mass. 211; Harriman v. Woburn Elec. Light Co., 163 Mass. 85, 39 N. E. 1004. It was held in Hall v. Jackson, 20 Pick. 194, that an irrevocable power of attorney to bankers to collect debts due to a manufacturer from his customers, as security for advances made by the bankers, did not constitute a lien superior to an attachment by trustee process, in the absence of possession, control or disposing power in the person claiming the lien over the subject matter in which the lien was claimed. See, also, Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314. In the light of these decisions it would be illogical and discordant with the policy of our law to uphold the assignment in the case at bar. It was held in Purcell v. Mather, 35 Ala. 570, 76 Am. Dec. 307, Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646, and Clanton Bank v. Robinson, 195 Ala. 194, 70 South. 270, that assignments similar to those here in question were invalid.

In accordance with the terms of the reservation let the entry be: Bill dismissed without costs.[16]

RICHARDSON v. MEAD.

(Supreme Court of New York, 1858. 27 Barb. 178.)

This action was brought in a court held by a justice of the peace, where the plaintiff recovered a judgment against the defendant for $35.38 damages, besides costs. The cause of action was a claim in favor of Philo Wetherby against the defendant, for work of the

[15] Such an assignment has been held valid as between assignor and assignee. Field v. Mayor, etc., of City of New York, 6 N. Y. 179, 57 Am. Dec. 435 (1852).

[16] In accord: Herbert v. Bronson, 125 Mass. 475 (1878); Draeger v. Wisconsin Steel Co., 194 Ill. App. 440 (1915); McKneely v. Armstrong (Tex. Civ. App.) 212 S. W. 175 (1919); Raulines v. Levi, 232 Mass. 42, 121 N. E. 500 (1919); O'Keefe v. Allen, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884 (1898). See, also, annotation in L. R. A. 1918A, 124.

former, which he had performed for the defendant: and which claim the plaintiff alleged Wetherby had assigned to him. The claim, as presented to the justice, was in the form of an account; and on the back thereof was an assignment of it to the plaintiff in these words and figures, to wit:

"Oct. 13, 1856. This day, at 8 o'clock in the morning, I sell and transfer this account to William Richardson against David Mead.

"[Signed] Philo Wetherby.

"Witness, Austin Richardson."

The defendant objected to the sufficiency of the assignment of the claim for the work, on the ground that there was no consideration expressed in it. The justice overruled the objection; and upon the evidence in the case showing that Wetherby performed the work for the defendant, mentioned in the account, rendered the above mentioned judgment. Philo Wetherby was examined, as a witness for the plaintiff, to prove that he did the work specified in the account, and to establish the price that the defendant agreed to pay him therefor. But he was not questioned as to whether there was any consideration for the assignment of the account by him to the plaintiff. Whether the plaintiff had title to the claim in dispute, so that he could recover on it, was the only material question for the consideration of the court, in the case. The Otsego county court held that the assignment of the account, by Wetherby to the plaintiff, was void, for the reason that it was without consideration; and reversed the judgment of the justice. The plaintiff appealed from the judgment of the county court to this court.

BALCOM, J. If the defendant had paid to the plaintiff the claim for Wetherby's work, without suit, the latter could not have recovered it again, of the defendant, upon proof that the assignment of it to the plaintiff was without consideration. The assignment establishes the fact that Wetherby desired the defendant should pay the plaintiff for the work; and if he had paid the claim therefor, the law would declare that he had done so at Wetherby's request.

There can be no doubt, if Wetherby had only promised the plaintiff that he would transfer the claim to him, that the plaintiff would have been obliged to aver and prove a consideration for the promise, in order to recover, in an action against Wetherby for a refusal to transfer it. See Barnes v. Perine, 15 Barb. 249. But the transfer of the claim was executed. Wetherby had done all that he had agreed to do with it; and the plaintiff was in possession of a statement of it, and of evidence that he received it lawfully. And where a contract has been executed, it is not always necessary for a party, who claims the benefit of it, to show that there was a consideration for it. Robertson v. Gardner, 11 Pick. (Mass.) 146.

It is never necessary for the assignee of a thing in action or contract to prove that he paid or agreed to pay a consideration for it, to

entitle him to maintain an action thereon, in his own name, if he shows that he holds it, and is the real party in interest. Code, § 111. A gratuitous assignment, if good on its face, is sufficient; for it passes the title, as between the parties. Arthur v. Brooks, 14 Barb. 533.[17]

Now the real question in this case is whether it was necessary for the plaintiff to prove that he paid a consideration for the claim, for Wetherby's work. He clearly might have done this, if there was any consideration for the assignment, notwithstanding its language. Barnes v. Perine, supra. The assignment states that Wetherby sold and transferred the claim to the plaintiff, at 8 o'clock in the morning of the 13th day of October, 1856; and I think we should not presume that he gave the claim to the plaintiff, or that the assignment was without consideration; but rather that Wetherby sold it to the plaintiff for a valuable consideration, paid or agreed to be paid therefor. See 2 Cowen's Tr. 47 (2d Ed.).

I am of the opinion the assignment of the claim by Wetherby to the plaintiff, in the form it was, established the fact that the plaintiff owned the claim; and that he was entitled to recover.

There being no other question in the case, worthy of notice, I think the judgment of the county court should be reversed, and that of the justice affirmed, with costs.

Decision accordingly.

CRONIN v. CHELSEA SAVINGS BANK et al.

(Supreme Judicial Court of Massachusetts, 1909. 201 Mass. 146, 87 N. E. 484.)

Action by James P. Cronin against the Chelsea Savings Bank; Jeremiah Cronin, administrator, being admitted as claimant. From a verdict for defendant, plaintiff brings exceptions. Exceptions sustained.

[17] In accord: Coe v. Hinkley, 109 Mich. 608, 67 N. W. 915 (1896); Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351 (1903); Phipps v. Bacon, 183 Mass. 5, 66 N. E. 414 (1903); MacKeown v. Lacey, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683, 16 Ann. Cas. 220 (1909); Allen v. Brown, 44 N. Y. 228, (1870), affirming 51 Barb. 86 (1870); Buxton v. Barrett, 14 R. I. 40 (1882); Welch v. Mayer, 4 Colo. App. 440, 36 Pac. 613 (1894); Moore v. Waddle, 34 Cal. 145 (1868); Morrison v. Ross, 113 Ind. 186, 14 N. E. 479 (1887); Pugh v. Miller, 126 Ind. 189, 25 N. E. 1040 (1890); Wardner, Bushnell & Glessner Co. v. Jack, 82 Iowa, 435, 48 N. W. 729 (1891); Walker v. Bradford Old Bank, 12 Q. B. D. 511 (1884); Brandts v. Dunlop, [1905] A. C. 454, 462; In re Westerton, [1919] 2 Ch. 104; Scheffer v. Erie County Savings Bank, 229 N. Y. 50, 127 N. E. 474 (1920), gift of savings bank book. See articles by Jenks, Anson, and Costigan in 16 L. Q. R. 241, 17 L. Q. R. 90, 27 L. Q. R. 326. See, also, Walker v. Rostron, 9 M. & W. 411 (1842); Griffin v. Weatherby, L. R. 3 Q. B. 753 (1868); Lord Carteret v. Paschal, 3 P. Wms. 197, 199 (1733).

When the gift is executed by delivery, it is irrevocable; and if the donor of a savings account retakes the bank book by force and collects from the bank, the assignee can recover from the assignor in an action for money had and received. Brown v. Brown, 40 Hun (N. Y.) 418 (1886).

MORTON, J. This is an action of contract brought by the plaintiff to recover of the defendant bank the proceeds of a draft drawn on the National Bank, Limited, of Cahirciveen, Ireland, in favor of one Ellen Sullivan, now deceased. The draft was deposited by the said Ellen Sullivan with the defendant bank for collection on April 3, 1906, and the bank gave her the following receipt: "Chelsea, Mass., April 3, 1906. Received from Ellen Sullivan for collection draft #21,615 for £199 by Natl. Bank, Limited, of Cahirciveen, Ireland. Dated Oct. 24, 1904. Chelsea Savings Bank, per R." The said Ellen Sullivan died a few days later on April 8th. On April 6th she was informed by the doctors and by the clergyman who attended her that her end was approaching. The last rites of the church were administered to her about 4 o'clock and about 7 o'clock she called the plaintiff to her and discussed with him the place where she wished to be buried and other matters relating to the burial. She told him that she wished him to have the money and handed the receipt to him, saying, "You better take this check," and he said, "All right." She told him to pay for her burial and a headstone and her bills and to keep the rest for himself. The plaintiff then said to her, "Aunt Nell, this [meaning the receipt] is no use to me unless you make it payable to me." Thereupon she indorsed it as follows: "Pay this to James P. Cronin. Ellen $\underset{\text{mark}}{\overset{\text{her}}{X}}$ Sullivan. Witness to mark: Minnie A. Cronin"—and delivered it to him. She came to this country in November, 1904, and, with the exception of the week following her arrival, lived with the plaintiff till her death and was buried from his house in accordance with the instructions which she had given him. She died on Sunday and before her death told the visiting clergyman that she had given her money to the plaintiff.

Demand was duly made by the plaintiff on the defendant bank for the proceeds of the draft after the same had been collected by it and it refused to pay over the same to the plaintiff. Thereupon this action was brought. The administrator was admitted as a claimant and at the close of the plaintiff's evidence the presiding justice ruled that the plaintiff was not entitled to the money and ordered a verdict for the defendant. The case is here on exceptions by the plaintiff to this ruling and direction.

We think that there was evidence warranting a finding of a donatio causa mortis, and that the case should have been submitted to the jury. There can be no doubt, we think, that if there was evidence warranting the finding of a valid delivery all of the other things necessary to constitute a donatio causa mortis could have been found to be present—expected and impending death, an intention to pass the title then and there, and no revocation of the gift before death. We think that there was evidence, which if believed, warranted a finding that there was a sufficient delivery. The deceased did not have the draft

itself, and she could not, therefore, deliver that. The only voucher for and evidence of title to the draft and its proceeds which she had was the receipt which had been given to her by the savings bank. This represented or at least could have been found to represent the draft and its proceeds when collected, and to have been so intended by the parties, even though it did not contain the words "to be accounted for when collected" or words of similar import. Not only was manual possession of the receipt given to the plaintiff by the deceased but it was assigned to him by an indorsement on the back for the purpose as it could have been found of transferring to him the property which it represented. Unless, therefore, the interest was one incapable of delivery and consequently one which could not be made the subject of a donatio causa mortis there would seem to have been ample evidence of a donatio causa mortis. We do not think that the interest was incapable of delivery any more than the interest represented by a deposit in a savings bank which a delivery of the book, without an assignment, if done with the intention to convey the title, is sufficient to pass. Pierce v. Boston Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371. The delivery was the best possible one under the circumstances. The case is not one of a gift of the donor's own check. The indorsement on the receipt was or could have been found to be simply for the purpose of perfecting the gift of the draft and its proceeds. See Moore v. Darton, 4 De G. & S. 517; In re Dillon [1890] 44 Ch. Div. 76.

Exceptions sustained.[18]

[18] A savings bank account can be assigned as a gift by a delivery of the deposit book (on presentation of which the money is payable), with or without a written order. Pierce v. Five Cents Sav. Bank, 129 Mass. 425, 37 Am. Rep. 371 (1880); Wade v. Smith, 213 Mass. 34, 99 N. E. 477 (1912); Harriman v. Bunker, 79 N. H. 127, 106 Atl. 490 (1919); Allen v. Smith, 38 Cal. App. 409, 176 Pac. 365 (1918); Wade v. Edwards, 23 Ga. App. 677, 99 S. E. 160 (1919); Scheffer v. Erie County Savings Bank, 229 N. Y. 50, 127 N. E. 474 (1920). The same is true of a certificate of stock and of a promissory note. Herbert v. Simson, 220 Mass. 480, 108 N. E. 65, L. R. A. 1915D, 733 (1915), citing many cases as to stock; Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319 (1837); State Bank of Crosswell v. Johnson, 151 Mich. 538, 115 N. W. 464 (1908), certificate of deposit.

An actual delivery is necessary to effectuate the gift, whether the gift be inter vivos or causa mortis. Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351 (1903).

Where the owner of bonds has pledged them as security and holds the pledgee's receipt for them, he can make a gift of the bonds by a delivery of the receipt. Lipson v. Evans, 133 Md. 370, 105 Atl. 312 (1918).

ADAMS v. MERCED STONE CO.

(Supreme Court of California, 1917. 176 Cal. 415, 178 Pac. 498.)

Suit by Edson F. Adams, as executor of the estate of Thomas Prather, deceased, against the Merced Stone Company. From a judgment for defendant and order denying new trial plaintiff appeals. Reversed.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant, and from an order denying his motion for a new trial.

The complaint states a cause of action against the defendant, in favor of the decedent, Thomas Prather, upon an indebtedness alleged to be the sum of $112,965.84. The defendant in its answer denied the existence of any indebtedness from it to said Thomas Prather at the time of his death, and on information and belief alleged that prior to his death said Thomas Prather made a gift of said indebtedness, due from the plaintiff to Thomas Prather, to one Samuel D. Prather, and that said Samuel then became and ever since has been the owner of said indebtedness.

The court found that during the last sickness of Thomas Prather, to wit, on April 17, 1913, said Thomas Prather made a gift to his brother Samuel D. Prather, of all of the indebtedness due from the defendant to said Thomas, being the indebtedness sued for by the plaintiff herein. That at that time Samuel was the president, the general manager, and a member of the board of directors of the defendant, said defendant being a corporation, and Thomas Prather knew that Samuel held said offices and by reason thereof had full and exclusive charge and control of defendant's books of account, including power to make or direct the making of entries and transfers in said books, and knew that by reason thereof Samuel D. Prather had the means of obtaining possession and control of the said indebtedness so given to him. The court further stated that by reason of the fact that Thomas Prather had this knowledge at the time he gave the indebtedness to Samuel, he therefore at that time gave to said Samuel the means of obtaining possession and control of the thing given, that is, of the said indebtedness. This last statement is, of course, a mere conclusion from the facts previously stated. The appellant contends that the transaction as stated in the findings did not constitute a valid gift of the indebtedness in question, and that the finding, so far as it states the ultimate fact of such gift, is contrary to the evidence.

It is conceded that at the time of the asserted gift Thomas Prather knew that Samuel D. Prather held the offices above mentioned, and that it was within his official power by reason thereof to make sufficient changes upon the books of account of the defendant to make them show that the said indebtedness had been transferred by Thomas Prather to Samuel D. Prather, and was owing by the defendant to Samuel D. Prather, instead of Thomas Prather. It is admitted that the asserted

gift was made during the last sickness of Samuel Prather, two days before his death, which event occurred on April 19, 1913, and was therefore a gift in view of death. Civ. Code, § 1150. It is also admitted that no change was made upon the books of the defendant regarding said indebtedness, up to the time of the trial of this action, and that when the action was begun the account books of the defendant showed it to be indebted to the said Thomas Prather in the sum claimed in the complaint.

The only evidence of the gift asserted in the answer is found in the testimony of Samuel D. Prather, and is as follows: "In talking business matters my brother said to me, 'Now, in reference to the account of Thomas Prather in the Merced Stone Company, I want to give you that account, all that is due me from that account. I don't know just how to do this, but I give it to you.' * * * A little further in the conversation my brother said to me, 'I give you the keys to my office, the combination of my safe and keys to my desk, and with these I give you all accounts, books, papers, letters, documents, furnishings, pictures, everything that belongs to me in that office. It is yours.'" This he said occurred on April 17, 1913.

The case depends upon the meaning and effect of section 1147 of the Civil Code which reads as follows: "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

The contention of the respondent is that this section is complied with in every case of gift of a chose in action where, at the time the donor makes such gift, he knows that the donee has it within his power to secure the possession and control of the thing given, and that in such a case no delivery or transmission from the donor to the donee of the means of obtaining possession and control of the subject of the gift is necessary. We do not think this is the correct construction of the section quoted. It contemplates that the donor shall do something at the time of making the gift which has the effect of placing in the hands of the donee the means of obtaining the control and possession of the thing given. That the fact that the thing was already in possession of the donee at the time of declaring the gift is not enough, is well settled by the authorities. Denigan v. Hibernian, etc., Society, 127 Cal. 141, 59 Pac. 389; Smith v. Zumbro, 41 W. Va. 623, 24 S. E. 653; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255; Allen v. Allen, 75 Minn. 116, 77 N. W. 567, 74 Am. St. Rep. 442.

In order to comply with the section the "means" must be "given." In the connection in which these words occur the effect is that such means must be given by the donor to the donee. This giving of the means is authorized, where the thing given is not capable of delivery, as a substitute for the actual or symbolical delivery of the thing by the donor to the donee required in cases where such thing is capable of

delivery. No good reason can be given for supposing that a transmission or delivery by the donor to the donee of the means was not intended to be as essential in the case of intangible property, as the delivery, actual or symbolical of the thing itself, where it is tangible.

In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing, or some equivalent thereof.

"According to the weight of authority, in order to make a valid gift inter vivos of a chose in action not evidenced by a written instrument, there must be a written assignment, or some equivalent instrument." 20 Cyc. 1202.

"A written assignment of the demand by the donor to the donee is essential to complete the delivery" in the case of gifts causa mortis. 20 Cyc. 1237; 14 Am. & Eng. Ency. of Law, 1022.

"If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." 2 Kent. Com. *p. 439.

This passage from Kent was quoted and approved in Driscoll v. Driscoll, 143 Cal. 534, 77 Pac. 471, and in Giselman v. Starr, 106 Cal. 657, 40 Pac. 8.

In Cook v. Lum, 55 N. J. Law, 373, 26 Atl. 803, the court said that the test of an effectual gift was this: "That the transfer was such that in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action."

To the same effect was Ewing v. Ewing, 2 Leigh (Va.) 344; Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201; McMahon v. Newton, 67 Conn. 79, 34 Atl. 709, and many other cases. That section 1147 was not intended to change the law respecting the necessity of an assignment, or its equivalent, to make a valid gift of a chose in action, not itself evidenced by a writing, is shown by the fact that in the annotated edition of the Code, edited by the committee that prepared it, there is cited to support the section Hunter v. Hunter, 19 Barb. (N. Y.) 631, in which case the above passage from Kent is quoted and approved.

In the present case it is true that Samuel D. Prather was possessed of the physical power and of the official authority, by reason of his relation to the defendant, to make the necessary changes on its books to show that the indebtedness was due to him and not to the decedent. But this power did not emanate from the decedent. Samuel possessed it before the asserted gift as well as after. The decedent did not even authorize him to make such changes, nor suggest that the gift might be effected in that way. It was not shown that such method was in the mind of the donor. The fact that it was a book account, or that a change might be made in the name of the debtor, was not even

mentioned in the conversation. The law intends something more than a mere power to make physical entries in the books of the debtor in such a case. The authority to make the change, or cause it to be made, must be vested in the debtor by reason of some act or direction of the creditor. If verbal gifts could be made in such loose manner as this it would open the door to innumerable frauds and perjuries.

For this reason the authorities hold that something more than mere physical power is necessary; something more than the previous possession of the property or of the means of obtaining it; something emanating from the donor which operates to give to the donee the means of obtaining such possession and control.

The case is not different in principle from Pullen v. Placer County Bank, 138 Cal. 170, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. In that case a father gave to his son a check for $1,000 upon the bank, with the intention of making to him a gift of that amount of money. After delivering the check to the son the father stated that he wished he would not present it until after his death. The son awaited his death and then presented the check, which the bank refused to pay, on the ground that the death of the father revoked it. The court said:

"In the present case the gift was verbal, and the property which the father intended to give to his son was money on deposit in the bank. The check was not itself the property which the father intended to give, but was merely a direction to the defendant to pay $1,000 to the son. It indicated the amount to be given and the place at which the money was to be delivered. The check was not a symbolic delivery of the money, but it was a delivery of the means by which the son could obtain possession of the money. It was, however, subject to revocation by the father at any time before its presentation to the bank, and was in fact revoked by his death. The request of the father that the son would not present the check until after his death did not affect the sufficiency of the gift. If the gift were complete by his delivery of the check, such subsequent request would not destroy its validity, and if not then complete, this request would not have the effect to dispense with its presentation for the purpose of making it complete. By the failure of the son to present the check, there was no delivery of the money during the lifetime of the father, and the gift was therefore not complete."

The mere delivery of an order for the payment of a debt is therefore not sufficient to make a complete gift thereof. In the present case there was not even the delivery of an order, nor any suggestion thereof. All that was done was to declare the present intention to give the indebtedness to Samuel D. Prather. No means whatever were delivered by the donor to the donee by which the latter could obtain payment of the indebtedness. The fact that Samuel D. Prather was the managing officer of the defendant and had power to change its books did not make the gift effectual. The indebtedness was due from the defendant and not from Samuel D. Prather, and it was necessary

that the defendant should have some authority from Thomas Prather before it could legally make a change upon the books of the company to show the change in the indebtedness. Thomas Prather gave no such authority to his brother or to any other person.

The conclusion of the court below upon the facts found was not in accordance with the law, and its finding of the ultimate fact that Thomas Prather transferred the debt to Samuel D. Prather by way of a verbal gift is not supported by the evidence. Consequently the judgment and order cannot be upheld.

The judgment and order are reversed and the cause is remanded, wih directions to the court below to enter judgment upon the findings in favor of the plaintiff for the amount prayed for.[19]

AMERICAN BRIDGE CO. OF NEW YORK et al. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, 1909. 202 Mass. 374, 88 N. E. 1089.)

Action by the American Bridge Company of New York and others against the City of Boston. Verdict for plaintiffs, and defendant excepts. Exceptions sustained.

HAMMOND, J. This is an action of contract brought by the plaintiffs as assignees of all "the moneys now due or which may hereafter become due" to one Coburn, the assignor under two certain building contracts between him and the defendant, dated respectively July 16, 1901, and August 27, 1901. It is brought to recover the amount of two architect's certificates, one for $2,210 and the other for $3,085.50, each dated November 10, 1902. The case was heard upon the auditor's report (which was for the defendant) and certain exhibits, by a justice of the superior court, sitting without a jury, who found for the plaintiffs for the full amount claimed; and it is before us upon exceptions taken by the defendant.

These exceptions raise the general question whether in this action the defendant may recoup for the damages sustained by the default of the assignor, which occurred after the defendant had notice of the assignment.

It is contended by the plaintiffs that these sums were due and payable at the time the defendant received notice thereof, that the plaintiffs' rights were fixed at the time of notice and could not be changed by the act of the assignor or of the defendant after notice, and consequently that the damages caused to the defendant by the default of the assignor in leaving his contract unperformed, although without any fault or collusion on the part of the defendant, cannot be recouped in this action. It is contended that the only remedy open to the defendant is by way of an action against the assignor.

[19] See note in 3 A. L. R. 928.

Even if it be conceded in favor of the plaintiffs that the sums were due and payable at the time of the notice, and that the rights of the plaintiffs were fixed at that time, still the conclusion which the plaintiffs seek to draw by no means necessarily follows.

We are dealing, not with the right of set-off, but with that of recoupment—an entirely different right. The one is a creation of statute; the other exists at common law and not by statute. The one is applicable even where there are different contracts; the other arises only out of the same contract as that under which the claim of the plaintiffs arises. Confusion sometimes has been caused by a neglect to note the distinction between these two rights. The principles applicable to a case of set-off are in many respects different from those applicable to a case of recoupment, and some care is required not to be misled by apparent analogies.

The assignment of a chose in action conveys, as between the assignor and assignee, merely the right which the assignor then possesses to that thing; but as between the assignee and the debtor it does not become operative until the time of notice to the latter, and does not change the rights of the debtor against the assignor as they exist at the time of the notice.

It becomes necessary to consider the exact relation between the defendant and Coburn, the assignor, at the time of the notice. The auditor has found that written notice of the assignments were given to the defendant on November 14, 1902, before the service of any trustee process. At that time there does not seem to have been any default on the part of Coburn. At the time of the notice what were the rights between him and the defendant, so far as respects this contract? He was entitled to receive these sums, but he was also under an obligation to complete his contract. This right of the defendant to claim damages for the nonperformance of the contract existed at the making of the contract and at the time of assignment and of notice, and the assignees knew it, and they also knew that it would become available to the defendant the moment the assignor should commit a breach. Under these circumstances it must be held that the assignees took subject to that right. Coburn, the assignor, abandoned the work in a few days after the notice. This action was not brought until October 30, 1906, nearly four years after the breach.

Even if the sums were due and payable in November, 1902, at the time of the notice, still if this action had been brought by the assignor after the default, there can be no doubt that the defendant would have had the right to recoup the damages suffered by his default. And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor. The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge, and since they have delayed suit for these sums, until after default, the defendant may recoup against them as it could have recouped against the assignor. It

cannot without its own fault or consent be deprived of rights under the contract. Any other conclusion would make the contract different from that into which the defendant entered. The case is very similar to Rockwell v. Daniels, 4 Wis. 432, in the reasoning of which we fully concur. See, also, Government of Newfoundland v. Newfoundland Ry., 13 App. Cas. 199. We see nothing in First National Bank v. Perris Irrigation District, 107 Cal. 55, 40 Pac. 45, or Wilkinson v. Clements, 42 L. J. Ch. (N. S.) 38, cited by the plaintiffs, which changes our view. They seem to proceed upon the principle of separate contracts.

Exceptions sustained.[20]

HOMER v. SHAW.

(Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 113, 98 N. E. 697.)

Action by Horace S. Homer against Frederick E. Shaw. There was a finding for defendant, and plaintiff excepts. Exceptions overruled.

Plaintiff's assignor entered into a contract with defendant to transport, erect, and paint the steel work of a section of subway at $6 per ton, to be paid monthly for all work completed.

BRALEY, J. The defendant's liability upon acceptance of the assignment depended upon the assignor's performance of his contract to transport, erect and paint the steel work required for a section of a subway which the defendant was building in accordance with the plans and specifications of the transit commissioners. If not fully performed, the entire contract price, although payable in monthly installments, never became due, or if before completion the assignor, by reason of his inability to go on, voluntarily abandoned the work, he could not recover for work and labor already performed and fur-

[20] An assignee gets no better right than the assignor had, and defenses that would have been good against the assignor are good against the assignee. Rice v. Friend Bros. Co., 179 Iowa, 855, 161 N. W. 310 (1917), counterclaims for breach of warranty; Brunswig v. Farmers' Grain, Fuel & Live Stock Co., 100 Kan. 261, 164 Pac. 154 (1917), previous modifications in the contract; Suhr v. Metcalfe, 33 Cal. App. 59, 164 Pac. 407 (1917); Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65 (1858); Lane v. Smith, 103 Pa. 415 (1883); Parmly v. Buckley, 103 Ill. 115 (1882); Mangles v. Dixon, 3 H. L. C. 735 (1852); Graham v. Johnson, 8 Eq. 36 (1869), fraud; Crouch v. Credit Foncier, L. R. 8 Q. B. 380 (1873); Stoddart v. Union Trust, [1912] 1 K. B. 181; Steltzer v. C. M. & St. P. R. Co., 156 Iowa, 1, 134 N. W. 573 (1912), employer expressly reserved power to apply wages to board bills.

In some states he takes subject to whatever equities exist in favor of third persons against the assignor. Owen v. Evans, 134 N. Y. 514, 31 N. E. 999 (1892); Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41 (1891); Green v. Consolidated Wagon & Machine Co., 30 Idaho, 359, 164 Pac. 1016 (1917), assignor's contract provided for payment to specified previous creditors.

nished. Homer v. Shaw, 177 Mass. 1, 58 N. E. 160; Burke v. Coyne, 188 Mass. 401, 404, 74 N. E. 942; Buttrick Lumber Co. v. Collins, 202 Mass. 413, 420, 89 N. E. 138. A few days only elapsed after the assignor entered upon the performance of the contract when he informed the defendant that, owing to the failure of the plaintiff to advance money, which apparently he had agreed to furnish, he would be unable to complete the work, as his workmen had not been paid, and if their wages remained in arrears they would leave his employment. The evidence, if no further action had been taken by the parties, and performance of the work had ceased, would have warranted a finding that, the assignor having repudiated or abandoned his contract before the first installment of the contract price became payable, the defendant would not have been indebted to the plaintiff. Homer v. Shaw, 177 Mass. 1, 58 N. E. 160; Bowen v. Kimbell, 203 Mass. 364, 370, 371, 89 N. E. 542, 133 Am. St. Rep. 302; Barrie v. Quinby, 206 Mass. 259, 267, 92 N. E. 451.

But without any ostensible change the assignor remained in charge of the work until completion, and the plaintift contends under the substituted declaration, that the money thereafter received should be considered as earned under the original contract. The assignor needed immediate financial assistance, and if the defendant might have advanced the money which the evidence shows he furnished to enable him to pay his employees, yet if he had done so the plaintiff's assignment would have been given priority over the loan. Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 N. E. 138.

The parties, while they could not modify to his prejudice the terms of the contract assigned, without the plaintiff's consent, or by a secret fraudulent arrangement deprive him of the benefit of the assignment, were not precluded from entering into a new agreement if performance by the assignor had become impossible from unforeseen circumstances. Eaton v. Mellus, 7 Gray, 566, 572; Linnehan v. Matthews, 149 Mass. 29, 20 N. E. 453. It consequently was a question of fact upon all the evidence for the presiding judge before whom the case was tried without jury to decide whether upon facing the exigencies of changed conditions the parties mutually agreed to a cancellation, and thereupon in good faith an independent contract was substituted, by the terms of which the defendant undertook to furnish sufficient funds to pay the workmen the wages then due, and their future wages as they accrued, while the assignor was to receive a weekly salary for his personal services of supervision. The refusal to comply with the plaintiff's requests for findings, and the general finding for the defendant manifestly show his conclusion to have been that the first contract was treated as having been rescinded, and the plaintiff had no enforceable claim against the defendant under the assignment. Earnshaw v. Whittemore, 194 Mass. 187, 192, 80 N. E. 520; Glidden v. Massachusetts Hospital Life Ins. Co., 187 Mass. 538, 541, 73 N. E.

538. The plaintiff's requests for rulings in so far as they were not given were rightly refused, and the exceptions must be overruled.

So ordered.[21]

MUIR v. SCHENCK & ROBINSON.

(Supreme Court of New York, 1842. 3 Hill, 228.)

Debt on bond, tried at the Cayuga circuit, in October, 1841, before Moseley, Chief Judge. The case was this: On the 5th of September, 1836, the bond in question, and a mortgage of the same date, were executed by the defendants to the plaintiff. The bond was conditioned for the payment of $1500, in five equal annual installments, with interest. The first three installments were paid to the plaintiff, who, on the 13th of November, 1839, assigned and delivered the bond to Ira Doty, as collateral security for the payment of a note of $318.85, held by him against the plaintiff. On the 9th of March, 1840, the plaintiff executed to Sedgwick Austin an absolute assignment of the mortgage "and the bond therein referred to," in payment of certain notes held by Austin against the plaintiff, which were thereupon delivered up to the latter. In this assignment the plaintiff covenanted that there remained unpaid the sum of $600, and interest from the 5th of September, 1839. Austin gave immediate notice of the assignment to the defendants, who promised to pay him. Accordingly, in September, 1840, the defendants paid Austin the fourth installment, ($342,) and on the 6th of September, 1841, they paid the balance; whereupon he acknowledged satisfaction of the mortgage. Intermediate these two payments, viz. in October, 1840, Doty gave notice to the defendants that the bond had been assigned to him before the assignment to Austin; and forbade any further payments to the latter; claiming a right to the money thereafter to become due. The defendants enquired why he had not given notice before, and Doty gave as a reason, that he did not suppose he would be obliged to resort to the bond in order to obtain payment of the debt due from the plaintiff. This action was brought for the benefit of Doty, who insisted that he was entitled to recover the last installment with interest. The circuit judge charged the jury, that the payment to Austin of the last installment was rightfully made by the defendants, notwithstanding the notice from Doty. The jury rendered a verdict for the defendants, and the plaintiff now moved for a new trial on a case.

By the Court, COWEN, J. The question is, whether the defendants were right in preferring Austin, and making the last payment to him instead of Doty. Doty had the first assignment from the obli-

[21] If the assignor's right was subject to a condition precedent, so is the assignee's right. Whan v. Hope Natural Gas Co., 81 W. Va. 338, 94 S. E. 365 (1917).

gee, and, as between him and Austin, was entitled to the money. In a conflict of equitable claims, the rule is the same at law as in equity, qui prior est tempore, potior est jure. There was no need of notice to Austin for the purpose of securing the preference as against him; and Austin might have been compelled at the election of Doty to pay over to him the last installment received from the defendants. But before that installment was paid, he chose to fix the defendants by giving notice of his right to them, and forbidding the payment of any more to Austin. The payments were correctly made to the latter, till notice.[22] The payment afterwards, was in the defendants' own wrong. The notice, when it came, afforded them a complete protection, and had the farther effect to render what was before an inchoate right in Doty, perfect from the beginning. As Austin had never any right to receive, the defendants had now no right to pay. No one would doubt that the first assignment divested the right of the obligee, though the legal interest remained in him. Could he transfer to Austin a greater right than his own? His legal interest was not assignable; and he had parted with all his equitable right. Does it not follow that nothing remained for Austin?

The decision at the circuit, I admit, derives some degree of countenance from the remarks made by Chancellor Kent in Murray v. Lylburn, 2 John. Ch. 441, 443. I allude to the view there taken of Redfearn v. Ferrier, 1 Dow's Parl. Cas. 50, which the learned Chancellor supposed should perhaps be received as a qualification of the rule laid down by Lord Thurlow, in Davis v. Austin, 1 Ves. Jun. 249, who said: "A purchaser of a chose in action must always abide by the case of the person from whom he buys; that I take to be an universal rule." True, his lordship was speaking of the case of the assignor, as it stood between him and the debtor; yet the same rule has been often applied to a case as between him and one of his previous assignees. Nothing is better settled, for instance, than that the previous assignment of a chose in action will prevent its passing to assignees by a general assignment under the bankrupt or insolvent acts; an assignment carrying even the legal right, and this too, without notice either to the debtor or the subsequent assignees. Ordinarily, any notice to subsequent conventional assignees must be out of the question; for the first assignee cannot know who they will be. Notice to the debtor might, I admit, afford them a better chance; for then there would be one of whom they might enquire, and of whom they naturally would enquire.

[22] That payment by the debtor operates to discharge him, when made either to the assignor or to the later of two assignees, if he has received no notice of the first assignment, see Meghan v. Mills, 9 Johns. (N. Y.) 64 (1812); Heermans v. Ellsworth, 64 N. Y. 159 (1876); Williams v. Sorrell, 4 Ves. 389 (1799); Stocks v. Dobson, 4 D. M. & G. 15 (1853). The rule was the same at Roman Law Dig. II, 15, 17.

This might prevent fraud; and, to require it, would therefore perhaps be very proper. It is required by the law of Scotland, as appears by Redfearn v. Ferrier, which was decided upon the Scotch law. By that law there must be what is called an intimation to the debtor, before the assignment is perfect and secures a complete preference even as against a subsequent assignee. In suggesting, however, that such is perhaps the law of England or of this state, Chancellor Kent admitted that he was doing what was not necessary to the decision of the case under his consideration, which turned on a point entirely different, viz. a lis pendens operating as constructive notice. In Livingston v. Dean, 2 John. Ch. 479, there was actual notice. But neither Redfearn v. Ferrier, nor the two cases decided by Chancellor Kent, related to a previous express assignment. There was scarcely the semblance of such an assignment, but only a trust to be inferred by the court of chancery from circumstances—a sort of implied trust—a creature peculiar to that court. The prior right claimed, was spoken of as a latent equity. As between express assignments, I take the law to be correctly laid down by Parker, C. J., in Wood v. Partridge, 11 Mass. 488, 491, 492. He said: "Between assignor and assignee the contract is complete without any notice to the debtor;" and he considered the notice as intended to protect the debtor alone. Story, J., in his learned work on the Conflict of Laws, (pages 328 to 330,) mentions the difference between the Scotch law and our own, admitting the necessity of intimation in the former. He says, that according to our law, an assignment operates, per se, as an equitable transfer of the debt, and he concedes that notice is necessary to protect the debtor; adding: "But an arrest or attachment of the debt in his hands by any creditor of the assignor, will not entitle such creditor to a priority of right, if the debtor receive notice of the assignment pendente lite, and in time to avail himself of it in discharge of the suit against him." That has been held in several cases. Bholen v. Cleveland, 5 Mason, 174, 176, Fed. Cas. No. 1381; Foster v. Sinkler, 4 Mass. 450; Dix v. Cobb, 4 Mass. 508. In Wood v. Partridge, this question between a previous assignee and a subsequent attaching creditor, was considered the same in principle as that between conflicting assignees. It is undoubtedly so. The principle has been declared by other cases. White's Heirs v. Prentiss' Heirs, 3 T. B. Mon. (Ky.) 510; Madeiras v. Catlett, 7 T. B. Mon. (Ky.) 477. In Jordan v. Black, 6 N. C. 30, the claim of the assignee presented a very strong equity. Hall, J., said, in substance, that "upon an examination of the authorities it would be found that the ground taken by the assignee of being a bona fide purchaser, is tenable by those persons only who have the legal title in them, and plead that they are purchasers for a valuable consideration without notice. By this plea they shew that they have as much equity on their side as their opponents; and that being the case, a court of equity will not inter-

fere and divest them of their legal title. All that the assignee shows is, that she purchased the assignor's right to a chose in action. She has no legal, but only an equitable title."

No fraud upon Austin's rights is imputable to Doty. He entertained a confidence that the assignor would pay his claim, and that he should therefore not find it necessary to take measures for collecting the bond. He gave notice to the defendants as soon as he found himself disappointed.

Nor is it any answer to Doty's claim, that the defendants promised to pay Austin. It is said truly, that this, in an ordinary case, would have entitled him to an action in his own name. Prima facie it brought him within the rule, that an assignee of a chose in action may sue in his own name, on an express promise by the debtor to pay him. This arises from consideration and privity; but in the case at bar, the assignment to Austin having failed of effect by reason of the prior assignment to Doty, there was no consideration for the promise. The case is the same as if Austin had held no assignment even in form. The last payment by the defendants was, therefore, made in their own wrong; and there must be a new trial, the costs to abide the event.

New trial granted.[23]

ADAMSON v. PAONESSA et al.

(Supreme Court of California, 1919. 180 Cal. 157, 179 Pac. 880.)

Interpleader suit by John Z. Adamson against George C. Paonessa, Charles W. Lloyd, and the National Surety Company. From judgment for defendant Lloyd, defendant National Surety Company appeals. Judgment modified by striking out a portion, and new trial ordered on a single issue.

LAWLOR, J. This is an appeal from a judgment in an interpleader suit in favor of one of the defendants and claimants as against the other defendant and claimant. There is practically no conflict in the evidence, and the material facts are as follows:

One Paonessa entered into a contract with the city of Colton for the doing of certain street work under the Improvement Act of 1911. Stats. 1911, p. 730. As a condition of the contract he was required by the statute to give, and did give, a surety bond for the payment of claims for materials furnished or labor rendered in the doing of the work. The appellant, National Surety Company, was the surety on this bond. In order to obtain the bond the contractor, Paonessa, made a written application to the surety company which, by its terms, con-

[23] In accord: Niles v. Mathusa, 162 N. Y. 546, 552, 57 N. E. 184 (1900); Williams v. Ingersoll, 89 N. Y. 508 (1882); Thayer v. Daniels, 113 Mass. 129 (1873); Sutherland v. Reeve, 151 Ill. 384, 38 N. E. 130 (1894); Summers v. Hutson, 48 Ind. 228 (1874).

stituted a contract between them. The portion of this application contract material here reads:

"All payments specified in the above-mentioned contract [i. e., the contract with the city of Colton for the doing of the work] to be withheld by the obligee until the completion of the work shall, as soon as the work is completed, be paid to the company [i. e., the surety company], and this covenant shall operate as an assignment thereof, and the residue, if any, after reimbursing the company as aforesaid, be paid to the applicant after all liability of the company has ceased to exist under said bond."

No notice of this assignment, if it be such, was given to the city of Colton, or, so far as appears, to any one else, until shortly before the commencement of this litigation.

While the work was in progress the other defendant, the respondent here, one Lloyd, advanced certain sums of money to the contractor, Paonessa, and took from him an assignment of all his rights under the contract, all without notice of the prior assignment to the surety company and in complete ignorance of it. This assignment Lloyd filed with the city clerk immediately.

The proceedings under which the contract was let provided, as permitted by the statute, for payments in street improvement bonds. Upon the completion of the contract, the city authorities, recognizing Lloyd as the assignee of Paonessa, delivered to him the warrant and assessment for the payment of the work, and the city treasurer was about to issue to him street improvement bonds in payment when the surety company demanded of the city treasurer the issuance of the bonds to it. This was the first notice to the city authorities of any claim of assignment to the surety company.

In the meantime Paonessa had failed to pay claims approximating $10,000 for material and labor furnished and rendered in completing the contract. The surety company was obligated under its bond to pay these claims and did so. No claim is made by the respondent that such payment was not pursuant to the obligation of the bond and in strict accord with it.

Upon the surety company demanding the issuance of the bonds to it and Lloyd insisting that they be issued to him, the city treasurer interpleaded the two claimants and deposited the bonds in court. A trial was had and judgment was rendered against the surety company in favor of Lloyd that the bonds be delivered to the latter.

The contention of the surety company that the judgment is erroneous and that it is entitled to the bonds, or at least to sufficient thereof to reimburse itself for the amounts which it paid to materialmen and laborers, is twofold.[24] * * *

The second point made by the appellant is that, by virtue of the provision heretofore quoted of the application contract executed by

[24] The discussion of the company's first point is omitted.

Paonessa, he assigned to the appellant his right to the bonds subsequently to become due him under the contract, and that this assignment, being prior in time to the assignment by Paonessa to Lloyd, is prior in right.

Passing for the time being the question as to the sufficiency of the contract provision as an assignment by Paonessa, it does not follow that because it is prior in time it is necessarily prior in right to the subsequent assignment to Lloyd. The surety company neglected to give immediate notice of the assignment to it, and before it gave such notice Lloyd had taken an assignment for a valuable consideration without notice or knowledge of the prior assignment, and had given notice of his own assignment. The rule in such a case is well established. It is thus stated in Widenmann v. Weniger, 164 Cal. 667, 672, 130 Pac. 421, 424:

"The effect of such successive assignments and the rights of the successive assignees without notice, with respect to each other, were considered and decided in Graham Paper Co. v. Pembroke, 124 Cal. 117 [56 Pac. 627]. There is some conflict of authority on the subject, but this court approved and followed the English rule stated as follows: 'As between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of a prior assignment.' "

The judgment of the lower court, therefore, in directing the delivery of the bonds to Lloyd, was correct and to that extent is affirmed.

The judgment of the lower court, however, goes further than this. The court found and its judgment decrees, that the surety company has no right or interest in the bonds. The evidence at the trial showed without conflict that Lloyd took his assignment by way of security for advances. It follows that as between himself and Paonessa he was not the absolute owner of the bonds. Paonessa still had an interest in them. If, then, the application contract executed by Paonessa did in fact amount to an assignment by him to the surety company, the latter stood in the former's shoes, and had, and still has, an interest in the bonds, and the finding of the court to the contrary is not supported by the evidence. This brings us to the question of the sufficiency of the application contract as an assignment by Paonessa to the surety company. If it amounts to an assignment, the finding that the surety company has no interest in the bonds is contrary to the evidence, and the decree of the court to the same effect is in that particular incorrect. * * * [25]

The judgment of the lower court is therefore modified by striking out the portion which decrees that the appellant has no right or interest in the bonds, and a new trial is ordered on the single issue as to

[25] The court then held that the surety company's contract operated as an assignment.

whether or not as between himself and the surety company the respondent Lloyd holds the bonds as absolute owner or by way of security merely.

Both prior to the commencement of the litigation and at the time of the trial respondent Lloyd offered to account to the surety company for any balance which he might receive from the bonds after the satisfaction of his own advances. This was all that the surety company was entitled to. Accordingly, although the judgment is reversed in part and a new trial is directed as to one of the issues, it is ordered that appellant pay the costs of appeal.[26]

HERMAN v. CONNECTICUT MUT. LIFE INS. CO. et al.

(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 181, 105 N. E. 450, Ann. Cas. 1916A, 822.)

Bill by Joseph Herman against the Connecticut Mutual Life Insurance Company and others. Reported by a single justice for the determination of the full court. Bill dismissed, unless plaintiff desires a decree for partial relief.

The bill was brought by plaintiff, claiming to be an assignee of a life policy of life insurance in the defendant company, against the company and other defendants, of whom defendant Harry R. Stanley, as executor, claimed to hold the policy under an assignment subsequent in time to that of plaintiff, to establish plaintiff's rights in and to the policy under his assignment. When the assignment to plaintiff was made, the business was transacted by George E. Williams, agent of the insurance company, as agent for insured. Williams sent plaintiff the assignment, but did not deliver the policy, and, upon inquiry being made, told plaintiff that the company held it as collateral for a premium loan. The suit was brought in insured's lifetime.

SHELDON, J. 1. The defendant Stanley's demurrer to the bill was overruled rightly. The bill states a proper case for equitable relief. Brigham v. Home Life Ins. Co., 131 Mass. 319; French v. Peters, 177

[26] In accord: Dearle v. Hall, 3 Russ. 1 (1823); Marchant v. Morton, Down & Co., [1901] 2 K. B. 829; Jenkinson v. N. Y. Finance Co., 79 N. J. Eq. 247, 82 Atl. 36 (1911); Peters v. Goetz, 136 Tenn. 257, 188 S. W. 1144 (1916); Hess & S. Eng. Co. v. Turney (Tex. Civ. App.) 207 S. W. 171 (1918); Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26 (1899); Vanbuskirk v. Hartford Fire Ins. Co., 14 Conn. 141, 36 Am. Dec. 473 (1841); Clodfelter v. Cox, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157 (1853); Fraley's Appeal, 76 Pa. 42 (1874); Murdoch v. Finney, 21 Mo. 138 (1855); Ward v. Morrison, 25 Vt. 593 (1853).

An assignee, who has given no notice to the debtor, is generally preferred over a subsequent attaching creditor; the latter not being in as strong a position as a subsequent innocent assignee for value. Hall v. Kansas City Terra Cotta Co., 97 Kan. 103, 154 Pac. 210, L. R. A. 1916D, 361, note, Ann. Cas. 1918D, 605 (1916); Market Nat. Bank v. Raspberry, 34 Okl. 243, 124 Pac. 758, L. R. A. 1916E, 79, note (1912); Pellman v. Hart, 1 Pa. 263 (1845). Contra: Vanbuskirk v. Hartford Fire Ins. Co., supra.

Mass. 568, 573, 574, 59 N. E. 449. A somewhat similar bill was maintained in Blinn v. Dame, 207 Mass. 159, 93 N. E. 601, 20 Ann. Cas. 1184.

2. The plaintiff by his assignment from Sommer acquired as against the latter a valid title to the policy of insurance which here is in question. As between the plaintiff and Sommer it is immaterial that the assignment was not written upon or attached to the policy, that no reference to the assignment was written or noted on the policy, or that no notice of it was given to the insurance company, either in the manner required by the fifth clause of the policy or otherwise. Merrill v. New England Mut. Life Ins. Co., 103 Mass. 245, 252, 4 Am. Rep. 548; Hewins v. Baker, 161 Mass. 320, 37 N. E. 441; Atlantic Mutual Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933. See, also, Northwestern Mutual Life Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078, Ann. Cas. 1914D, 697; Wood v. Phœnix Life Ins. Co., 22 La. Ann. 617; Manhattan Life Ins. Co. v. Cohen (Tex. Civ. App.) 139 S. W. 51; Howe v. Hagan, 110 App. Div. 392, 97 N. Y. Supp. 86; Cowdrey v. Vandenburgh, 101 U. S. 572, 25 L. Ed. 923; Dunlevy v. New York Life Ins. Co. (D. C.) 204 Fed. 670; Fortescue v. Bennett, 3 M. & K. 36. The contrary statements in Palmer v. Merrill, 6 Cush. 282, 52 Am. Dec. 782, have not been followed. James v. Newton, 142 Mass. 366, 378, 8 N. E. 122, 56 Am. Rep. 692; Richardson v. White, 167 Mass. 58, 60, 44 N. E. 1072. The English rule, as stated in Dearle v. Hall, 3 Russ. 1, though adopted in many other jurisdictions, is not the law of this commonwealth. Thayer v. Daniels, 113 Mass. 129, 131; Putnam v. Story, 132 Mass. 205, 211.[27]

It is true also, as the plaintiff has contended, that the owner of a chattel does not, by merely intrusting to a third person the custody or even the possession thereof, hold him out as its owner, and will not by that fact alone be estopped from setting up his title against even a bona fide purchaser from his bailee. Rogers v. Dutton, 182 Mass. 187, 189, 65 N. E. 56, and cases there cited. But we have here to do, not with a chattel, but with a nonnegotiable chose in action, the right to receive in the future a certain sum of money upon the happening of certain contingencies. The policy of insurance merely shows the existence, nature and extent of the right. As has been correctly stated by counsel for Stanley: "It is the tangible evidence which the owner of the right possesses in order to show title to the right."

[27] By Mass. St. 1906, c. 390, the rule in Dearle v. Hall, supra, has been made applicable in certain specified cases. See Hall v. Boston Plate & Window Glass Co., 207 Mass. 328, 93 N. E. 640 (1911). For other statutory limitations, see Mutual Loan Co. v. Martell, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746, 128 Am. St. Rep. 446 (1909).

By Rev. St. U. S. § 3477 (U. S. Comp. St. § 6383), certain formalities are necessary to the validity of an assignment of a claim against the United States. See National Bank of Commerce v. Downie, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1065, 20 Ann. Cas. 1116 (1910); Manhattan Commercial Co. v. Paul, 216 N. Y. 481, 111 N. E. 76 (1916); Cf. Jennings v. Whitney, 224 Mass. 138, 112 N. E. 655 (1916).

The court must apply here the rule stated by the Chief Justice in Baker v. Davie, 211 Mass. 429, 440, 97 N. E. 1094, 1097, 37 L. R. A. (N. S.) 944: "That when an owner has so acted as to mislead a third person into the honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth."

The statement of Lord Herschell in London Joint Stock Bank v. Simmons, [1892] A. C. 201, 215, quoted and followed by this court in Gardner v. Beacon Trust Co., 190 Mass. 27, 28, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303, 5 Ann. Cas. 851, is to the same effect: "The general rule of law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner."

The same general principle (although its application in that case depended upon the existence of a custom) was stated again in Baker v. Davie, 211 Mass. 429, 436, 97 N. E. 1094, 37 L. R. A. (N. S.) 944. See also, Washington v. First Nat. Bank, 147 Mich. 571, 111 N. W. 349, 11 L. R. A. (N. S.) 471; Brocklesby v. Temperance Building Society, [1895] A. C. 173, 181; Farquharson Brothers & Co. v. King & Co., [1901] 2 K. B. 697. See Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284.

But this estoppel of a rightful owner to set up his title against a bona fide purchaser for value from one who had not the right to sell rests upon the conduct of the rightful owner. It arises against him when by his own conduct he has so clothed the wrongdoer with the indicia of ownership as to justify third persons in regarding the wrongdoer as either the rightful owner or as having authority from that owner. The estoppel arises only from the owner's voluntary action tending to produce and in fact producing that result. If this policy had been delivered to the plaintiff and then had been obtained from him by Sommer or Williams by means of a common-law larceny, there would have been no foundation for an estoppel against the plaintiff, because, whatever third persons might have thought or even might have been justified in thinking, the possession and apparent ownership would not have been put into Sommer or into Williams as Sommer's agent by any voluntary action of the plaintiff. Bangor Electric Light & Power Co. v. Robinson (C. C.) 52 Fed. 520; Farmers' Bank v. Diebold Lock & Safe Co., 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620, 90 Am. St. Rep. 586. This distinction was stated clearly by Holmes, C. J., in Russell v. American Bell Tel. Co., 180 Mass. 467, 62 N. E. 751, et seq., citing as typical cases Knox v. Eden Musee American Co., 148 N. Y.

441, 42 N. E. 988, 31 L. R. A. 799, 51 Am. St. Rep. 700, and Pennsylvania R. R.'s Appeal, 86 Pa. 80. See, also, Varney v. Curtis, 213 Mass. 309, 312, 100 N. E. 650, L. R. A. 1916A, 629, Ann. Cas. 1914A, 340. The rights of these parties depend upon the application of the principles which we have stated.

The plaintiff took his assignment by an instrument separate and apart from the policy itself. He allowed the possession of the policy to remain unaltered. It is true that he did this on the false representation that it was held by the insurance company as security for a premium loan; but the fact remains that it was his voluntary act. He took no other precaution either by giving notice to the company or otherwise. He testified that he did not even tell Sommer that the policy had not been delivered to him. He trusted everything to Williams; and his own testimony was that he did this by reason of his "full confidence in Williams." He knowingly allowed the circumstances to be such as to indicate that Sommer retained the full ownership of the policy, and such that no inquiry of the company would disclose anything to the contrary or throw any doubt upon Sommer's title. For this reason, such cases as Mente v. Townsend, 68 Ark. 391, 59 S. W. 41, are not applicable here. The case is a stronger one than Bridge v. Connecticut Mut. Life Ins. Co., 152 Mass. 343, 25 N. E. 612, and the reasoning of that opinion is decisive against the plaintiff. There are no circumstances upon which any distinction can be made in his favor.

But the assignment to Stanley was not in reality, but only in form, an absolute one. It was given to secure an indebtedness of Sommer to Stanley. The plaintiff has a right to redeem from Stanley. This makes it necessary to determine the amount for which Stanley can hold the policy against the plaintiff.

This policy was assigned to Stanley on Febuary 2, 1910, to secure a note for $3,000. Afterwards Stanley loaned to Sommer the further sum of $1,000, and took from him a note for that amount, dated February 2, 1911, and signed by Sommer. Above Sommer's signature, Williams, without Sommer's knowledge or consent, wrote the words: "Conn. Mut. policy 215356 as security." Those words described this policy.

We need not consider whether this interpolation by Williams in the note before its delivery to Stanley destroyed the validity of the note. R. L. c. 73, §§ 141, 142; Stoddard v. Penniman, 108 Mass. 366, 11 Am. Rep. 363; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92; Citizens Nat. Bank v. Richmond, 121 Mass. 110; Greenfield Savs. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67. But we are clearly of opinion that it does not give to Stanley the right to hold the policy as security for the payment of this latter note. The assignment to him was to secure the payment of the note for $3,000, not what further amounts might become due to him from Sommer. Sommer has never made or

undertaken to make further assignment to Stanley, or given or undertaken to give to Stanley any greater rights in the policy.

The other questions raised are disposed of by the findings of fact made in the superior court.

The plaintiff, if he so desires, may have a decree allowing him to redeem the policy upon payment of the amount due on Sommer's note for $3,000, with interest and costs, within such time and upon such terms as may be determined by a judge of the superior court. If he shall not so redeem, his bill must be dismissed with costs.

So ordered.

RABINOWITZ v. PEOPLE'S NAT. BANK.

(Supreme Judicial Court of Massachusetts, 1920. 235 Mass. 102, 126 N. E. 289.)

Action by Jacob Rabinowitz against the People's National Bank. Verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

CARROLL, J. On September 13, 1917, one Cohen assigned certain accounts which were then due him for goods sold, to the plaintiff as security for a loan of $1,000, of which $573 has been paid. No notice was given the debtors of this assignment. On October 4, 1917, Cohen assigned the same accounts to the defendant, as security for a loan which he then obtained; the defendant collected $600 on the accounts. This action is for money had and received, to recover $427. In the superior court there was a directed verdict for the defendant, and the plaintiff excepted.

Although the assignment to the plaintiff was earlier in time than the one to the defendant, plaintiff cannot recover for money had and received. There was a valid consideration for the later assignment. It does not appear that the defendant knew of the one to the plaintiff and there is no suggestion of bad faith; it did not receive the money as the plaintiff's agent or in his behalf; it was received in its own right as the assignee of the chose in action. An action for money had and received lies to recover money which should not in justice be retained by the defendant and which in equity and good conscience should be returned to the plaintiff. The right to recover does not depend upon privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense. Claflin v. Godfrey, 21 Pick. 1, 6; Farmer v. Arundel, 2 Wm. Bl. 824.

As the money was received from the debtors by the defendant as its own, in good faith, without notice of the prior assignment, under an instrument duly executed and for a good consideration purporting to assign the accounts receivable, the plaintiff cannot recover in this action. Cole v. Bates, 186 Mass. 584, 72 N. E. 333; Lawrence v. Batch-

eller, 131 Mass. 504; Rand v. Smallidge, 130 Mass. 337; Moore v. Moore, 127 Mass. 22.

We therefore do not consider it necessary to discuss the question whether the plaintiff comes within the rule established in this commonwealth that, as between competing assignees assignments of a chose in action take precedence according to their dates and not according to the time when notice is given to the debtor; the earlier assignment being good against the subsequent one, though no notice is given the debtor (Thayer v. Daniels, 113 Mass. 129, 131, Putnam v. Storey, 132 Mass. 205), or within the exceptions to the rule where, by his own acts or conduct, the earlier assignee has been prevented from recovering. As bearing on this point, see Bridge v. Connecticut Mutual Life Insurance Co., 152 Mass. 343, 25 N. E. 612. Nor is it necessary to decide what rights, if any, the plaintiff has against the debtors. See Hellen v. Boston, 194 Mass. 579, 80 N. E. 603.

Exceptions overruled.[28]

KING BROS. & CO. v. CENTRAL OF GEORGIA RY. CO. et al.

(Supreme Court of Georgia, 1910. 135 Ga. 225, 69 S. E. 113.)

Action by the Traders' Investment Company against the Central of Georgia Railway Company and King Bros. & Co. Judgment for plaintiff, and defendants King Bros. & Co. bring error. Reversed.

EVANS, P. J. An employé of the Central of Georgia Railway Company assigned to the Traders' Investment Company a stated amount, less than the whole, of the salary earned by him at the time of the assignment. Subsequently, for value and without notice of the prior partial assignment, the employé assigned his entire salary which he had earned to King Bros. & Co. The railroad company refused to pay the first assignees, and suit was instituted by them against the railroad company, the employé, and the subsequent assignees. The railroad company admitted the indebtedness, and paid the money into court, and the court awarded it, after deducting the costs, to the first assignee. The only point involved is the prior rights of the two assignees to the fund.

In the first assignment the assignor transferred a stated portion of the fund, by virtue of which the assignee acquired no separate and distinct part, but only an equitable interest, in the whole fund to the extent of the interest assigned. Fidelity Co. v. Exchange Bank, 100 Ga. 619, 28 S. E. 393; W. & A. R. Co. v. Union Investment Co., 128 Ga. 74, 57 S. E. 100. A partial assignment of a chose in action will not vest in the assignee such a title to the portion assigned as can be enforced in action at law without the consent of the debtor. Such an assignment is, however, enforceable in equity, though the debtor may

[28] In accord: Judson v. Corcoran, 17 How. 612, 15 L. Ed. 231 (1854); In re Hawley Down-Draft Furnace Co. (D. C.) 233 Fed. 451 (1916).

not assent, if all the parties at interest are before the court, so that the rights of each in the fund may be determined in one suit and settled by one decree. Rivers v. Wright, 117 Ga. 81, 43 S. E. 499.

The second assignment is of the entire chose in action, and vests in the assignee the legal title to the whole chose in action. Civ. Code 1895, § 3077. The second assignee had no notice of the prior partial assignment, nor did the debtor assent to the partial assignment of the chose. The contest for priority in payment, therefore, is between the holder of an equitable right to be paid a stated sum from the chose in action, and a subsequent bona fide assignee for value, who has the legal title to the whole chose. This priority cannot be determined by the order of the time of execution of the respective assignments, because the doctrine of "qui prior est tempore potior est jure" only applies as between persons having equitable interests, where such interests are in all other respects equal. It is only where the interests assigned are equitable in their nature, and the equity of no assignee is intrinsically superior to the others, that the order of time determines the order of priority. Where the subsequent assignee has acquired the legal title for a valuable consideration and without notice of the prior equitable assignment, he is protected. 2 Pomeroy's Eq. Jur. § 713. The relation of the holder of the legal title under such circumstances is that of a bona fide purchaser, and his title is not affected by a latent equity. The court erred in awarding the fund to the holder of the equitable assignment.

Judgment reversed. All the Justices concur.[29]

ANDREWS ELECTRIC CO., Inc., v. ST. ALPHONSE CATHOLIC TOTAL ABSTINENCE SOC. et al.

(Supreme Judicial Court of Massachusetts, 1919. 233 Mass. 20, 123 N. E. 103.)

Action by the Andrews Electric Company, Incorporated, against the St. Alphonse Catholic Total Abstinence Society and others. On report to the Supreme Judicial Court. Decree directed for plaintiff.

PIERCE, J. The plaintiff in 1915 was employed as a subcontractor on a building erected for the defendant St. Alphonse Catholic Total Abstinence Society. The contractor was the defendant James Shields. The defendant Ovide V. Fortier is the trustee in bankruptcy of the estate of Shields. At the completion of the work of the plaintiff, Shields owed it $223. It requested Shields to make payment of the debt due, and he thereupon delivered to it the following order upon the society:

"St. Alphonse Total Abstinence Society, Gentlemen: Kindly pay to Andrews Electric, Inc., the sum of $223 out of the amount coming to

[29] In accord: Pickett v. School District, 193 Mo. App. 519, 186 S. W. 533 (1916). See note, Ann. Cas. 1912A, 672.

me on my contract with the society, same being the balance due them on wiring contract. James Shields."

Before March 9, 1916, the plaintiff delivered this order to one Barlow, an architect employed by the society and the architect on the building in question. On March 9, 1916, the plaintiff wrote to the treasurer of the society a letter wherein it was stated that "he [Shields] has given us an order on his account with you for the balance, thus releasing any claim he may have on so much of the balance due on the building due him as will satisfy our bill, namely, $223. This order has been handed to Mr. Barlow."

When the order was delivered through Barlow to the society it claimed certain deductions from the balance of the contract price for the work done by Shields, because of defective work, and it was therefore uncertain what amount if any was due Shields. The order was never in fact accepted. Upon an adjustment of the account in March, 1918, under authority of the bankruptcy court it was agreed that the society owed Shields $419 when the order was given to the plaintiff.

The order was a good assignment between the parties. Richardson v. White, 167 Mass. 58, 44 N. E. 1072. It was given in consideration of a pre-existing debt, was drawn upon a specific fund identified by the order itself, was delivered to the payee and notice thereof was given to the debtor. Putnam v. Story, 132 Mass. 205, 212; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456.

Shields was adjudicated a voluntary bankrupt on January 25, 1917. There is nothing in the agreed statement of facts to show Shields had any other creditor than the plaintiff when the order was given it, and the existence of creditors on March 9, 1916, cannot be inferred from the fact that Shields was bankrupt on January 25, 1917. The assignment appears to have been made in good faith, it did not affect the rights of creditors and was made more than four months before the commencement of bankruptcy proceedings. An assignment of the whole fund made under these circumstances is good between the parties and against the trustee in bankruptcy of the assignor. Bridge v. Kedon, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235.

An assignment of part of the fund against the consent of the drawee is void at law because the partial assignor is not an attorney with power to sue in the assignor's name and because "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire." Gibson v. Cooke, 20 Pick. 15, 32 Am. Dec. 194; Palmer v. Merrill, 6 Cush. 282, 52 Am. Dec. 782; Papineau v. Naumkeag, 126 Mass. 372; Mandeville v.

Welch, 5 Wheat. (U. S.) 277, 286, 5 L. Ed. 87.[80] In equity, however, the objections to a partial assignment disappear. All persons in interest can be brought before the court in a single suit and a decree can be entered which will protect the rights of all parties concerned. National Exchange Bank v. McLoon, 73 Me. 498; 40 Am. Rep. 388.

The question at issue has never been directly decided in this commonwealth, but inferentially the decisions are in accord with the very great weight of authority in England and the United States in the support of the legal statement that such an assignment is valid in equity without the assent of the debtor, trustee or stakeholder; and we are of opinion that such is the true rule and should be followed in this commonwealth. Putnam v. Story, supra; James v. Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Richardson v. White, supra; Kingsbury v. Burrill, 151 Mass. 199, 24 N. E. 36; Nashua Savings Bank v. Abbott, 181 Mass. 531, 63 N. E. 1058, 92 Am. St. Rep. 430; Security Bank of New York v. Callahan, 220 Mass. 84, 107 N. E. 385; Row v. Dawson, 1 Ves. Sr. 331; Ex parte Moss, 14 Q. B. D. 310; Percival v. Dunn, 29 Ch. D. 128; Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Peugh v. Porter, 112 U. S. 737, 5 Sup. Ct. 361, 28 L. Ed. 859; Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Nat. Exchange Bank v. McLoon, supra; Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Appeals of Philadelphia, 86 Pa. 179; Bower v. Hadden Blue Stone Co., 30 N. J. Eq. 171.[81]

The assignment being valid in equity and not void as in fraud of creditors or as contravening the Bankruptcy Act (U. S. Comp. St. §§ 9585–9656) the trustee took subject to it. Bridge v. Kedon, supra; Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4864; Parker v. Muggridge, 2 Story, 334, Fed. Cas. No. 10743; In re Hanna (D. C.) 105 Fed. 587.

It follows that a decree should be entered that the St. Alphonse Catholic Total Abstinence Society pay the plaintiff from said fund of $419 the sum of $223, with interest thereon from the filing of the bill, and the balance of the fund to the trustee in bankruptcy.

Decree accordingly.

[80] See, also, Sheatz v. Markley, 249 Fed. 315, 161 C. C. A. 323 (1918); John A. Schmitt's Sons v. Shadrach, 251 Fed. 874, 164 C. C. A. 90 (1918).

[81] Also in accord: Escanaba Traction Co. v. Burns, 257 Fed. 898, 904, 169 C. C. A. 48 (1919); Field v. Mayor, etc., of City of New York, 6 N. Y. 179, 57 Am. Dec. 435 (1852); Palmer v. Palmer, 112 Me. 149, 91 Atl. 281 (1914). If all the claimants join as plaintiffs, the debtor cannot object to a partial assignment. Whittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708 (1891); McInnis Lumber Co. v. Rather, 111 Miss. 55, 71 South. 264 (1916). See, also, Carvill v. Mirror Films, 98 Misc. Rep. 650, 163 N. Y. Supp. 268 (1917), 26 Yale L. Jour. 792; Skipper v. Holloway (1909) 26 T. L. R. 82, 23 Harv. L. Rev. 307.

DEVLIN v. MAYOR, ETC., OF CITY OF NEW YORK et al.

(Court of Appeals of New York, 1875. 63 N. Y. 8.)

This action was brought by plaintiff, as assignee of an interest in a contract, made between the corporation of the city of New York and one Andrew J. Hackley, under the act (chap. 309, Laws of 1860) for cleaning the streets of said city. The other defendants, it was alleged, claimed interest in the contract, but refused to join as plaintiffs.

By the contract, which was made February 26th, 1861, the contractor agreed to sweep all the paved streets, avenues, lanes, alleys, etc., in said city at least once a week, Broadway once every twenty-four hours, and some other streets specified twice a week for the term of five years, and to immediately remove the sweepings. * * *

ALLEN, J.[32] The referee has found the making of the contract as alleged, the performance thereof by Hackley, from the making thereof in February, 1861, until May, 1863, an ability, readiness and offer by him to perform the contract for the unexpired term thereof, and that he was, in May, 1863, without cause, ejected by the respondents from the work, and by them prevented from proceeding in the performance of the agreement. He has also found the amount due and unpaid for work actually done at the time of the interference by the respondents, and the damages sustained by the parties in interest by reason of the breach of the contract by the respondents. * * *

Upon the adjudged facts the plaintiff and the defendants, appellants, the assignees of Hackley were entitled to recover unless there is some legal impediment, and were entitled to retain the judgment given by the referee, unless for some reason no action at law could be maintained for the work actually performed, or upon the agreement for a breach thereof, or some material error was committed by the referee upon the trial to the prejudice of the respondents.

But two objections to the recovery against the city, the present defendant, were considered by the court below in the opinion annexed to the record before us, and they being regarded as insuperable and fatal to the action, the judgment of the referee was reversed and judgment absolute given for the city. These objections were: First, that the contract between the city and Hackley was not assignable, and that the assignment by the original contractor, of itself, terminated the contract and justified the action of the city authorities in refusing longer to be bound by it. * * *

The question, however, whether the assignment by the original contractor terminated the contract, or authorized the refusal of the city longer to be bound by it, still remains to be considered, as the waiver has not been found by the referee. An assignment by the contractor of the amounts which would have become due from the city from time to time, made before the doing of the work or the perform-

[32] Parts of the opinion are omitted and the statement of facts is condensed.

ance of the conditions upon which the payments depended, would, under the liberal rule permitting the assignment of choses in action now prevailing, be valid. Expectancies, as well as existing rights of action, may be assigned, and the rights of the assignees will be protected and enforced at law. Field v. Mayor, etc., 6 N. Y. 179, 57 Am. Dec. 435; Hall v. Buffalo, 2 Abb. Dec. 301. An assignment may include all contingent and incidental benefits or results of an executory contract, as well as the direct fruits or earnings under it, and thus entitle the assignee to the damages resulting from a violation of its terms. The right of action for a breach of the contract, resulting in pecuniary loss to the contractor, would survive to the personal representatives of the aggrieved party, and that is one test of the assignability of contracts and choses in action. Byxbie v. Wood, 24 N. Y. 607; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551. In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor. Hackley, the original contractor, was at no time discharged from his obligations to the city, nor was he disqualified for the performance of the contract,[33] but was at all times in a position to perform his part of this agreement, facts which distinguish this case from Stevens v. Benning, 6 De G., M. & G. 223, and Robson v. Drummond, 2 Barn. & Ad. 303.

Stevens v. Benning is distinguished from the present by the additional circumstances that the contract in the case cited was in its nature personal, and was made in reference to the character and facilities of the contracting firm as a publishing house, and was in

[33] An assignment is not a novation, even though the other party to the contract assents to the assignment, and the assignor escapes none of his contractual duties by the assignment. See Houston v. Barnett, 90 Or. 94, 175 Pac. 619 (1918); Haag & Bro. v. Reichert, 142 Ky. 298, 134 S. W. 191 (1911); McFarland v. Mayo (Okl.) 162 Pac. 753, L. R. A. 1917C, 901 (1916); Granite Building Corporation v. Rubin, 40 R. I. 208, 100 Atl. 310, L. R. A. 1917D, 845 (1917). See, also, chapter V, Discharge of Contract.

the nature of a partnership in so far as it provided for a division of the profits of the work to be published. In Robson v. Drummond the defendant had agreed to pay annually in advance for the use of the carriage to be furnished by Sharpe, a coachmaker, and was not bound, after notice of his withdrawal from and assignment of the contract to Robson, to trust to the ability or integrity of the assignee; and the court also held that the contract was one for the personal service of Sharpe, and that the defendant was entitled to his judgment and taste to the end of the contract. It is not disputed that in all cases when the executor or administrator would succeed to the rights and liabilities of a deceased party to a contract, the contract is assignable by the act of the parties, the personal representatives of a decedent being regarded but the legal assignee upon whom the law devolves the rights and obligations of their testator or intestate. In one case in which the executory obligations of deceased parties have been sought to be enforced against their personal representative, the question has been said to be one of construction depending upon the intention of the parties, and that we are without any well-defined rule on the subject. Dickinson v. Calahan's Admrs., 19 Pa. 227. In some cases in which executors and administrators have assumed the contracts of their testators or intestate, and after performance sought to recover the stipulated compensation, the question has been one of pleading rather than of principle. Edwards v. Grace, 2 M. & W. 190.

The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed rather than the supposed intent of the parties, except as that intent is expressed in the agreement. Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry or engagements for personal services requiring skill, science or peculiar qualifications, may be assigned, and by them the personal representatives will be bound. In Hyde v. Windsor, Cro. Eliz. 552, it was said that executors are bound by all covenants of their testator, whether named or not, "unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform." If the contract be personal and the performance of the party himself be the essence thereof, it neither devolves upon his representatives, nor can it be assigned. White's Ex'rs v. Commonwealth, 39 Pa. 167. When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that the original contractor could have done, the assignee or representative may do so and have the benefit of the contract. Quick v. Ludbaum, 3 Bulst. 30, adjudged a contract to build a house binding upon the executors. This case has been criticised, and sometimes its authority questioned, but the modern cases in England and the deci-

sions of the courts of this State are in harmony with it. It is cited with approval in Siboni v. Kirkman, 1 M. & W. 417, and in many other cases.

The act of God in the death of the party does not dissolve the contract or excuse performance, except in the case of a contract requiring personal service, and then the law will imply an exception. In the case last referred to executors were held entitled to enforce a contract for the exchange of pianos made by their testator twenty years before the bringing of the action. There may be cases in which the executor may not be compellable to perform a contract of his testator, and yet may elect to do so and entitle himself, in his representative capacity, to the compensation. Marshall v. Broadhurst, 1 Cr. & J. 403, 1 Tyrwhitt, 348, was for work and materials in building a house which the testator of plaintiff had agreed to build, but died before the work was begun and the plaintiffs were held entitled to recover. The court say, that in case of such a contract, if the executors do not go on they will be liable to damages for not completing the work, and if they go on they may recover as executors. See, also, Wentworth v. Cock, 10 A. & E. 42. In the latter case Pattison, J., refers to a case at Liverpool where a contract to build a light-house was held to be personal, and therefore not assignable, but solely on the ground of its being a matter of personal skill and science, clearly implying that but for that element in the contract it would have been assignable. Sears v. Conover, 34 Barb. 331, was not unlike Wentworth v. Cock, except that the action was an action by the assignee of an executory contract for non-performance by the other party.

Within the principle of the adjudications in this State this contract was assignable. The executor of the contract would have been bound to perform it to entitle him to recover what had been earned, and to prevent an action for non-performance. It was a contract not capable of being performed in person by Hackley. At most, he could only employ workmen and appoint agents and overseers of the work. The work did not require or call for the exercise of any peculiar skill, science or experience. It was by law all to be done under the directions of the city inspector, who may be supposed to have been in possession of all the local knowledge and experience essential to the general direction of the work. It was merely the servile labor of sweeping and cleaning the streets, and removing the garbage as specified in the agreement and under the general supervision of the city inspector, that the contractor engaged for.

Work upon the canals of this State, either in their repair or construction, calls for more of skill and scientific knowledge, as well as of experience, than this work could call for, and yet contracts for that class of work have been recognized as assignable by the legislature and by the courts, and the rights of assignees protected and en-

forced. Munsell v. Lewis, 2 Denio, 224. So contracts for the labor of convicts in the State prisons have been expressly held assignable, and on the ground that notwithstanding the intimate personal relations that must exist between the contractor and the convict laborers, and their presence at all times within the prison walls, and their opportunities of interfering with the discipline of the prison, the contract is not personal in its character. There the general discipline and government of the prison and the prisoners was with the warden and other officers, while here, so far as any judgment or discretion is to be exercised, it was with the city inspector. The circumstance that by the statute in this case the contract was to be awarded as the common council should deem for the best interests of the city, does not distinguish this case from those referred to. This provision did not refer to the person of the contractor, but to the terms of the contract. It was not intended to enable the common council to be a respecter of persons and to give the contract to favorites, but to give them a discretion to choose between different proposals, relieving the authorities from the necessity of awarding the contract to the lowest bidder irrespective of the terms of the contract, the security offered, or the fairness or sufficiency of the compensation to insure performance with reasonable certainty. This statutory provision does not change the character of the work or import into the contract any unusual terms, or destroy its assignability. The assignment of the contract and the interest of the contractor under it did not terminate the agreement or authorize its rescission or abandonment by the city. * * *

All concur.

Judgment accordingly.[34]

BRITISH WAGON CO. et al. v. LEA & CO.

(In the Queen's Bench Division, 1880. 5 Q. B. Div. 149.)

The judgment of the Court (Cockburn, C. J., and Manisty, J.) was delivered by.

Cockburn, C. J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway wagons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances:

By an agreement in writing of February 10th, 1874, the Park-

[34] In the following cases personal performance by the assignor was held not to be a condition precedent, and performance by the assignee made the assigned right enforceable by him: Corvallis & A. R. R. Co. v. Portland E. & E. R. Co., 84 Or. 524, 163 Pac. 1173 (1917); Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co., 59 App. Div. 353, 69 N. Y. Supp. 355, affirmed 170 N. Y. 582, 63 N. E. 1119 (1901); La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42, 18 Am. St. Rep. 179 (1890). See, also, Rochester Lantern Co. v. Stiles & Parker Co., 135 N. Y. 209, 31 N. E. 1018 (1892).

gate Wagon Company let to the defendants, who are coal merchants, fifty railway wagons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13th, 1874, the company in like manner let to the defendants fifty other wagons, at a yearly rent of £625, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said wagons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the wagons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On October 24th, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding up of the company should be continued under the supervision of the Court.

By an indenture of April 1st, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the wagons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs. It was expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said wagons. This, however, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation; secondly, by assigning the

contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this Court, the use of the wagons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of §§ 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these wagons, and the receipt of the rent payable in respect of them, would, we presume, be.[85]

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the wagons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of Robson v. Drummond (2 B. & Ad. 303), approved of by this Court in Humble v. Hunter (12 Q. B. 310). In Robson v. Drummond a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden

[85] Suppose the Parkgate Company had been dissolved and its assets distributed; could the British Company continue performance and enforce the assigned right to payment? See Tolhurst's Case, [1902] 2 K. B. 660 (1902); Detroit T. & I. R. Co. v. Western Union Tel. Co., 200 Mich. 2, 166 N. W. 494 (1918).

on the ground that "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;" and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this Boulton v. Jones (2 H. & N. 564) is a sufficient authority. The case of Robson v. Drummond comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in Robson v. Drummond rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of

Queen's Bench in Robson v. Drummond went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim "Qui facit per alium facit per se" applies.

In the view we take of the case, therefore, the repair of the wagons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the wagons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in Brice v. Bannister (3 Q. B. D. 569) be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.

(Supreme Court of the United States, 1888. 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.)

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows:

On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing & Eilers, at their smelting works in Leadville, 10,000 tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least 50 tons a

day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party;" and it was further agreed as follows: "The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered. Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices;" specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice;" that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract canceled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the

ore was definitely fixed;" and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract. The circuit court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. St. § 914 (U. S. Comp. St. § 1537); Code Civ. Proc. Colo. § 3; Steel Co. v. Lundberg, 121 U. S. 451, 7 Sup. Ct. 958, 30 L. Ed. 982. The vital question in the case, therefore, is whether the contract between the defendant and Billing & Eilers was assignable by the latter, under the circumstances stated in the complaint. At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am. Dec. 93; Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; King v. Batterson, 13 R. I. 117, 120, 43 Am. Dec. 13; Lansden v. McCarthy, 45 Mo. 106.

The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: "Rights arising out of contract cannot be transferred if they are coupled with liabilities. or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided."

Pol. Cont. (4th Ed.) 425. The contract here sued on was one by which the defendant agreed to deliver 10,000 tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

The fact that upon the dissolution of the firm of Billing & Eilers, and the transfer by Eilers to Billing of this contract, together with the smelting works and business of the partnership, the defendant continued to deliver ore to Billing according to the contract, did not oblige the defendant to deliver ore to a stranger, to whom Billing had undertaken, without the defendant's consent, to assign the contract. The change in a partnership by the coming in or the withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting; but, however that may be, an assent to such a change in the one party cannot estop the other to deny the validity of a subsequent assignment of the whole contract to a stranger. The technical rule of law, recognized in Murray v. Harway, 56 N. Y. 337, cited for the plaintiff, by which a lessee's express covenant not to assign has been held to be wholly determined by one assignment with the lessor's consent, has no application to this case. The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff, (which might perhaps be an assignable chose in action,) but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tend-

ing to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. Sears v. Conover, *42 N. Y. 113, 4 Abb. Dec. 179; Tyler v. Barrows, 29 N. Y. Super. Ct. 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. Hambly v. Trott, Cowp. 371, 375; Wentworth v. Cock, 10 Adol. & E. 42, 2 Perry & D. 251; 3 Williams, Ex'rs (7th Ed.) 1723–1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. Dickinson v. Calahan, 19 Pa. St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. Taylor v. Palmer, 31 Cal. 240, 247; St. Louis v. Clemens, 42 Mo. 69; Philadelphia v. Lockhardt, 73 Pa. 211; Devlin v. New York, 63 N. Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. Robson v. Drummond, 2 Barn. & Adol. 303; Waggon Co. v. Lea, 5 Q. B. Div. 149; Parsons v. Woodward, 22 N. J. Law. 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case. Judgment affirmed.[36]

[36] In American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (D. C.) 248 Fed. 172 (1918), a similar contract contained a term that it should be "binding upon and inure to the benefit of successors and assigns." At suit of the assignee the contract was specifically enforced in equity. The court said: "The assignment, it must be understood, cannot relieve the assignor of its obligations to the Mining Company under its agreement. 5 C. J. 879. But the Smelting Company having by its assignment delegated its performance to the A. S. & R. Company, and the A. S. & R. Company by accepting the assignment having become bound to perform as the Smelting Company was bound in the first instance, the Mining Company has lost no remedial rights, but instead has been accorded a like remedy against the A. S. & R. Company to that it had against the Smelting Company. In a

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO v. WELLES et al.

(Supreme Court of the United States, 1916. 242 U. S. 7, 37 Sup. Ct. 3, 61 L. Ed. 116, Ann. Cas. 1918D, 643.)

Mr. Justice HOLMES delivered the opinion of the court:

This is a suit brought by the appellee Welles to establish a lien upon a debt of $6,830.85, due under a construction contract from the city of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The district court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the circuit court of appeals. 211 Fed. 561, 128 C. C. A. 161; 215 Fed. 81, 131 C. C. A. 389. The subject-matter is the fourth progress payment, which, on December 5, 1910, had been authorized by the board of public works of the city.

broad sense, this is exactly what the parties from the very inception of the negotiations contemplated might happen."

Personal performance by the assignor was held to be a condition precedent, so that attempted substitution of an assignee had the effect of a repudiation, in the following cases: Griffith v. Tower Pub. Co., [1897] 1 Ch. 21, contract by defendant to publish plaintiff's book and to pay royalty; Kemp v. Baerselman, [1906] 2 K. B. 604; New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N. Y. 280, 73 N. E. 8 (1905), contract to sell presses and to pay over money received; New England Cabinet Works v. Morris, 226 Mass. 246, 115 N. E. 315 (1917), contract to design and install furniture; Paige v. Faure, 229 N. Y. 114, 127 N. E. 898 (1920), in spite of an express provision for the benefit of "assigns"; Edison v. Babka, 111 Mich. 235, 69 N. W. 499 (1896); Hardy Implement Co. v. South Bend Iron Co., 129 Mo. 222, 31 S. W. 599 (1895); Walker Electric Co. v. New York Shipbuilding Co., 241 Fed. 569, 154 C. C. A. 345 (1917).

In sales on credit, where the assignor was to give his personal note, a tender of the assignee's note is not sufficient. Hambleton v. Jameson, 162 Iowa, 186, 203, 143 N. W. 1010 (1913); Wood v. Blanchard, 212 Mass. 53, 55, 98 N. E. 616 (1912). But where mere book credit was to be given the seller must deliver to the buyer's assignee on tender of the cash by the latter. Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co., 143 Minn. 344, 173 N. W. 703 (1919).

An assignment of contract rights is not invalid, even though it purports to provide for a substitution of the assignee in the matter of duty and liability as well as of right; the assignee may enforce the assigned right in case the conditions precedent thereto in the way of performance by the assignor have been fulfilled. American Lithographic Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909 (1914).

Where the assignee clearly assumes to perform the contractual duties of the assignor, this is no novation, and the assignor remains bound as before; but the other party to the original contract now has an additional security and can sue the assignee for breach in jurisdictions recognizing the rights of a creditor-beneficiary. Corvallis & A. R. R. Co. v. Portland E. & E. R. Co., 84 Or. 524, 163 Pac. 1173 (1917); Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. C. 368, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363 (1908); Jones v. Allert, 161 Cal. 234, 118 Pac. 794 (1911). A mere assignment of rights does not necessarily carry with it such an assumption of duties. Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237 (1918); Mound Valley Vitrified Brick Co. v. Mound Valley Natural Gas & Oil Co. (C. C.) 258 Fed. 936 (1911); Lisenby v. Newton, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203 (1898).

On that day the Construction Company applied to the appellant bank for a loan of $30,000, secured by an order on the auditor of the city, authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor, whereupon, on the next day, the order was presented to the auditor's office and stamped as received on December 6. The order was intended and taken as an assignment, and, after it had been stamped, was accepted by the bank as security, and the money was advanced. The next day $5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the state of California. It is admitted by Welles that if the assignment was valid, his rights are subordinate to it (Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187); and the only question argued on his behalf is whether the terms of the contract beween the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control, and should not assign or sublet the whole or any part thereof without the consent of the board of public works. It further declared that no subcontract should relieve the contractor of any of his obligations, and that he should not, "either legally or equitably, assign any of the moneys payable under the contract or his claim thereto unless with the like consent." The city has made no objection to the assignment to the bank, and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. Arkansas Valley Smelting Co. v. Belden Min. Co., 127 U. S. 379, 8 Sup. Ct. Rep. 1308, 32 L. Ed. 246. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a res incorporalis, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies

the principle recognized by the statute of California that a debt is to be regarded as a thing, and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civ. Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.[37] * * *

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and consequently that the decree must be reversed. See Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; Burnett v. Jersey City, 31 N. J. Eq. 341; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

Decree reversed.[38]

Mr. Justice McKENNA dissents for the reasons stated by the circuit court of appeals.

BUTLER v. SAN FRANCISCO GAS & ELECTRIC CO.

(Supreme Court of California, 1914. 168 Cal. 32, 141 Pac. 818.)

Action by Frank I. Butler against the San Francisco Gas & Electric Company, in which Henry T. Johnson intervened. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

LORIGAN, J.[39] This cause was transferred to this court after judgment affirmed by the District Court of Appeal.

On December 30, 1909, William A. Butler, brother of the plaintiff, entered into a written contract with the defendant gas company to furnish the labor and material and do the brick and terra cotta work on a certain building to be constructed for the defendant; the latter agreeing to pay him therefor the sum of $2,940. The contract expressly provided that no assignment of it should be

[37] The court here distinguished the case of Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578 (1894).

[38] See, also, Pond Creek Coal Co. v. Riley Lester & Bros., 171 Ky. 811, 188 S. W. 907 (1916); Payne v. Lautz Bros. & Co. (Sup.) 168 N. Y. Supp. 369 (1918). See comment in 26 Yale Law Journal, 304.

A provision in an insurance policy that it is to be void if assigned before loss, is valid. Morgan v. American Cent. Ins. Co., 80 W. Va. 1, 92 S. E. 84, L. R. A. 1917D, 1049 (1917).

In Brice v. Bannister, 3 Q. B. D. 569 (1878), Bramwell, L. J., said: "Maybe, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him, such a stipulation would be binding. I hope it would be."

[39] Part of the opinion is omitted.

made by said Butler nor any portion of the work sublet by him to any subcontractor without the written consent of the defendant, and that said Butler should personally supervise and direct the work contracted for. On February 12, 1910, said William A. Butler and his brother, the plaintiff herein, entered into the following contract:

"This agreement made this twelfth day of February, 1910, between Frank I. Butler, party of the first part, and William A. Butler, party of the second part, both of the city and county of San Francisco, witnesseth: That the party of the first part does hereby agree for and in consideration of $2,940, to furnish all labor and material required to do all the brick work and set all terra cotta, for building of the addition of the central station 'C' of the San Francisco Gas & Electric Company, east of Fourth street, all in accordance with the plans and specifications furnished by D. H. Burnham & Co., architects, and included in the contract entered into by the said W. A. Butler and the said San Francisco Gas & Electric Company. In consideration of this agreement the said W. A. Butler will pay or cause to be paid to the said Frank I. Butler the above-mentioned sum when it becomes due from the said San Francisco Gas & Electric Company."

Under this last contract the work was commenced by the plaintiff, although it was personally supervised and directed by said William A. Butler, and was completed and accepted by the defendant on April 14, 1910. No question is made but that the work provided to be done was done satisfactorily. On March 19, 1910, the defendant paid to William A. Butler $1,350 pursuant to the terms of its contract with him, which left a balance to become due under the contract of $1,440 ($150 having been deducted by mutual consent), of which $705 was payable April 14, 1910, the remainder of $735 payable 35 days thereafter, or about June 4, 1910. On April 7, 1910, plaintiff in writing notified defendant that he was the subcontractor for the work, that he had received from William A. Butler $1,350, the first payment thereon, and that another payment would be due thereon in a few days, as his work would then be finished, and notified defendant to withhold the money due on its contract with William A. Butler for the plaintiff. This notice was accompanied with a copy of the contract set forth above between plaintiff and the said William A. Butler. The defendant was not requested to, nor did it, give its consent to the contract entered into between the Butlers, nor did it know of such contract or that William A. Butler had not personally performed the work under his contract with it until this notice and a copy of the contract was served on it on said April 7, 1910, when the work was substantially completed.

The intervener herein, Henry T. Johnson, had on November 7, 1909, obtained a judgment against said William A. Butler for $862.-25. An execution was issued thereon on March 23, 1910, and served on defendant, levying upon any moneys due or owing by defend-

ant to said William A. Butler. On April 18, 1910, William A. Butler by written instrument assigned to plaintiff all moneys due or to become due by reason of his contract with defendant, but of this assignment defendant had no notice until the present action was brought. On April 25, 1910, plaintiff served another notice on defendant similar to that of April 7, 1910, but on April 28th thereafter the defendant paid to the sheriff under the levy on the execution heretofore referred to the sum of $705, and took the receipt of the sheriff therefor. On May 12, 1910, plaintiff filed a claim of lien for $1,440 against the property of the defendant upon which the work had been performed, and thereafter commenced this action. Prior to the filing of the second amended complaint herein, and about October 18, 1910, another writ of execution was issued on the judgment against William A. Butler obtained by the intervener, Johnson, and was served on defendant to satisfy a balance claimed to be due on said judgment of $164.30, but no part of this was paid by the defendant.

The second amended complaint set forth three causes of action: To foreclose a mechanic's lien; to recover upon the notices served on the defendant to withhold the money due; to recover upon an assignment to plaintiff from William A. Butler of all moneys due him under his contract with defendant.

The defendant gas company in its answer set up as a defense the violation of the clause in its contract with William A. Butler, and further that the contract between said William A. Butler and the plainfiff had been knowingly and fraudulently entered into by them for the purpose of defrauding a judgment creditor—the intervener, Johnson—out of the fruits of his judgment against said William A. Butler by a transfer from said William A. Butler to the plaintiff of the moneys which might become due from the defendant under its contract with said William A. Butler; set up the payment by defendant of $705 to the sheriff under the execution as heretofore stated, and the further levy on the money in its hands for the balance claimed to be due said Johnson on his judgment; and admitted that there was due William A. Butler under his contract any balance remaining, after deducting these amounts.

A complaint in intervention was filed by the intervener, Johnson, in which said William A. Butler was made a party defendant and to which he appeared and answered. The intervener also attacked the validity of the contract between William A. Butler and the plaintiff, on the ground that it was entered into between them for the purpose of cheating and defrauding him of the fruits of his judgment obtained against William A. Butler, and asked for a judgment requiring the defendant gas company to pay over to the sheriff upon the execution levied on the money in its hands, the balance due said intervener.

The court found that the contract entered into between William A. Butler and the plaintiff was, in legal effect, an assignment of the contract between said William A. Butler and the defendant and utterly void, as in contravention of the clause in the original contract prohibiting any assignment thereof; that being void for this reason plaintiff succeeded to no rights whatever under it either to support a lien or any other claim against the defendant; that the assignment of April 18, 1910, from William A. Butler to plaintiff of all moneys due or to become due arising out of the contract between William A. Butler and defendant was equally void by virtue of the prohibitory clause in the original contract. The court further found that the contract between the Butlers was made pursuant to a collusion and conspiracy on their part to defraud the intervener as a judgment creditor of William A. Butler; sustained the payment of the $705 made by the defendant to the sheriff on the levy of the execution; and found that there was still due the intervener $156.67 as a balance on his judgment against William A. Butler, and that there was unpaid from defendant to William A. Butler the sum of $578.33. The judgment was that the intervener had a lien on the moneys in the hands of the defendant due and unpaid from it to William A. Butler to the extent of the balance due on his judgment, and that plaintiff take nothing by his action.

Plaintiff appeals from the judgment, and insists that the view of the trial court that the contract entered into between himself and William A. Butler was in legal effect, an assignment of the original contract, and hence void, is erroneous. He insists further that the finding of the court that this contract between himself and William A. Butler was fraudulently entered into for the purpose of defeating the claim of the intervener as a judgment creditor of William A. Butler, and so sustaining the payments made by the defendant under the execution levied thereon, is not supported by the evidence; and, in any event, that as to the balance of the contract price admitted to be due by defendant to William A. Butler plaintiff, as his assignee, was entitled to a judgment for it in his favor.

As to the nature of the contract between himself and William A. Butler, the position of the appellant is that that contract does not purport to be an assignment of the original contract, and does not have that legal effect; that it does not pretend to transfer the legal title to plaintiff or create any privity between the plaintiff and defendant; that it is purely an independent contract whereby plaintiff undertook to furnish the materials and do the work contracted for by William A. Butler for the sum which was to be paid by it to William A. Butler; that the fact that the price to be paid coincides in both contracts is entirely collateral, and does not make his contract with William A. Butler an assignment or detract at all from its force as an independent contract. While stating this contention as to the nature of the contract, we do not feel required to determine

it. In the view we take on this appeal, a construction in harmony with the contention of appellant could only be important on the question of a lien in his favor, and then only with reference to a portion of the last payment admitted by defendant to be due William A. Butler for the work performed, because, under the particular finding of the court, to be immediately referred to, that is all which, in any event, the plaintiff would be entitled to recover. And, if entitled to a judgment for that amount, it is apparent in this case that he will be just as fully protected by a personal judgment against the defendant as through a lien. The question must, as we say, be limited to the right of plaintiff to recover this balance of the last payment for the work, because, whatever the nature of the contract between plaintiff and William A. Butler may have been, the finding of the court that it was fraudulently made for the purpose of defeating the rights of the intervener as a judgment creditor of William A. Butler, if supported by the evidence, fully warranted the trial court in sustaining the payments made by the defendant to the sheriff after the levy of execution, and providing also for the further payment of the balance due on the judgment. * * *

It will now be observed that deducting these amounts—$705 and $156.67—from the $1,440 due under the original contract leaves the sum of $578.33 unpaid and in the hands of the defendant. The defendant admitted that it was indebted under the original contract for that amount, but contends that it owes it to William A. Butler, and not to the plaintiff, and this is the effect of the judgment rendered by the trial court. In this conclusion we are of the opinion that the trial court was in error. Assuming, as the court found, that the contract between the Butlers was void as an attempted assignment of the original contract, then the work under it must be deemed to have been done by William A. Butler, and on this theory the payments thereunder were due to him alone. But one of the causes of action set up by plaintiff as the basis of a recovery against defendant was an assignment by William A. Butler to him of all moneys due or to become due under the original contract which was made after the work was fully performed and accepted by the defendant. The theory of the trial court was that this assignment of these moneys due under the original contract was void, as controverting the clause of the contract against assignment. But it is apparent from the terms of the prohibition against assignment that this went only to the performance of the work itself, which was to be personally supervised by William A. Butler. It did not apply to the benefits accruing on performance of the work. He was to perform the work before any liability could exist for the final payment. That work was done, and all that was assigned was the final payment earned, but not yet due. The mere assignment of moneys due or to become due, although the contract may not be assigned, is held not to be an assignment of the contract. National

Surety Co. v. Maag, 43 Ind. App. 16, 86 N. E. 862; In re Wright, 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193; Dickson v. City of St. Paul, 97 Minn. 258, 106 N. W. 1053; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

The assignment of the payments being valid, the court should have entered a judgment in favor of the plaintiff for this balance of $578.33. It had all the parties before it, so that complete disposition of the matter could be had. The claims of Johnson, the intervening creditor, were satisfied. Defendant had admitted that it owed the money. One or the other Butler was entitled to it. William A. Butler was before the court, having answered the complaint in intervention. He made no claim to the money, and clearly under his assignment was estopped from doing so. It is true, as found by the court, that the defendant had no notice of this assignment until this action was brought. This, however, would only affect the matter of costs. But under the circumstances we do not think the defendant is entitled to any consideration in that matter. While it had no notice until this suit was brought of this particular assignment, it had several notices served upon it which showed that plaintiff was quite persistently claiming that he was entitled to the money from the defendant, and that as between the Butlers, who were the only ones, except the creditor Johnson, who made claim to a portion of it, he was entitled to it.

As we have said, we do not think it is necessary to pass upon the question as to the nature of the contract between the Butlers, whether, in effect, an assignment or an independent contract. This would only be necessary if we thought the matter of a lien in favor of the plaintiff was important. But it is not. Plaintiff, for the reasons heretofore given, would not in any event be entitled to recover a greater sum than the amount of the balance of the final payment due by the terms of the original contract. The defendant admitted that indebtedness and its willingness to pay it to William A. Butler. No question arises but that it is amply able to make the payment and to whoever the court determines is entitled to it.

The judgment is reversed, with directions to the lower court to enter a personal judgment in favor of plaintiff against the defendant for $578.33, and costs.

WHITELEY, Limited, v. HILT.

(In the Court of Appeal. [1918] 2 K. B. 808.)

Appeal from the decision of a Divisional Court (Salter and Roche, JJ.)

The action was brought in the county court by the plaintiffs, William Whiteley, Limited, against the defendant, Miss Mina Hilt, for

the return of a piano, which they had let to a Miss Nolan under a hire-purchase agreement, and for damages for its detention.

By an agreement dated December 10, 1916, the plaintiffs agreed to let Miss Nolan, who was then living in a flat at College Court, Hammersmith, the piano in question upon the following terms:

(1) To pay £2 13s. 11d. on signing in consideration of the option of purchase therein granted, and punctually to pay a further £2 13s. 11d. quarterly. (2) To keep the piano in good repair and take all risks. (3) Not to remove it without the previous consent of the owners. (5) In case of any breach of the agreement the owners were to be entitled to enter the premises and to retake the piano. The owners agreed: (a) That the hirer could at any time during the hire terminate the same by returning the article to the owners. (b) The hirer could become the owner of the said article by paying the hire punctually, but should remain merely a bailee until the full sum of £32 7s. was paid. (c) Should the owners retake the piano under the terms of the agreement, the hirer should have the right to resume the hiring, provided she paid the arrears of hiring up to the date of repossession and procured a guarantor to the satisfaction of the owners, and paid expenses.

On December 3, 1916, Miss Nolan, having paid all the instalments which were due up to that date, amounting to £13 9s. 7d., sold the contents of her flat, including the piano for £100 to the defendant, who succeeded her as occupier of the flat. She gave the defendant a receipt for the £100 in the following form:

"40, College Court, Hammersmith. Received of Mina Hilt £100 in full payment for all my furniture, piano, and plate, pictures, linen, carpets, and effects—the whole contents of this flat as set down in the following list. I solemnly declare that the property is my own and that no one has any claim upon it. Received £100 from Mina Hilt. Nina Incledon Widlake, December 3, 1916."

Mrs. Widlake was the same person as Nina Nolan. The defendant, in a letter to the plaintiffs, dated August 10, 1917, stated that before purchasing she made various inquiries to ascertain that Miss Nolan had the right to dispose of all the contents of the flat; she inquired of the landlord's agent and his solicitor, and she employed a person to search for bills of sale or judgments against her. She added in her letter that she had paid her hard-earned savings in all good faith, and could have taken no more precaution or used greater care than she did.

At the date of the purchase it was not suggested that there had been any breach of the agreement, and four days subsequently, on December 7, 1916, Mrs. Widlake paid to the plaintiffs £2 13s. 11d., which would become due under the agreement on December 10. This payment was unknown to the defendant, and it was not alleged that the defendant was then aware of the hire-purchase agreement. No further payments were made to the plaintiffs by Mrs. Widlake. The

amount paid by her was £13 9s. 7d., leaving £18 17s. 5d. as the amount required to make up the full sum of £32 7s. The plaintiffs not receiving the remaining hire payments, made inquiries about the piano, and, ascertaining that it remained in the flat and that the defendant was the occupier, on August 9, 1917, they wrote to her demanding the return of the piano. The defendant refused to deliver up the piano, but offered to pay the balance of the instalments remaining unpaid and to give a substantial guarantee for the payment. The plaintiffs refused to accept the offer, and sued the defendant in the county court for detinue and alternatively for conversion of the piano. The defendant paid £18 7s. 5d., together with a sum for costs, into Court in satisfaction of the claim, and set up the defence that the plaintiffs were not entitled to more than that amount. The county court judge gave judgment for the defendant. On appeal from his decision the Divisional Court held that the defendant had acquired no interest in the piano, for that Miss Nolan by wrongfully selling it had repudiated the agreement, and had no interest in the piano to transfer. The plaintiffs were therefore entitled to recover the piano or its full value without giving credit for the instalments which they had already received.

The defendant appealed.

SWINFEN EADY M. R. (after stating the facts). The county court judge decided that the defendant acquired the rights of Miss Nolan (otherwise Mrs. Widlake) under the agreement before anything was or could be done to terminate it, no instalment being then in arrear, and that the measure of the plaintiffs' damage was the amount of instalments unpaid, £18 17s. 5d.; and, as that sum had been paid into Court, the plaintiffs were not entitled to recover anything more. He accordingly directed judgment to be entered for the defendant.[40] * * *

The appellant upon this appeal also contends that the judgment of the Divisional Court was erroneous upon the measure of damages, and that the judgment of the county court judge was right in law. The first question which arises is whether Mrs. Widlake had any interest under the hire-purchase agreement which she could lawfully assign. The plaintiffs insist that the agreement merely amounts to a bailment which was ended by parting with the possession of the chattel bailed, and that the owner thereupon became entitled to its immediate return. It is not disputed that, by virtue of the sale, all the right, title and interest which Mrs. Widlake could dispose of passed to the defendant. At the date of the sale there had not been any breach of the agreement, and there was not any present right in the plaintiffs to claim the return of the piano. The agreement is not only a letting to hire of a piano; it also confers for a val-

[40] The court then held that the trial court's finding was conclusive on appeal, and that therefore Miss Nolan must be regarded as not having repudiated the contract and as not having committed either larceny or conversion.

uable consideration an option of purchase. Moreover, clause (c) shows that if default is made in payment of the instalments, or if for any other breach the plaintiffs retake possession of the chattel, the hirer's interest is not thereby terminated, but the hirer has the right to resume the hiring, on paying the arrears of hire up to the date of repossession, and procuring a satisfactory guarantee. Parting with the possession of the piano would not be a breach of the agreement if the piano remained in the flat and was not removed contrary to clause 3. If Mrs. Widlake had let her flat furnished for three years with the piano, the plaintiffs would not have been entitled on that account to retake the piano. The whole terms of the agreement show that the contract was not merely a bailment for reward, but that it conferred on the bailee an interest in the chattel. It did not amount to a contract for sale, as the hirer was not bound to purchase. But it did confer on the hirer an absolute right to purchase on complying with the provisions of the agreement. The contract was in my opinion assignable by the hirer, but the assignee could only retain possession of the chattel upon the terms of the contract. There was no right to remove the piano from the flat, nor has it been removed. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, or that it would make any difference to the plaintiff by whom the obligations of the contract were fulfilled, or that there were any grounds for taking this contract out of the well-settled general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee: see Tolhurst v. Associated Portland Cement Manufacturers, [1902] 2 K. B. 660, [1903] A. C. 414; British Waggon Co. v. Lea, 5 Q. B. D. 149.

The defendant therefore acquired all the interest of the vendor, and moreover she had the right in equity to compel the vendor to pay the remaining instalments to the plaintiffs and enforce for the benefit of the defendant all rights conferred by clause (c) of the contract.[41] * * *

Under these circumstances I am of opinion that the appeal should be allowed and the judgment of the county court judge restored.

WARRINGTON, L. J. I am of the same opinion. The question is whether under this agreement the hirer on December 3, 1916, had an interest assignable and in fact assigned that interest to the defendant. The agreement refers to a specific ascertained chattel. It describes the nature of the transaction as being an option to purchase. The first payment was to be made in consideration of the option to purchase therein granted. The nature of the interest taken by the hirer under the agreement appears to me to be this: First, a right to retain possession of the chattel so long as she performed the con-

[41] The concurring opinion of Duke, L. J., and parts of the other two opinions have been omitted.

ditions of the agreement. Secondly, an option to purchase the chattel exercisable by payment of the instalments provided for by the contract. Thirdly, in case of failure to pay any instalment or breach of any other of the provisions of the agreement and possession thereupon taken by the plaintiffs, the right to have restored first her right to possession and secondly the option of purchase upon performing the conditions prescribed by the agreement. That, in my opinion, was the interest of the hirer. The general property in the chattel no doubt remained in the plaintiffs, but that general property in it was qualified and limited by the contractual interest conferred by the agreement upon the hirer.

Now, was that interest assignable? In my opinion it clearly was.[42] * * *

HYLAND v. CROFUT.

(Supreme Court of Errors of Connecticut, 1913. 87 Conn. 49, 86 Atl. 753.)

Action by James J. Hyland against Harriet S. Crofut for damages on a contract made by defendant to pay the debts of plaintiff's assignor to a specified amount. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

Prior to February, 1909, the defendant and George E. Crofut, her husband, conducted a hotel at Oxford, Conn., known as the Crofut Inn. Shortly before the execution of the contract in question, the defendant had brought an action for divorce against her husband and attached his personal property and his interest in the real estate connected with the business. The trial court has found that on March 8, 1909, the defendant in consideration of a transfer to herself of the attached personal property and of his interest in the attached real estate agreed to pay Crofut $400 in cash, and to pay certain debts contracted by him in the conduct of the business to an amount not exceeding $1,000. Pursuant to this agreement, bills of sale and deeds

[42] The power created by an ordinary offer is still regarded as unassignable by the offeree. See Corley v. Ehlers, 99 Kan. 748, 163 Pac. 140 (1917), offer to sell land; Jordan, Marsh Co. v. Beals, 201 Mass. 163, 87 N. E. 471 (1909). But the irrevocable power created by an option contract is assignable, the legal relations being regarded as conditional rights and conditional duties. Cummins v. Beavers, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986 (1904); Watkins v. Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880 (1906); Black v. Maddox, 104 Ga. 157, 30 S. E. 723 (1898); Thommen v. Smith, 88 N. J. Eq. 476, 103 Atl. 25 (1918); House v. Jackson, 24 Or. 89, 32 Pac. 1027 (1893); Blank v. Independent Ice Co., 153 Iowa, 241, 133 N. W. 344, 43 L. R. A. (N. S.) 115 (1911), a receiver was ordered by the court to sell an option.

There is no power of assignment in case the option contract expressly so provides. Myers v. J. J. Stone & Son, 128 Iowa, 10, 102 N. W. 507, 111 Am. St. Rep. 180, 5 Ann. Cas. 912 (1905); Behrens v. Cloudy, 50 Wash. 400, 97 Pac. 450 (1908).

See Corbin, "Option Contracts," 23 Yale Law Journal, 641, 658 (1914).

were prepared and executed by Crofut and delivered to and accepted by the defendant, and the defendant then paid to Crofut $400, and took possession of the property, and also signed in duplicate an agreement to pay the debts of Crofut to an amount not exceeding $1,000, with list of creditors annexed, the total amount of listed debts being $940.09. One of these duplicates was delivered to Crofut and the other retained by the defendant.

Some time between March 8th and March 29th substitute bills of sale and conveyances of real estate were made in order to correct a supposed mistake in the original papers. The plaintiff James J. Hyland was a creditor of Crofut, whose claim appeared upon the list in question, and on April 12, 1909, he made a demand on the defendant to pay his bill, but the defendant neglected and refused to pay the same. The plaintiff then recovered judgment against George E. Crofut in the amount of $48.53, and took out execution for the same, which was returned unsatisfied.

The plaintiff then, in order to collect his debt, brought an action against the defendant, declaring on her agreement of March 8, 1909, to pay Crofut's debts, including the plaintiff's debt. This action was subsequently withdrawn on the theory that the plaintiff had no right to sue on said contract without an assignment from Crofut. On October 16, 1909, the plaintiff took from Crofut an assignment in writing of all Crofut's rights, claims, and demands against the defendant by reason of her agreement of March 8, 1909; and in consideration for the assignment the plaintiff executed a bond in the sum of $1,000, reciting that his judgment was due and unpaid and conditioned to prosecute the chose in action against the defendant, and apply the amount of the recovery, if any, in satisfaction of his own judgment and all other debts of said Crofut which were due on March 8, 1909, to the amount of $1,000, and to his expenses in connection therewith. On October 19, 1909, the plaintiff gave written notice of the assignment to the defendant and made demand for $1,000 or for a list of bills which had been paid by her, if any, on account of the agreement, and for the balance remaining in her hands. It is alleged in the complaint and admitted in the answer that "the defendant neglected and positively refused to pay said debts or to pay the plaintiff said $1,000 or any part thereof or to account for said $1,000."

BEACH, J.[43] * * * The principal claim of law made by the appellant is that a contract to pay the debts of another is not assignable, and that the attempted assignment conveyed to the plaintiff nothing more than the right to sue for and collect his own debt of $30. It is argued that some sort of a trust relation was created by the original contract; that the damages to be recovered in this action, if any, are in the nature of a trust fund, and that the proposed appli-

[43] Part of the opinion is omitted.

cation of some part of the recovery to the expenses of this litigation is in violation of such a trust; and that the plaintiff, being under no obligation to pay Crofut's debts, cannot be injured by the defendant's refusal to pay them. We think the contract creates no trust relation. There is no suggestion that the transfer was in fraud of creditors. Crofut's creditors had no lien on the property transferred, and the defendant holds it as her own. Her agreement to pay Crofut's debts created merely a personal obligation in his favor. She has no fund in her hands which is earmarked for the payment of his debts, nor will the amount recovered as damages in this action be held in trust for that purpose, although the plaintiff has agreed with Crofut as part of the consideration for his assignment to apply some part of the recovery in payment thereof.

An agreement to pay the debts of another, as pointed out in Lathrop v. Atwood, 21 Conn. 117, is not simply an agreement to indemnify, but also an agreement to perform the act of paying the debts in question. In this case, as in that, the debts agreed to be paid were for goods sold and delivered without any specified term of credit, and were presumably due and payable at the time when the contract was made. No time having been specified within which the defendant was to pay them, a reasonable time was impliedly given, and upon the failure to pay within such a reasonable time a breach of the contract arose for which Crofut could have recovered as damages the amount of the debts so remaining unpaid with interest from the date of the contract. Lathrop v. Atwood, supra; Whitney v. Cady, 71 Conn. 170, 41 Atl. 550. This contract was dated March 8, 1909, and the assignment to the plaintiff although it bears date as of May 15, 1909, was, as the court finds, actually made on October 16, 1909, about seven months after the date of the contract. In Lathrop v. Atwood, supra, it was held that four months was a very liberal allowance of time for the payment of the partnership debts, and that a failure to pay them within that time was a breach for which the plaintiff was entitled to sue. In the present case there was not only a much longer delay before the date of the assignment, but the defendant had refused to pay the plaintiff's debts on demand, and Crofut had been subjected to suit and judgment on account of such refusal.

We think the contract had been broken by the defendant's failure to pay the debts before the date of the assignment to the plaintiff, and that the assignment was in effect a transfer of a claim for damages already accrued by reason of the breach of the contract. This is consistent with the language of the assignment itself which is "of all of Crofut's rights, claims, and demands" on account of his contract with the defendant. Such a claim is plainly assignable, and the fact that the assignee agrees to apply some part of the recovery to the payment of Crofut's debts after satisfying his own judgment and paying the expenses of this litigation does not prevent the plaintiff from being the actual bona fide owner of said claim within the meaning of section 601,

Gen. Stat. In Metropolitan Life Insurance Co. v. Fuller, 61 Conn. 252, 23 Atl. 193, 29 Am. St. Rep. 196, a number of policy holders assigned their claims for damages against the company to Fuller and wife upon the assignees undertaking to bring suit and pay all expenses and keep half of the net proceeds, and these assignments were upheld as carrying a full beneficial interest. So in this case the plaintiff is beneficially interested, not only in having his judgment satisfied, but his expenses of litigation paid. * * *

Judgment for plaintiff.[44]

[44] It has often been stated that the assignment of a "mere right of litigation" or a "right of action for damages" is invalid. See Prosser v. Edmonds, 1 Y. & C. Ex. 497 (1835); May v. Lane, 64 L. J. Q. B. 236, 237 (1894); Torkington v. Magee, [1902] 2 K. B. 427, 434; Dawson v. G. N. & City Ry. Co., [1905] 1 K. B. 271. And assignment of secondary rights for breach of contract or for tort may still possibly fall within some state rules governing champerty and maintenance. This will seldom be the case, however. In the United States, generally, all such secondary rights are assignable, except those for torts to the person and for breach of a promise of marriage. See Brantly, Pers. Prop. §§ 265–271; N. Y. Personal Property Law (Consol. Laws, c. 41) § 41; Butler v. New York & E. R. Co., 22 Barb. (N. Y.) 110 (1856); Millan v. Bartlett, 78 W. Va. 367, 89 S. E. 711 (1916), holding that "a right of action for breach of covenant, like any other chose in action, may be assigned"; United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574, 146 C. C. A. 532 (1916), right to treble damages under Sherman Act for tortious injury to business; Wells, Fargo & Co. Exp. v. Pugh (Tex. Civ. App.) 185 S. W. 61 (1916), right to damages for wrongful delivery by carrier; Ellis v. Torrington, [1920] 1 K. B. 399, right to damages for breach of a covenant to repair.

In County Hotel & Wine Co. v. L. & N. W. R. Co., [1918] 2 K. B. 251, the court said: "It has been said that the purchase of a mere right of litigation is void. See Prosser v. Edmonds, 1 Y. & C. Ex. 497 (1835), and Hill v. Boyle, L. R. 4 Eq. 260 (1867). That doctrine arose in times when the common law was incapable of recognizing the assignability of choses in action: cf. Pollock on Contracts (8th Ed.) pp. 351, 352, and the learned note (F) at p. 747 thereof. But although the doctrine of assignability developed, the law of champerty long maintained its rigidity both at law and in equity. Bills of exchange became freely negotiable at law. Debts became assignable in equity, and their assignability at law (together with other choses in action) was finally recognized by section 25, subsec. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66). Such being the state of things, it would seem strange indeed to hold that a debt could not be assigned after the debtor had repudiated the debt by refusing to pay."

CHAPTER VIII

JOINT CONTRACTS

HANKINSON v. SANDILAUS.

(In the King's Bench, 1612. Cro. Jac. 322.)

Debt upon an obligation of forty pounds. Upon oyer of the condition thereof the case was, two persons bound "themselves, or any of them, their heirs, executors, or either of their heirs, &c.;" and the action was here brought against one of the obligors only, the other then living; whereupon the defendant demurred in law.

The question was, whether this bond be joint and several, or only a joint bond, to be sued against them both?

It was urged for the defendant, that the obligation was sealed and delivered by both of them jointly, and was a joint bond, and the words subsequent, "or either of us" (in respect one of the obligors was to be discharged thereby, it being uncertain which of them), were therefore void: and it differed from the case in Dyer, 19, where three were bound in an obligation, "obligamus nos et utrumque nostrum, &c.;" the bond there is joint and several, all of them being so bound at the beginning; but it is not so here: for first, both of them are here bound, and afterwards follow these words, "or either of us;" and the obligee hath accepted it as a joint deed, and so ought to pursue the same.

But it was held by THE COURT, that the acceptance here is not material as to the election, but it still remains at the pleasure of the obligee to sue them jointly and severally: and the joint delivery of the bond shall not make it to be a joint bond, and not several, the same being by the law joint and several; and in this case "et" and "vel" are all one. And the Court thereupon over-ruled the demurrer; and judgment was given, and entered for the plaintiff.[1]

PROCTOR v. BAUBY.

(Supreme Court of Errors of Connecticut, 1916. 90 Conn. 251, 96 Atl. 935.)

Action by Sanford Proctor against Peter Bauby to recover unpaid balance of a certain note, brought by appeal to the district court, and tried to the jury. Verdict and judgment for plaintiff for $458.64, and appeal by defendant. Affirmed.

[1] "Obligamus nos et singulos" is joint and several. Bellewe, 255.
Where two or more persons promise jointly and severally, they may be sued separately just as if they executed wholly separate contracts. Beecham v. Smith, El. Bl. & El. 442 (1858).

RORABACK, J.[2] The plaintiff seeks to recover the amount of an unpaid balance of a note for the principal sum of $2,800, upon which divers payments were made down to November 20, 1913. The note reads as follows:

"$2,800.00. Waterbury, Conn., Nov. 30, 1906.

"For value received, I promise to pay Sanford Proctor, of city of Waterbury, or order, twenty-eight hundred dollars, with interest at 5 per cent. per annum, payable semiannually, together with all taxes and assessments of every nature when due that may be laid on said sum and on the property by which it is secured. Principal of note is to be paid in payments of $600.00 every six months thereafter, and in default of any payments, said note shall become due and payable on demand. Attilio Menichino.

"Peter Bauby." * * *

Several of the defendant's reasons of appeal are based upon the theory that the court should have instructed the jury, as requested, that, as a matter of law, it appears that the plaintiff should have brought his action upon a complaint alleging that the defendant was liable as an indorser of the note, and not that he was the maker. The language of the note "I promise to pay," etc., makes the contract of both signers joint as well as several. The pronoun "I" represents the signers collectively as well as severally.

General Statutes, § 4187, provides: "(7) Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severably liable thereon." * * *

The jury were instructed that: "Where a note contains the words 'I promise to pay,' and is signed by two persons as makers, they are deemed to be and are jointly and severally liable thereon, and either of the makers is liable for the full amount of the note due and unpaid."

The charge upon this point was correct in law, adapted to the case as it was presented to the jury, and was sufficient for their guidance in reaching a verdict.

There is no error. The other judges concurred.[3]

RIPLEY v. CROOKER et al.

(Supreme Judicial Court of Maine, 1860. 47 Me. 370, 74 Am. Dec. 491.)

On an agreed statement of facts.

Assumpsit on an account annexed, and for a balance alleged to be due jointly from the defendants to the plaintiff, for building five-

[2] Parts of the opinion are omitted.

[3] In accord: March v. Ward, Peake's Cas. 130 (1792); Lewenstein v. Forman, 223 Mass. 325, 111 N. E. 962 (1916).

eighths of the ship Adrianna in 1854–55, under the following contract:

"Memorandum of agreement made and concluded upon by Theodore Ripley, of Hallowell, Maine, on the one part, and William D. Crooker, Samuel Swanton, 2d, and David Crooker and Isaac Preble, all of Bath, on the other, to wit:

"The said Ripley agrees to build and complete a good ship of about eleven hundred tons, to be built at Hallowell, and to be commenced the next week and completed ready for sea as soon as possible, to be rigged at Bath; and it is binding on him to be particular to charge all the bills, which he pledges to do in good faith, to arrive at her cost; and for his services is to receive one dollar each register tonnage, with two hundred dollars for use of yard, steambox, and yard tools and shores, &c, and is to receive five thousand per month on eleven-sixteenths, commencing payment the first day of July next, and so on monthly, not to exceed five payments, and when completed the balance to be paid in five and ten months, reckoning interest on rigging bill, iron bill, and Kendall, Richardson & Co.'s bill, should these bills become due previous to the five and ten months payments, no interest to be calculated otherwise but at the bills. And the second parties agree to pay the said Ripley five thousand dollars per month, commencing the first of July, and so on monthly, not to exceed five payments, to the ship's completion ready for sea, when her cost by the bills is to be estimated, and the materials to be bought at the best advantage for cash, save the iron bill, and rigging, and Kendall, Richardson & Co.'s bills, which, if they become due previous to five and ten months after her completion, the interest on said bills are to be added to the balance to be paid in notes at five and ten months—all other interest not to be reckoned.

"Recapitulation: Payments, five thousand dollars per month to her completion ready for sea, say $25,000, and the balance in notes at five and ten months; not to be more than five payments in cash monthly.

"Three-eighths,	William D. Crooker.
"One-eighth,	Samuel Swanton, 2d.
"One-eighth,	David Crooker.
"One-sixteenth,	Isaac Preble.
	Theodore Ripley.

"Witness to all the signatures: Howard P. Wiggin.

"Bath, May 31, 1854." * * *

MAY, J.[4] The contract set forth in the writ, is of two parts. In its direct terms, it is between the plaintiff "on the one part," and the defendants "on the other." Its language is too unequivocal in its meaning to admit of any other construction than that of a joint undertaking, on the part of the defendants, to pay for the eleven-sixteenths of the ship built for them, at her cost, in the manner and

[4] Part of the statement of facts and a part of the opinion are omitted.

at the times stipulated in the contract. The contract contains no words fairly indicative of a several liability by each of the defendants for particular parts of the ship; but, on the contrary, the defendants together agree to pay the entire price which was to be paid, for that portion of the ship which they together agreed to take, and which the plaintiff agreed to build for them.

The fact, that words indicative of the proportional part of the ship which each defendant was to take were set against the name of each, does not change the construction of the contract, nor in any way affect the joint liability of the defendants. Such words do not sufficiently show an intention to limit the liability of each defendant to his proportion of the ship, and cannot, therefore, control the general language used in the contract, so far as the plaintiff is concerned. They may, however, like the word surety or sureties appended to some of the signatures upon a note, serve to show the relations subsisting between the parties of the second part of the contract; but they cannot be permitted to subvert, or even modify the unambiguous terms of the contract, as made by the parties themselves.

It is contended, in defence, that the terms of the contract are modified by the proof in the case, tending to show the existence of a custom on the Kennebec river for persons engaged in the building of vessels each to be responsible only for his own share. In the case before us, the contract is in writing, and there is no proof that any of its words are by usage or custom understood to be used in any other than their ordinary sense. The custom which is attempted to be proved does not reach this case. To allow such a custom to modify the written contract of the parties would be to set it up against their express agreement and manifest intentions, which the law will not permit. See Metcalf v. Weld & al., just decided in Massachusetts, and reported in the Law Reporter, vol. 23, No. 9, p. 551.

Again, it is said that both the plaintiff and the defendants have always treated this contract as several and not joint; and it fully appears from the evidence that payments have been made by the defendants severally, and receipts given by the plaintiff therefor, which clearly indicate that such payments were made by each defendant towards his particular share of the ship, and were so received. If the contract was doubtful in its construction, such facts might well aid the Court in determining the intention of the parties in making it; but, in a case like this, where there is no ambiguity in its terms, it is not perceived how the subsequent conduct of the parties can change the plain meaning of the contract, or take away the appropriate remedy thereon, unless such conduct amounts to a severance of the joint liability, or consists of acts which may fairly operate as a release from such liability. But, where several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt.

Such receipt, not being under seal, is neither a severance of the indebtedness, nor an effectual release; and, notwithstanding such receipt, the parties to the contract will remain jointly bound, to the extent of what is unpaid, in the same manner as if no such specific payment had been made. McAllester et al. v. Sprague et al., 34 Me. 296.[5] * * *

RUTHERFORD v. HOLBERT.

(Supreme Court of Oklahoma, 1914. 42 Okl. 735, 142 Pac. 1099.)

Action by A. B. Holbert, on written instrument for purchase price of stallion, against C. N. Rutherford. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

THACKER, C.[6] Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 15, 1911, plaintiff obtained a verdict and judgment against the defendant for $300, with interest thereon at 6 per cent. per annum from May 17, 1910, in an action upon an instrument in writing, which reads as follows:

"Tishomingo, Okla. May 17, 1910. Seeing it necessary to improve the breed of our horses, we, the undersigned subscribers, hereby purchase and agree to pay the sum of $3,000.00 to A. B. Holbert for the English Hackney Stallion Ryedale Evolution. Payments to be made to A. B. Holbert by cash or joint note, drawing eight per cent. interest from date, payable as follows: $1,000.00 one year. $1,000.00 two years. $1,000.00 three years.

"If full amount is not subscribed, this is null and void."

A. B. Holbert	
M. J. Jester	$ 300 00
C. N. Rutherford	300 00
Z. T. Burton	300 00
H. E. Fagan	450 00
J. A. Ray, Sr.	450 00
O. J. Davis	300 00
J. H. Duncan	450 00
R. C. Johnson	300 00
C. D. Bynum	150 00
	$3,000 00

The petition alleged compliance with the foregoing on the part of plaintiff, and that defendant "without any cause refused to execute a

[5] In accord: Philadelphia v. Reeves and Cabot, 48 Pa. 472 (1865); Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161 (1897); Turley v. Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667 (1909); Morrison v. American Surety Co. of New York, 224 Pa. 41, 73 Atl. 10 (1909); Mintz v. Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285 (1918); Walter v. Rafalsky, 186 N. Y. 543, 79 N. E. 1118 (1906), affirming 113 App. Div. 223, 98 N. Y. Supp. 915 (1906).

[6] Parts of the opinion are omitted. Also reported, with annotations, in L. R. A. 1915B, 221.

joint note, and refused to pay the same." The overruling of defendant's demurrer to the petition is assigned as error; and this presents the question as to whether said instrument is a joint obligation requiring that the action must be brought against all the living joint obligors within the jurisdiction of the court. As between plaintiff and the purchasers of the stallion the instrument appears to be a joint obligation so as to bind all the obligors for said $3,000. All the obligors join in a promise to pay him the whole amount to be paid. Davis et al. v. Shafer et al. (C. C.) 50 Fed. 764; Davis & Rankin Bldg. & Mfg. Co. v. Knoke, 55 Minn. 368, 57 N. W. 62; Field v. Runk, 22 N. J. Law, 525.

However, the last sentence of the instrument and the figures set opposite the names of the obligors, characterize the instrument as a species of subscription contract, when completely executed and delivered, in which as between the obligors, each should pay the amount set opposite his name as the amount of his individual subscription, so that as between them each is a principal debtor for such amount and a mere surety for his co-obligors in respect to the other portion of the joint indebtedness. It thus appears that while the obligation to plaintiff is a joint one, the instrument discloses a somewhat qualifying state of facts and a special and equitable reason for permitting plaintiff, at his election, to treat it as several as against each obligor to the extent of his individual subscription, that is, it shows that he is a principal debtor as between the joint obligors, and that his co-obligors are his sureties to that extent, and this action deprives him of no right, and the plaintiff only demands of him an amount he is ultimately and in all events bound to pay.

A joint contract will be treated in equity as joint and several where there is a special and equitable reason for so treating it (9 Cyc. 654, and cases cited in notes); and, where a joint contract shows upon its face that as between the obligors one is ultimately bound as principal for a specified amount and ought to contribute that amount as his share of the indebtedness, he cannot be heard to complain if he is sued alone for only that amount. (Id., and, among others, Pickersgill v. Lahens, 15 Wall. 140, 21 L. Ed. 119.)

The conclusion we have reached as to the several liability of each of the subscribers seems also to be in accord with and required by section 877, Stat. 1890 (section 969, Rev. Laws 1910), which reads as follows: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." See Schowalter & Gerber v. Beard, 10 Okl. 454, 63 Pac. 687. It thus appears that there was no error in overruling the demurrer to the petition.

The defendant answered by general denial and further by alleging in effect: * * * (3) that if defendant signed said instrument, he did not deliver it, except upon the condition precedent that the plaintiff should procure in all ten financially responsible and otherwise, to

him and each to all the others, satisfactory subscribers, who would keep the stallion at Tishomingo; but that the plaintiff failed to procure the requisite satisfactory additional subscribers, and the contract was never consummated, nor any writing thereof unconditionally delivered. Although the answer is somewhat vague and uncertain in this respect, we think it appears therefrom that it is intended to allege a conditional, if any, delivery in substance and effect as stated. * * *

The court in effect instructed the jury: (1) That if they found that defendant was induced by fraud or trickery to sign the contract, if they found that he did sign it, their verdict should be for him, otherwise it should be for the plaintiff; (2) * * * (3) that if defendant signed the contract "he is bound by it, and he cannot escape liability, although he did not read it, and although he thought he was signing a blank paper, if it appears that by the use of reasonable diligence he could have ascertained what the contract was that he was signing, as the law requires every man who can read and write and is in possession of his faculties to use ordinary and accessible means of informing himself of the contents of any instrument that he signs." These instructions eliminate from the issues triable to the jury the question as to whether the contract was completely executed and unconditionally delivered, and are erroneous at least in this respect.

The last sentence of the contract ("if full amount is not subscribed this is null and void") stated a condition precedent (and not a condition subsequent) to the complete execution and final delivery of the instrument sued on as the contract of the parties thereto, and we have thought it a serious question if such an expression in the writing itself does not exclude all other conditions precedent to its finality; but, although we deem it unnecessary to determine whether this expressed condition precedent would exclude others wholly repugnant thereto, we think it does not exclude the condition that the plaintiff should procure financially responsible and otherwise satisfactory subscribers who would keep the stallion at Tishomingo, nor any other condition precedent not wholly repugnant to that expressed in the writing. Ware v. Allen et al., 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; Golden v. Meier, 129 Wis. 14, 107 N. W. 27, 116 Am. St. Rep. 935; Elastic Tip Co. v. Graham, 174 Mass. 507, 55 N. E. 315; Boston Woven Hose & Rubber Co. v. Same, 185 Mass. 597, 71 N. E. 117; Wilson v. Powers & Another, 131 Mass. 539; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127.[7] * * *

For the reasons stated, this case should be reversed and remanded for another trial.[8]

[7] See 4 Wigmore on Evidence, §§ 2408–2410; 28 Yale L. Jour. 764–768.

[8] The duties of the promisors were held to be several and not joint in Fell v. Goslin, 7 Ex. 185 (1852), "we guarantee that the said sum of £400 shall be duly paid * * * in the proportion of £200 each"; Gaines v. Vandecar, 59 Or. 187, 115 Pac. 721, 1122 (1911).

In White v. Tyndall, L. R. 13 App. Cas. 263 (1888), there was a lease to

WHELPDALE'S CASE.[9]

(In the King's Bench, 1605. 5 Coke, 119a.)

In debt by Whelpdale against Whelpdale, which began Hil. 45 Eliz. Rot. 1303. The plaintiff declared on a bill obligatory made by the defendant to the plaintiff; the defendant pleaded, non est factum; and the jury found that the bill was a joint bill made by the defendant and another to the plaintiff; and if on the matter the bill mentioned in the declaration be the deed of the defendant, the jurors prayed the advice of the Court. And it was adjudged that the plaintiff should recover. And in this case four points were resolved:

1. When two men are jointly bound in a bond, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed, for he has sealed and delivered it, and each of them is bound in the whole. And therefore if they are both sued, and one appears, and the other makes default, and by process of law is outlawed, he who appears shall be charged with the whole, as appears in 40 E. 3. 36. 41 E. 3. 3. But in the case at Bar, he might have pleaded in abatement of the writ, but cannot plead non est factum.[10] * * *

DAVIS v. VAN BUREN.

(Court of Appeals of New York, 1878. 72 N. Y. 587.)

PER CURIAM. One Bixbee was arrested at the suit of the plaintiffs, in an action commenced against him by them in the New York Common Pleas, and to procure his discharge from such arrest, he, Benjamin G. Bloss and Jordan Mott, defendant's testator, executed an undertaking as required by section 187 of the old Code. There was default in the undertaking, and the plaintiffs then caused a summons to be issued in this action against Bloss and Mott, which was served on Bloss; before it could be served on Mott he died. Bloss

George and Albert White as tenants in common, and "the said George White and Albert White do hereby for themselves * * * covenant, promise, and agree * * * that they, or some or one of them will pay." This was held to be a joint promise, even though the property interests of George and Albert were several and not joint.

[9] Parts of the report relating to collateral matters are omitted.

[10] In accord: Stead v. Moon, Cro. Jac. 152 (1604); Cabell v. Vaughan, 1 Wms. Saund. 291 and note (1669); Richards v. Heather, 1 B. & Ald. 29 (1817), if the joint obligor who is not named in the writ is dead, the survivors can not plead the general issue, nor can they plead in abatement.

Where a joint promisor, who is still surviving, is not joined in the action, the defendants can take advantage of the nonjoinder by motion or plea in abatement: Philadelphia v. Reeves & Cabot, 48 Pa. 472 (1865); Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638 (1904); Bragg v. Wetzel, 5 Blackf. (Ind.) 95 (1839). Statutes now generally prevent this, declaring that contracts in terms joint shall in effect be joint and several. See Stim. Am. St. Law, § 4113; N. Y. Code Civ. Proc. §§ 1932, 1946.

was afterward discharged in bankruptcy, and the defendant, as executor of Mott, was substituted, and the action continued against him.

The undertaking is a joint obligation. It is so in terms, and we cannot interpolate into it words of severalty. It could have been made joint and several, but it was not. Bloss and Mott were sureties. They did not assume a principal obligation; they undertook for another; they had no interest except as sureties, and were entitled to all the rights of sureties. This case cannot therefore be distinguished from Wood v. Fisk, 63 N. Y. 245, 20 Am. Rep. 528, and the defendant, as the representative of Mott, cannot be held. It is a rule of the common law, too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. Towers v. Moore, 2 Vern. 98; Simpson v. Vaughan, 2 Atk. 31; Bradley v. Burwell, 3 Denio, 61; Richter v. Poppenhausen, 42 N. Y. 393; Pickersgill v. Lahens, 15 Wall. 140, 21 L. Ed. 119; Getty v. Binsse, 49 N. Y. 388, 10 Am. Rep. 379; Risley v. Brown, 67 N. Y. 160.

However unjust this rule may be in its general operation we have no right to abrogate it. We must enforce it whenever it is applicable and leave to the law-making power any needed change.

The judgment must be affirmed. All concur.

Judgment affirmed.[11]

HALE v. SPAULDING et al.

(Supreme Judicial Court of Massachusetts, 1888. 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475.)

Contract upon an instrument under seal, dated May 23d, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff on demand, six sevenths of any loss to which he might be subjected as the endorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, etc., and dated May 23d, 1885.

[11] The rule that the death of one joint promisor operated as a complete discharge, causing the duty to devolve upon the survivors alone, is nullified by those statutes that declare that joint contracts are to be construed to be joint and several. Stim. Am. St. Law, § 4113; N. Y. Code Civ. Proc. § 758.

Although the executor of a deceased joint surety owed no further duty to the creditor, equity would compel him to contribute a pro rata share to any other surety who paid the whole. Bradley v. Burwell, 3 Denio (N. Y.) 61 (1846).

At the trial in the Superior Court, before Hammond, J., it appeared that on September 20th, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant.

The plaintiff alleged exceptions.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule that a release to one joint obligor releases all. Wiggin v. Tudor, 23 Pick. 434, 444; Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 600; Pond v. Williams, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433; 2 Chit. Con. (11th Am. Ed.) 1154 et seq. Ex parte Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose, or the instrument is put in the form of a covenant not to sue. See Kenworthy v. Sawyer, 125 Mass. 28; Willis v. De Castro, 4 C. B. (N. S.) 216; North v. Wakefield, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. Tuckerman v. Newhall, 17 Mass. 581, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.[12]

[12] In accord: Brooks v. Neal, 223 Mass. 467, 112 N. E. 78 (1916). The release of one debtor releases all, where the obligation was joint and several, as well as where it was joint only. Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818 (1891); Bank v. Doolittle, 14 Pick. (Mass.) 123 (1833); Rowley v. Stoddard, 7 Johns. (N. Y.) 207 (1810), but a receipt acknowledging payment of a part of the sum due in full of all demands does not operate as a discharge.

PRICE v. BARKER et al.

(In the Court of Queen's Bench, 1855. 4 El. & Bl. 760, 119 Eng. Rep. 281.)

COLERIDGE, J.[13] This was an action by the public officer of a banking Company against the executors of George Hopps. The declaration was on a bond conditioned for the security to the bank of a banking account of one William Brown. The plea set out the bond, which was the joint and several writing obligatory of the said George Hopps and William Brown, and then set out a general release, made after the accruing of the causes of action, and averred that the release was made in the lifetime of the said George Hopps without the privity, knowledge, authority, or consent of the said George Hopps. The replication set out the release, which, after general words of release, contained the following proviso. "Provided always, that nothing herein contained shall extend, or be deemed or construed to extend, to prevent the said Banking Company, their successors or assigns, or the partners for the time being constituting the said Company," "from suing or prosecuting any person or persons, other than the said William Brown, his executors, administrators, or assigns, who is, are, shall or may be liable or accountable to pay or make good to the said Banking Company all or any part of any debt or debts, sum or sums of money, now due from the said William Brown to the said Company, either as drawer, endorser, or acceptor of any bill or bills of exchange or promissory note or notes, or as being jointly or severally bound with the said William Brown in any bond or bonds, obligation or obligations, or other instrument whatsoever, or otherwise howsoever, as if these presents had not been executed: it being understood and agreed that, as regards any such suits or prosecutions, these presents shall not operate or be pleaded in bar, or as a release."

To this replication the plaintiff demurred: and the demurrer was argued before us in the course of the last Term.

On the argument two questions arose:

1st, Whether the general words of the release were restrained by the proviso, so that, in order to give effect to the whole instrument, we must construe it as a covenant not to sue, instead of a release.

And, 2dly, Assuming the deed to operate merely as a covenant not to sue, whether the reservation of rights against other parties than the principal debtor contained in the proviso would prevent the surety from being discharged by a binding covenant to give time to, or not to sue, the principal debtor.

To entitle the plaintiff to our judgment, it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff as against the surety were preserved by the particular reservation in question, notwithstanding such covenant not to sue.

[13] The statement of the case and argument of counsel are omitted.

With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman, in Nicholson v. Revill, 4 A. & E. 675 (E. C. L. R. vol. 31), as explained by Baron Parke in Kearsley v. Cole, 16 M. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved: and we think that we are bound by modern authorities (see Solly v. Forbes, 2 Br. & B. 38 (E. C. L. R. vol. 6), Thompson v. Lack, 3 Com. B. 540 (E. C. L. R. vol. 54), and Payler v. Homersham, 4 M. & S. 423 (E. C. L. R. vol. 30),) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release. It is impossible to suppose for a moment that the parties to this deed could have contemplated the extinguishment of their rights as against parties jointly liable. It was argued, indeed, that the particular words of the proviso in the present case prevented this construction by appearing to recognise that Brown was not to be sued, and that, in an action against him, the deed was to operate as a release and might be pleaded at bar. The words, however, that the proviso was not to extend to prevent the bank from suing or prosecuting any person or persons other than the said defendant or his representatives, which were said to show that Brown was not to be sued, are quite as applicable to a covenant not to sue as to a release: and the later general words in the conclusion of the deed, "that, as regards any such suits or prosecutions" (against parties jointly liable), "these presents shall not operate or be pleaded in bar," are, we think, like the words of actual release, too general to prevent us by inference from giving effect to the plainly expressed intention that the parties jointly liable should not be discharged by an extinguishment of the debt. If, therefore, the testator, whom the defendants represent, had been in the situation of co-obligor merely, we should think that he was not discharged by the deed in question.

It remains, however, in the second place, to consider what effect the deed had upon his liabilities in reference to his relation as surety for Brown, the principal debtor. It was thrown out, indeed, in argument, that we were bound to consider him as a principal debtor and not as a surety upon this bond, the obligatory part of the bond

being joint and several without any reference to either being surety or principal. But, for the purpose of seeing the relation of the parties, we must look at the condition of the bond, as set out upon the pleadings, which plainly discloses that the defendant was a surety for the liabilities of Brown.

If the question, whether a covenant not to sue, qualified by such a proviso as that in the present case, and entered into by the creditor without the consent of the surety, discharges the surety, were a new one unaffected by authority, we should pause before deciding that such a case does not fall within the general rule of the creditor discharging a surety by entering into a binding agreement to give time to his principal debtor; and we should have thought the forcible observations of Lord Truro in the recent case of Owen v. Homan, 3 Macn. & G. 378, entitled to much consideration. We find, however, that the Court of Exchequer, in a solemn and well considered judgment, in the case of Kearsley v. Cole, 16 M. & W. 128, 136, after referring to all the authorities, states that the point must "be considered as settled:" and they rest their judgment upon this, although it was not necessary to decide it, as the surety in that case had consented to the deed: which consent they treat indeed as an additional reason; but they expressly state that it was not necessary. They state that they "do not mean to intimate any doubt as to the effect of a reserve of remedies without such consent:" and they add that "the cases are numerous that it prevents the discharge of a surety, which would otherwise be the result of a composition with or giving time to a debtor by a binding instrument;" and they then explain how it is that, in their judgment, the reserve of remedies has that effect. After this judgment, and after the strong expression of opinion by the present Lord Chancellor in his judgment in the House of Lords in the case of Owen v. Homan, 4 H. L. Ca. 1037, where he dissents from the remarks made by Lord Truro in the Court below, and states that, but for those remarks, he should have thought that the principle contended for by the plaintiffs was "a matter beyond doubt," we think that we ought to consider the law on this subject as settled, at least until it is questioned in a Court of error.

It seems to be the result of the authorities that a covenant not to sue, qualified by a reserve of the remedies against sureties, is to allow the surety to retain all his remedies over against the principal debtor; and that the covenant not to sue is to operate only so far as the rights of the surety may not be affected.

Probably many deeds of this nature are framed continually on the supposition that the law has been supposed to be settled, in the manner stated in the Exchequer, since the time of Lord Eldon: and we think that, sitting as a Court of co-ordinate jurisdiction with the Exchequer, we ought not to disturb the law stated by them in a solemn judgment to be clearly settled.

Our judgment, therefore, upon the demurrer in the present case is in favour of the plaintiff.

Judgment for the plaintiff.*

PETERS v. SANFORD & READ.

(Supreme Court of New York, 1845. 1 Denio, 224.)

Assumpsit, tried at the Delaware circuit in June, 1844, before Ruggles, C. Judge. The declaration, besides the common money counts, contained a count for goods sold and delivered, and the defendants pleaded non assump. On the trial it was admitted that there was a balance due the plaintiff for wool sold to the defendant Read, on the 29th day of August, 1842, of $300, for which sum Read, on that day, made his note payable to the order of the plaintiff at the Delaware Bank, which note the plaintiff received, and after endorsing it, procured it to be discounted by the bank at which it was payable; that when the note became due it was renewed by another note made by Read and endorsed by the plaintiff, for the same amount; that the last mentioned note not being paid at maturity, the plaintiff and Read were prosecuted thereon to judgment by the bank, which judgment was paid by the plaintiff, Read having prior to that time failed. The plaintiff then offered to prove that the defendants were partners in the purchase of the wool for which the first note was given, and that the same was purchased by Read on partnership account. The counsel for Sanford (who alone defended) objected to this evidence, and the circuit judge sustained the objection. The plaintiff then gave evidence to show that Read procured the renewal, after the first note had lain some time under protest, and that he paid the expenses on the old and the discount on the new one. It appeared, however, that the plaintiff procured the first note to be discounted and received the money. The plaintiff then renewed his offer to show that the wool was purchased for the copartnership, and the defendant again objected. The judge ruled as before, stating, however, that he would receive evidence to show why the note was made by one of the partners; but no such proof being given, the evidence first offered was rejected—the judge holding that the giving of the note by one of the partners, the transfer of it to the bank, and the obtaining of judgment thereon, precluded the plaintiff from recovering upon the original transaction; and he accordingly, on the motion of

*See, also, Ames' Cases on Suretyship, 147 and note. The Roman Law was similar. Dig. II, 14, 21-23, 32.

In the case of a joint tort an unqualified release, or other voluntary discharge, of one tort-feasor discharges all. See Cormier v. Worcester Consol. St. R. Co., 234 Mass. 193, 125 N. E. 549 (1919). But where the release or discharge is qualified by a reservation of rights against the other tort-feasors it operates only as a covenant not to sue and discharges nobody. Carey v. Bilby, 129 Fed. 203, 63 C. C. A. 361 (1904); Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883, L. R. A. 1915E, 800, Ann. Cas. 1918D, 270 (1915); Adams Exp. Co. v. Beckwith (Ohio) 126 N. E. 300 (1919).

the defendants' counsel, nonsuited the plaintiff. Exceptions were duly taken to the several decisions of the circuit judge, and the case was brought before the court on a bill of exceptions.

By the Court, JEWETT, J. Assuming that the defendants were partners in the purchase of the plaintiff's wool, and as such jointly liable for the payment of the price, still this action cannot be sustained. The plaintiffs accepted the individual note of Read as a security of the payment of that debt, he transferred the note by endorsement, and it not being paid at maturity, he as endorser and Read the maker, were sued upon it and judgment was recovered against them. It is well settled, that if a judgment be obtained against one of several joint contractors, in a separate action against him on such contract, the plaintiff cannot afterwards proceed against the parties omitted, and consequently loses their security. It is not necessary that satisfaction should follow the judgment, to work an extinguishment or merger of the liability of the joint contractors; the judgment performs that office. It cannot vary the principle, that this suit was brought and judgment obtained in the name of the holder, or that the plaintiff was made a defendant with Read. The right of action for the recovery for wool sold and delivered, is as effectually extinguished by the note and judgment upon it, as it would have been if the plaintiff had obtained a judgment on the note in his own name. The plaintiff could not sustain an action against Read, either for wool sold or upon the note. The judgment extinguished his right of action upon both. Having paid the judgment, his remedy is by an action against Read for money paid; but he cannot maintain such an action against Sanford, who was at no time liable to the plaintiff, except in assumpsit for wool sold and delivered; and his right of action against both defendants for that cause is merged in and extinguished by the judgment. The nonsuit was properly granted. (Robertson v. Smith and others, 18 John. 459, 9 Am. Dec. 227; Moss v. McCullough, 5 Hill, 131; Pierce v. Kearney, 5 Hill, 85.)[14]

New trial denied.

[14] In accord: King v. Hoare, 13 M. & W. 494 (1844); Mitchell v. Brewster, 28 Ill. 163 (1862); Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161 and note (1897); Candee v. Smith, 93 N. Y. 349 (1883). A fortiori, a judgment in favor of one joint promisor bars action against the others. Cowley v. Patch, 120 Mass. 137 (1876); Spencer v. Dearth, 43 Vt. 98 (1870).

If the contract is in terms joint and several, a judgment against one without satisfaction does not bar suit against another. People v. Harrison, 82 Ill. 84 (1876).

Many states have passed statutes declaring that contracts in terms joint shall be construed to be joint and several, thus preventing the above result. See Mason v. Eldred, infra; Candee v. Smith, supra; Sully v. Campbell, supra; Stimson, Am. St. Law, §§ 4113, 5015; Black on Judgments, § 208; N. Y. Code Civ. Proc. §§ 1932, 1946, 1 A. L. R. 1601, note. "The rule that a judgment upon a joint obligation merges the cause of action, and works a release of a joint obligor against whom no judgment is taken, does not apply to a joint and several note." Giles v. Canary, 99 Ind. 116 (1884), the note read: "I promise to pay."

In Mason v. Eldred, 6 Wall. 231, 238, 18 L. Ed. 783 (1867), the court said: "A judgment against one upon a joint contract of several persons, bars an ac-

DONNELL et al. v. MANSON et al.

(Supreme Judicial Court of Massachusetts, 1872. 109 Mass. 576.)

MORTON, J.[15] This is an action upon a bond given to dissolve an attachment under the Gen. St. 1860, c. 151, § 15. After the bond was executed two of the obligees died, and the action is brought by the surviving obligees. The defendants object that the suit cannot be maintained without joining the executors or administrators of the deceased obligees. But the contract of the defendants is with the obligees jointly; the form of the contract is joint and the legal interest in the subject matter of the contract is vested in them jointly. When this is the case the survivors are the proper parties to sue. Anderson v. Martindale, 1 East, 497; Rolls v. Yate, Yelv. 177 (Am. Ed.) and notes; Stowell v. Drake, 23 N. J. Law, 310; Smith v. Franklin, 1 Mass. 480. * * *

SWEIGART v. BERK et al.

(Supreme Court of Pennsylvania, 1822. 8 Serg. & R. 308.)

Action on a bond given by Sweigart to "the widow and heirs and personal representatives of Peter Berk, deceased," with condition to be void "if the said Sweigart should pay to the said widow and heirs and legal representatives £1,000 * * * at the death of Margaret Berk, or to the said deceased's heirs and representatives, in equal shares alike, with lawful interest," etc. The plaintiffs' statement showed that the action was brought by seven of the ten living children of Peter Berk, each claiming £100.[16]

TILGHMAN, C. J. It appears, by the plaintiff's own showing, that the bond was given to ten obligees jointly, all of whom are living, and

tion against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause." The judgment was provable under a plea of the general issue at common law.

In Kendall v. Hamilton, 4 App. Cas. 504 (1879), a judgment against a joint debtor was held a bar against a suit against another, even though that other was an undisclosed partner or principal whose existence was not known to the plaintiff at time of his first action. The plaintiff's ignorance of the fact prevented his action from operating as an election, but did not prevent the law of joint undertakings from operating. This is not unjust; for he contracted wholly on the credit of the first defendant. It was mere good luck that he could have held the undisclosed party also; and it is mere bad luck that he lost this security before becoming aware of it.

[15] The statement of facts and a part of the opinion are omitted.

[16] The statement of facts is rewritten.

the action is brought by only seven of them. I am at a loss to conceive, on what principle the action can be supported. It is well settled, that if a bond be given to several obligees, they must all join in the action, unless some be dead, in which case, that fact should be averred in the declaration. And if it appear on the face of the pleadings, that there are other obligees living, who have not joined in the action, it is fatal, on demurrer or in arrest of judgment. The authorities to this point are numerous, and will be found collected in 1 Saund. 291 f. The counsel for the plaintiffs has urged the inconvenience of this principle, when applied to the bond in suit, where it appears, by the condition, that ten persons have separate interests, and it may be, that some of them have received their shares before the commencement of this suit. There is very little weight in that argument. The acceptance of the bond was the voluntary act of the obligees, and if people will enter into contracts which are attended with difficulties, they have no right to expect that established principles of law are to be prostrated, for their accommodation. But in truth, there is very little difficulty in the case. The action may be brought on the penalty of the bond, in the name of all the obligees, and the judgment entered in such a manner as to secure the separate interest of each. The action may be supported, although some of the obligees have received their shares, because the bond is forfeited, unless they have all been paid.

It was objected, that those who had been paid might refuse to join in the action, or might release the obligor. But the court would permit those who were unpaid to make use of the names of the other obligees, against their consent; neither would their release be suffered to be set up in bar of the action. It may be resembled to the case of an assigned chose in action, where the action is brought in the name of the assignor, for the use of the assignee; there the release of the assignor would not be regarded. A release, in such case, would be a collusion between the assignor and assignee to defraud a third person, and therefore void. It is unnecessary to decide, whether each of the obligees in the present case, could have supported a separate action for his separate interest, appearing on the face of the condition. I will only say, that such an action would be hazardous. But this action has not been brought for the separate interest of any one. Seven of the obligees have joined in it. So that it is neither joint nor several. On no principle, therefore, can the action be supported. There were several other points discussed in the argument, in which the court will give no opinion. The judgment of the Court of Common Pleas must be reversed, and restitution is awarded.

Judgment reversed and restitution awarded.[17]

[17] That an action is not maintainable by less than all of the joint promisees, see Wetherell v. Langston, 1 Ex. 634 (1847), even though one promisee had never assented and expressly disclaimed any rights: Angus v. Robinson, 59 Vt. 585, 8 Atl. 497, 59 Am. Rep. 758 (1887), where one promisee had been paid his share and did not join for that reason. Under modern procedure,

JELL v. DOUGLAS.

(In the Court of King's Bench, 1821. 4 Barn. & Ald. 374.)

Assumpsit for goods sold and delivered by Jell to the defendant. Plea, general issue. At the trial, before Abbott, C. J., at the last summer assizes for the county of Kent; the proof was that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. Abbott, C. J., reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi was obtained for that purpose.

ABBOTT, C. J. It is a well-established rule, that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in Richards v. Heather, 1 Barn. & Ald. 29, that a party may maintain an action against a surviving partner without describing him as such; and the reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint-contractors sue, both being alive, that is a variance, and a good defence upon the general issue. It seems, therefore, to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to Webber v. Tivill, 2 Saund. 121, n. 1, Mr. Serjt. Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say that that has been the general practice, and I think it ought not to have been departed from in this instance. The rule for a nonsuit must be made absolute.

Rule absolute.[18]

if one promisee refuses to join, he may be joined as a codefendant, and the proper judgment rendered. Cullen v. Knowles, [1898] 2 Q. B. 380.

An absolute discharge given by any one joint promisee operates as a discharge against all the promisees, in the absence of fraud. Wallace v. Kelsall, 7 M. & W. 264 (1840); Osborn v. Martha's Vineyard R. Co., 140 Mass. 549, 5 N. E. 486 (1886); Rawstorne v. Gandell, 15 M. & W. 304 (1846); Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467 (1808).

[18] If one of two joint promisors is sued alone, and the defect of parties appears in the declaration, the defendant may properly demur. State of Maine v. Chandler, 79 Me. 172, 8 Atl. 553 (1887). If the defect does not so appear, the defendant may plead in abatement, but a plea of the general issue will not be sustained: Richards v. Heather, 1 Barn. & Ald. 29 (1817); Ames' Cases on Pleading, 142, note.

If one of two joint promisees sues alone, and the defect appears, the defendant may properly demur or move in arrest of judgment. In any case

ANDERSON et al. v. NICHOLS.

(Supreme Court of Vermont, 1919. 107 Atl. 116.)

Action of contract by George Anderson and seven others against E. M. Nichols. Demurrer to declaration was sustained, declaration adjudged insufficient, and judgment for defendant, and plaintiffs bring exceptions. Judgment affirmed.

The declaration, in substance, alleges that on October 5, 1915, the defendant owned and maintained an electric light and power transmission line and the plaintiffs were the owners of certain farms in the towns of Glover and Albany, and desired the defendant to extend his electric power transmission line to their buildings so that they could secure "electric current for lighting and power purposes to be used upon their said farms"; that on said October 5, 1915, they entered into a contract with the defendant to extend his transmission line from one Grant White's for the purpose of furnishing them electric current, and they "then and there severally promised and agreed to and with the said defendant to pay to said defendant the sum of $125 each when said transmission line should be constructed to a point opposite their buildings, and $125 each when their buildings should be by said defendant properly wired and equipped for turning on said electric current"; that the defendant erected said transmission line and wired the buildings of the plaintiffs, and they each paid him the sum of $250, amounting in the whole to the sum of $2,000, "and all in accordance with the terms of said contract."

The declaration further alleges that in said contract the defendant promised and agreed to and with the plaintiffs "that if, during the life of said contract, any person living on said transmission line as constructed under said contract desired to obtain electric current of and from the said defendant, he, the said defendant, would charge said person $250 for connecting said person's buildings with said transmission line, one half of which $250 should be retained by the said defendant, and the other half equally divided by the said defendant between the plaintiffs and other persons whose buildings should thereafter be connected with said transmission line under said agreement"; that, since the construction of said transmission line under said contract the defendant has connected with said transmission line the store of W. R. Graham and E. J. Douglas in the village of South Albany and the buildings of Lynn Anderson in Glover, said persons then and there living on and adjacent to said transmission line; that "the said defendant, not regarding said promises, agreements, and undertakings to and with the plaintiffs, neglected and refused to pay these plaintiffs their said several shares of money accruing to them under the terms of said contract and by reason of the said defendant

the general issue is proper (except by statute). See Ames' Cases on Pleading, 138, note.

having connected with said transmission line the buildings of the said Lynn Anderson and the store of the said Graham and Douglas."

The ground of demurrer is that there is a misjoinder of plaintiffs, for that the contract declared upon is, as to them, several, and not joint.

POWERS, J.[19] If you contract with two or more jointly, and their interests are several only, your engagement, in the absence of controlling language, will be taken to be several, and each promisee should sue separately for his damages. Note, Saund. 154; Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Emmeluth v. Home Benefit Ass'n, 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704. This rule of the common law was, at an early day, approved and adopted as the law of this jurisdiction. In Geer v. School District, 6 Vt. 76, Judge Mattock says, in effect, that in all actions on contracts suit must be brought in the name of the party who has the legal interest, though the form of the undertaking might require some one else to sue. And in Sharp v. Conkling, 16 Vt. 355, Judge Redfield, upon a consideration of the common-law authorities, asserts the fully established rule to be that, if the interest in the subject-matter secured by the contract is several, though the terms thereof are joint, the engagement will be taken to be several, unless such interpretation is excluded by the language used.

So it is that, when the promise is to pay a group of persons a stated sum to be divided among them in proportions named, the engagement, ordinarily, will be joint, and not several. 1 Parsons, *13; Lane v. Drinkwater, 1 C., M. & R. 599; Byrne v. Fitzhugh, 1 C., M. & R. 613.

On the other hand, when payment is to be made not to the group, but to its several members, each to receive from the promisor his own share, the engagement, ordinarily, will be several, and not joint. 1 Parsons, *19; Owings' Ex'rs v. Owings, 1 Har. & G. 484.

When tested by the above rule, the complaint before us breaks down. The interests of these plaintiffs are several. The consideration for the defendant's promise moved from them, not jointly, but severally; and this alone is enough to make that promise prima facie several. 2 Page, § 1142; Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793. Moreover, the contract set up in this complaint does not require the defendant to pay the sum specified to the plaintiffs, but binds him to divide it between them. So the defendant's promise, though joint in form, is several in essence. In legal consequence, it is a group of separate promises, and gives rise to separate actions in favor of the several promisees. * * *

Judgment affirmed.[20]

[19] Part of the opinion is omitted.

[20] In Keightley v. Watson, 3 Ex. 716 (1849), and Tompkins v. Sheehan, 158 N. Y. 617, 53 N. E. 502 (1899), the interests of the parties were several and the contract was held to be several, so that one promisee could sue alone.

The rights of the promisees were held to be joint in Lane v. Drinkwater,

CHAPTER IX

ILLEGAL CONTRACTS

SECTION 1.—RESTRAINT OF TRADE

BROAD v. JOLLYFE.

(In the King's Bench, 1620. Cro. Jac. 596.)

Assumpsit. Whereas the defendant was a mercer, and kept a shop at Newport in the Isle of Wight, and had his shop furnished with divers old and sullied wares, and the plaintiff had a shop there furnished with new and fresh wares; in consideration the plaintiff would buy of him all his said wares in the said shop, and would pay for them such prices as he paid for them when he first bought them, that he assumed he would not then any longer keep a mercer's shop in Newport: and alledges in fact, that he bought of him all his said wares, and paid to him three hundred pounds for them, being the price which he had paid for the said wares when he bought them, whereas in truth they were not then worth one hundred pounds; and that the defendant contrary to his promise kept his said shop, and furnished it with new and fresh wares, &c. to the plaintiff's damage five hundred pounds. After non assumpsit pleaded, and verdict for the plaintiff to his damage of forty pounds.

It was moved in arrest of judgment, that this assumpsit is against law, to restrain any to use their lawful trade: and for that purpose was cited 2 Hen. 5. pl. 5. where an obligation that one shall not use the trade of a dyer was held to be void.

1 Cr. M. & R. 599 (1834); Sorsbie v. Park, 12 M. & W. 147 (1843); Nabors v. Producers Oil Co., 140 La. 985, 74 South. 527, L. R. A. 1917D, 1115 (1917).

If the words are ambiguous, the contract will be construed to be joint if the interests of the parties are joint, and to be several if otherwise. International Hotel Co. v. Flynn, 238 Ill. 636, 87 N. E. 855, 15 Ann. Cas. 1059 (1909): Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 Pac. 379 (1912), held several; Atlanta & St. A. B. R. Co. v. Thomas, 60 Fla. 412, 53 South. 510 (1910); Gaines v. Vandecar, 59 Or. 187, 115 Pac. 721, 1122 (1911), held several as to promisors; Satler Lumber Co. v. Exler, 239 Pa. 135, 86 Atl. 793 (1913); Shipman v. Straitsville Central Min. Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015 (1894).

Covenantees may be joint or they may be several, according to their interests, but they cannot be both joint and several. Slingsby's Case, 5 Co. 18b (1588); Bradburne v. Botfield, 14 M. & W. 559 (1845); Keightley v. Watson, supra; Eveleth v. Sawyer, 96 Me. 227, 52 Atl. 639 (1902). Several promisees cannot maintain separate actions, where their interests are joint, and there was only one promise, requiring a single undivided performance. Anderson v. Martindale, 1 East, 497 (1801).

HOUGHTON, Justice, was of that opinion, for the reason above-mentioned: but all the other justices held, that it was good assumpsit, for it is voluntary; and upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers; and it is usual here in London for one to let his shop and wares to his servant when he is out of his apprenticeship; as also to covenant that he shall not use that trade in such a shop, or in such a street: so for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for volenti non fit injuria. And it is not like to the case in 2 Hen. 5, before cited; for there it is alledged, that he was compelled to enter into such a bond, it being an offence for which Hull swore he would have committed him had he been there; yet there the issue is taken, that he did not use the trade of a dyer in the said vill; which proves, that the defendant durst not demur thereupon; but the bond was allowed good. But here it is upon a good consideration, viz. that he should pay three hundred pounds for wares which were not worth one hundred and fifty pounds, for which he made the said promise, and is strong enough against himself.

MONTAGUE, Chief Justice, cited the case in 13 Hen. 7. If a feoffment be made upon condition that he shall not alien, it is a void condition, for it is against law: yet a covenant that he shall not alien, is good: wherefore it was adjudged for the plaintiff.—And in Michaelmas term, 19 Jac. 1. this judgment was affirmed in a writ of error before all the justices and Barons of the Exchequer; for they held, that one may voluntarily give over his trade, and is not compellable to use it, especially in one certain place: and therefore he may, upon good consideration, agree that he will not use it within such a vill; and upon the matter, it is but the selling of his custom, and leaving another to gain it. And it was said, that a prescription to restrain one from using a trade in such a place is good. Easter term, 18 Jac. 1. Bragg v. Tanner assumpsit for ten shillings he promised to pay an hundred pounds, if he thenceforward kept any draper's shop in Newgatemarket: judged good, and the plaintiff recovered.[1]

[1] In Mitchell v. Reynolds, 1 Peere Wms. 181 (1711), often cited as a leading case, the defendant had assigned to the plaintiff a lease of a messuage and bakehouse for a term of five years, and gave a bond conditioned not to engage in the trade of a baker within that parish during the five years. The defendant did engage in the trade and was sued in debt in the bond. The court gave judgment for the plaintiff, and classified restraints on trade at great length. Parker, C. J., said: "And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; * * * and that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive."

DIAMOND MATCH CO. v. ROEBER.

(Court of Appeals of New York, 1887. 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.)

ANDREWS, J.[2] Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the twenty-seventh day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good-will of the business, for the aggregate sum (excluding a mortgage of $5,000 on the property assumed by the company) of $46,724.05, of which $13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, $28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred, August 27, 1880, by giving to the defendant the option to receive the $28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1. 1881. The remainder of the purchase price, $18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the $28,000, the sum of $8,000 in cash and notes, and $20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant.

It is admitted by the pleadings that in August, 1880, (when the covenant in question was made), the Swift & Courtney & Beech-

[2] Part of the opinion is omitted.

er Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia;" and the complaint alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in 10 states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the twenty-seventh of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of $1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of $2,500 a year, and from January 1, 1882, at a salary of $3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than $2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of $5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of $15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date, in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (volume 2, p. 748, note.) The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indig-

nantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts, and gave judgment for the plaintiffs; and before the case of Mitchel v. Reynolds it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances, and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases prior to Mitchel v. Reynolds sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of Mitchel v. Reynolds was a case of partial restraint, and the contract was sustained.

It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this state are of that character, and in all of them the particular contract before the court was sustained. Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746. In Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119, the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In Mitchel v. Reynolds the court, in assigning the reason for the distinction between a contract for the general restraint of trade and one limited to a particular place, says: "for the former of these must be void, being of no benefit to either party, and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz., the mischief which may arise (1) to the party by the loss by the obligor of his livelihood and the substance of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when Mitchel v. Reynolds was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striv-

ing to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which gives scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. Rousillon v. Rousillon, 14 Ch. Div. 351.

The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in Horner v. Graves, 7 Bing. 735, Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case, and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessell in Printing Co. v. Sampson, L. R. 19 Eq. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered

into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."[8]

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of

[8] "'Public policy', said Burrough, J. (I believe quoting Hobart, C. J.), 'is an unruly horse and dangerous to ride.' I quote also another distinguished judge (more modern), Cave, J., 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.' I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?" Bramwell, L. J., in Mogul S. S. Co. v. McGregor, [1892] A. C. 25.

There seems to be no reason why judges should not require "evidence" on the subject before making a decision. It may also be remarked that, however unruly the horse may be, it is not possible for the courts to refuse to ride. Justice (whether described as "natural" or artificial), public policy, general welfare, the settled convictions of mankind, community ideals, are all modes of describing substantially the same thing. It is this that the courts are established to administer, and upon which in the last analysis their judgments are based.

In Hyams v. King, [1908] 2 K. B. 696, Sir G. Barnes, P., said: "It is necessary to avoid confusion between judicial and legislative functions * * * care must be taken not to lay down new principles of public policy without sufficient warrant." It should be needless to suggest with what conservative care this great judicial function should be exercised.

In Rodriguez v. Speyer Bros., 119 L. T. 409 (1918), Lord Haldane said: "I think there are many things of which the judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges."

In Wilson v. Carnley, [1908] 1 K. B. 729, 738, Vaughan Williams, L. J., partly quoting Lord Bowen, said: "The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. I cannot myself in the least acquiesce in the suggestion that, as habits change and time goes on, we may not find new instances of contracts which cannot be enforced on the ground that they are contrary to public morality."

For conservative statements, see Baron Parke, in Egerton v. Brownlow, 4 H. L. C. 1, 122 (1853), and Halsbury, L. C., in Janson v. Driefontein Mines, [1902] A. C. 484, 491. See article by John B. Waite, "Public Policy and Personal Opinion" (1921) 19 Mich. L. Rev. 265.

In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502 (1911), Mr. Justice Holmes said: "I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."

what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing. * * *

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 Mees. & W. 548; Mumford v. Gething, 7 C. B. (N. S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the state of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, supra, Bronson, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other

states from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested.

We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of Steam Co. v. Winsor, supra, supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.[4] * * *

[4] The court held that the bond liquidating the damages for breach at $15,000 did not preclude remedy by injunction in addition. This provision was for the purpose of making performance more certain, and not to give the defendant the power to regain the privilege of doing business by paying $15,000. Compare the contract in Baird v. Smith, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917A, 376 (1913). "Should the said Smith enter into any business * * * the said Smith agrees to pay $1,000 to the said Baird for this privilege."

Contracts in restraint of trade were held valid in the following cases: Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612 (1899), restraint valid so far as necessary to protect business and good will purchased, even though the buyer hopes to create a monopoly, and even though he has entered into illegal contracts with other producers to suppress competition; Baird v. Smith, 128 Tenn. 410, 161 S. W. 492, L. R. A. 1917A, 376 (1913), sale of store with agreement not to compete in that town; state statute construed to be declaratory of common law; see note as to such statutes, L. R. A. 1917A, 376; Williams v. Thomson, 143 Minn. 454, 174 N. W. 307 (1919), sale of garage with good will; Palumbo v. Piccioni, 89 N. J. Eq. 40, 103 Atl. 815 (1918), shoe-repairing business with five-year restraint; Boone v. Burnham & Dallas, 179 Ky. 91, 200 S. W. 315 (1918), lease of poultry warehouse with 15-mile restraint.

An excellent classification of contracts in restraint of trade is given by

HERRESHOFF v. BOUTINEAU.

(Supreme Court of Rhode Island, 1890. 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.)

On demurrer to bill.

Bill for injunction by Julian L. Herreshoff against A. Boutineau. Defendant demurs to the bill.

STINESS, J. The complainant, director of a school of languages in Providence, employed the respondent to teach French from January 7, 1889, to July 1, 1889. The contract in writing provided that the respondent would not, during the year after the end of his service, "teach the French or German language, or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way connected with any person or persons or institutions that teach them, in the said state of Rhode Island." The respondent's service ended July 1, 1889, after which time he gave lessons in French, in Providence. This suit is brought to restrain him from so doing within the time covered by this contract. The respondent demurs to the bill, contending—First, that the contract is void on the ground of public policy, because it imposed a general restraint throughout the state; and, secondly, because it is unreasonable. Is the contract void?[5] * * *

We think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a state. Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience now, to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from

Taft, J., in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 150, 46 L. R. A. 122 (1898).

For cases holding a narrower view of liberty of contract, and that general restraint throughout an entire state is invalid, see Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736 (1898); Union Strawboard Co. v. Bonfield, 193 Ill. 425, 61 N. E. 1038, 86 Am. St. Rep. 346 (1901); Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193 (1895); Henschke v. Moore, 257 Pa. 196, 101 Atl. 303, L. R. A. 1917F, 450 (1917).

[5] The court's review of authorities is here omitted.

one state to another, and from such removals a state would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the state.

Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract; yet, when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. For example, if one has sold the good-will of a mercantile enterprise, receiving pay for it, upon an agreement not to engage in the same business in the same state, for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business. In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail, and sending goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restriction embracing the state, or even a larger territory, could not be said on that account to be unreasonable; for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the Law Quarterly Review, above cited: "Covenantees desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

Besides the matter of protection, the hardship of the restriction upon the party and the public should also be considered. In the present case, we think the restriction is unreasonable. Not as a rule of law because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the state, and that by reason of the small extent of the state, and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools, and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils from all parts of the state

may come to Providence, as a center, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence, or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport; thereby admitting that the restriction is greater than the necessity. The people of Newport, Westerly, and other places have the right to provide for education in languages without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place who might leave the complainant, if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable; but we think it is unreasonable to go further. The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school, from teachers who may entice away his scholars, after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained.[6]

GAMEWELL FIRE-ALARM TELEGRAPH CO. v. CRANE et al.

(Supreme Judicial Court of Massachusetts, 1893. 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458.)

Bill in equity, filed in the Superior Court on January 14, 1892, against Moses G. Crane and Frederick W. Cole, to enjoin the violation of a contract between the plaintiff and Crane, the material provisions of which, together with the facts, appear in the opinion.

The case was argued at the bar in January, 1893, and afterwards was submitted on the briefs to all the judges.

FIELD, C. J. The plaintiff company and the defendant Crane have each appealed from the decree of the superior court. The principal question is whether the following stipulation in the contract between

[6] If the restraint is unreasonable in extent it is unlawful. Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339 (1888); Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119 (1837); Taylor v. Blanchard, 13 Allen (Mass.) 370, 90 Am. Dec. 203 (1866).

Although the restraint is greater than is reasonable, some courts are very liberal in holding that the contract is divisible in case the contract indicates any geographical lines subdividing the restricted territory, and in such case enforce the contract so far as it is reasonable. Trenton Potteries Co. v. Oliphant, supra, "within any state in the United States of America or within the District of Columbia, except in Nevada and Arizona"; enforced as to New Jersey; Mallan v. May, 11 M. & W. 653 (1843), dentist; restraint in London and in other towns; Price v. Green, 16 M. & W. 346 (1847), perfumery; London and within 600 miles.

the plaintiff and Crane is void. The stipulation is: "Said Crane further agrees not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881, he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for a term of ten years, and to give all its manufacturing to Moses G. Crane or Crane & Co., and they agreed not to compete with the Gamewell Company during that time." This is the contract which was annulled by the contract in suit. By the contract in suit Crane sold and conveyed to the company all his machinery, tools, draw cases, and other property used in or connected with his business of manufacturing for said company, including "stock supplies partly manufactured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under and control of all letters patent for fire alarm and police apparatus only, owned or controlled wholly or in part by him, together with exclusive rights under and control of all improvements in said fire alarm and police apparatus only, made by him up to the date of the contract, and he gave to said company the "first option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was $30,000 in cash and notes, and in addition to this such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was also to be paid for at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent if the company desired to hire it. The company actually paid Crane about $47,000 as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years," etc., is not void as being in restraint of trade—First, because it is an agreement pertaining to "property and business protected by patents;" secondly, because the restraint is only coextensive with the business sold, and is necessary to enable the company to enjoy fully

what it has bought and paid for; and, thirdly, because it relates to a single commodity, not of prime necessity, and not a staple of commerce. See Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Machine Co. v. Morse, 103 Mass. 73, 4 Am. Rep. 513; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214.

There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case. The defendant contends that he has a right to assist in forming a corporation, and to act as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase, under the option given in the contract, even although by so doing he enters into competition with the plaintiff in its business. He, in effect, concedes that, so far as the business is protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about 500. The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the good will which attached to his business was that of a manufacturer who did not sell his manufactures in the market; and that it is against public policy that he should be restrained from exercising his peculiar skill anywhere in the United States or in the world for the period of 10 years. The apparatus, as the defendant contends, which he has a right to manufacture and sell is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by patents at all, or by patents of his own, or of other persons who may choose to employ the defendant.

The only ground, then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one where a contract in restraint of trade has been held valid, the restriction has been limited as to space. In Taylor v. Blanchard, 13 Allen, 370, 90 Am. Dec. 203, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe cutters," and it was provided that "at whatever time the said copartnership shall be determined and ended" the de-

fendant "shall not, nor will at any time or times hereafter, either alone or jointly with or as agent for any person or persons whomsoever, set up, exercise, or carry on the said trade or business of manufacturing and selling shoe cutters at any place within the aforesaid commonwealth of Massachusetts, and shall not, nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on" by the plaintiff. The manufacture of shoe cutters was an art, which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons; but the court held the agreement void.

In Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339, the plaintiff, being engaged in the manufacturing and sale of bedquilts and comfortables, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortables," together with the good will of the business, and all the machinery, implements, and utensils used by him in said business, and agreed "that for and during the period of five years from the date hereof he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space. See also, Peirce v. Fuller, 8 Mass. 223, 226, 5 Am. Dec. 102; Perkins v. Lyman, 9 Mass. 522; Stearns v. Barrett, 1 Pick. 443, 11 Am. Dec. 223; Palmer v. Stebbins, 3 Pick. 188, 15 Am. Dec. 204; Alger v. Thacher, 19 Pick. 51, 31 Am. Dec. 119; Gilman v. Dwight, 13 Gray, 356, 74 Am. Dec. 634; Angier v. Webber, 14 Allen, 211, 92 Am. Dec. 748; Dean v. Emerson, 102 Mass. 480; Dwight v. Hamilton, 113 Mass. 175; Boutelle v. Smith, 116 Mass. 111; Ropes v. Upton, 125 Mass. 258; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634.

The case of Machine Co. v. Morse, ubi supra, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company," and that he will "do no act that may injure the company or its business, and that he will at no time aid, assist, or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it. He was a stockholder, and was made superintendent. The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have

been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations, and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court say that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The opinion proceeds to consider the English cases where the restriction was held not to extend beyond the good will of the business which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances.

This doctrine, in England, has been carried very far. See Badische Anilin und Soda Fabrik v. Schott, [1892] 3 Ch. 447; Mills v. Dunham, [1891] 1 Ch. 576; Davies v. Davies, 36 Ch. Div. 359. In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern methods of doing business. See 22 L. Ed. 315; Navigation Co. v. Winsor, 20 Wall. 64; Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Ellerman v. Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287; Association v. Starkey, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686; Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741; Oliver v. Gilmore (C. C.) 52 Fed. 562; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Whitney v. Slayton, 40 Me. 224.

In the present case the plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets everything it bought if it gets the tangible property and the letters patent and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for 10 years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents in which the plaintiff has no interest, or under patents which it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.

The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. Large cities and towns cannot well do without some

kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities. We are of opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it. See Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102; Taylor v. Saurman, 110 Pa. 3, 1 Atl. 40; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850; Strait v. Harrow Co., (Sup.) 18 N. Y. Supp. 224; Anderson v. Jett, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390; Urmston v. Whitelegg, 63 Law T. R. (N. S.) 455; Perls v. Saalfeld, [1892] 2 Ch. 149.

For these reasons a majority of the court are of opinion that the decree against Crane should be substantially affirmed as to the assignment of patents and inventions and as to costs, and should be reversed as to the rest. The decree in favor of Cole should be affirmed. So ordered.[7]

NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO., LIMITED.

(In the House of Lords, 1894. [1894] App. Cas. 535.)

Lord HERSCHELL, L. C.[8] My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms: "(2) The said Thorsten Nordenfelt shall not, during the term of 25 years from the

[7] Where the restraint covers a territory greater in extent that that in which the seller had already developed business and good will, it is illegal: it is not made reasonable by the fact that the buyer afterwards extends his business into the larger territory or by the fact that he himself was already doing business in such larger territory. Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612 (1899).

The restraint may be unreasonable because it covers lines of trade other than those sold by the party who is restrained; the restraint being only to prevent competition, and not to protect the buyer in the enjoyment of good will purchased. See Anchor Electric Co. v. Hawkes, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403 (1898).

Cf. Central Shade-Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629 (1887), holding that a combination of competing manufacturers and sellers of patented curtain fixtures was not unlawful, partly because each article was a patented article and partly because "the agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture." This was disapproved by Taft, J., in U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122 (1898).

[8] The statement of facts and the concurring opinions of Lords Watson, Ashbourne, Macnaghten, and Morris are omitted.

date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2,000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns & Ammunition Company by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns & Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3rd of July, 1888, and made between the Maxim Company, the

Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3d of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, inter alia, not only the adoption of the agreement of the 3d of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns & Ammunition Company, the good will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good will of the appellant's business, and was designed for the protection of the good will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the good will was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shewn, stated to the world to be the acquisition of the good will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was gen-

eral, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognized and given effect to by Lord Macclesfield in his celebrated judgment in Mitchel v. Reynolds, 1 P. Wms. 181. That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive as shall be shewn by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of Master, &c., of Gunmakers v. Fell, Willes, at p. 388, Willes, C. J., said the general rule was "that all restraints of trade, (which the law so much favours,) if nothing more appear, are bad. * * * But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of Horner v. Graves, 7 Bing. 735, Tindal, C. J., said: "The law upon this subject (i. e., restraint of trade) has been laid down with so much authority and precision by Parker, C. J., in giving the judgment of the Court of B. R. in the case of Mitchel v. Reynolds, 1 P. Wms. 181, which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration,

so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.' "

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, Parker, C. J., says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather instances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of Tindal, C. J., that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by Parker, C. J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of Tindal, C. J.'s opinion by his judgment in the subsequent case of Hinde v. Gray, 1 Man. & G. 195. In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere, but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, Tindal, C. J., saying that it was "assigned on a covenant which according to the case of Ward v. Byrne, 5 M. & W. 548, was void in law." This is, to my mind. only intelligible if Ward v. Byrne, 5 M. & W. 548, which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded as determining that the covenant in question in Hinde v. Gray, 1 Man. & G. 195, was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the

two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by Ward v. Byrne, 5 M. & W. 548; but Tindal, C. J., did not proceed to inquire whether, under the particular circumstances appearing on the record in Hinde v. Gray, 1 Man. & G. 195, the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to Ward v. Byrne, 5 M. & W. 548, except to say, that although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognize that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some color was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to Mitchel v. Reynolds, 1 P. Wms. 181. He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." "This exposition of the law has, further, the very weighty sanction of Willes and Keating, JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

In the year after the decision of Hinde v. Gray, 1 Man. & G. 195, the case of Whittaker v. Howe, 3 Beav. 383, 394, came before Lord Langdale. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of Mitchel v. Reynolds, 1 P. Wms. 181, was cited in argument, but neither Ward v. Byrne, 5 M. & W. 548, nor Hinde v. Gray, 1 Man. & G. 195, appear to have been brought to the notice of the Court. Lord Langdale expressed

himself thus (Whittaker v. Howe, 3 Beav. 383, 394): "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in Davis v. Mason, 5 T. R. 118, 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by Willes and Keating, JJ., as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in Hinde v. Gray, 1 Man. & G. 195, should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the Leather Cloth Company v. Lorsant, Law Rep. 9 Eq. 345, James, V. C., said: "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in Rousillon v. Rousillon, 14 Ch. D. 351, Fry, J., thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognize and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London today as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly that it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

When Lord Macclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavor by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman Law would not enforce such contracts by an action. (See Puffendorf, lib. 5, c. 2, s. 3, 21 H. 7, 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is true today as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons

which led to the adoption of the rule require that it should be frankly recognized that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the good will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognized in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the good will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good will were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in Horner v. Graves, 7 Bing. 735, 743, in considering whether the agreement was reasonable. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down

that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed. * * *

HALL MFG. CO. v. WESTERN STEEL & IRON WORKS et al.

(Circuit Court of Appeals of the United States, 1915. 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620.)

Suit in Equity by the Hall Manufacturing Company against the Western Steel & Iron Works. Decree for defendants, and complainant appeals. Reversed.

Baker, Circuit Judge.[9] This appeal is from a decree dismissing appellant's bill on final hearing.

[9] Part of the opinion is omitted.

Facts, counted on in the bill and established by the proofs, may be summarized as follows:

Appellant, an Iowa corporation, located at Monticello, was engaged in making wire stretchers, hoisting blocks, stake irons, weed pullers, and similar farm appliances, and in selling them generally wherever there was a demand.

Appellee, Western Steel & Iron Works, a Wisconsin corporation, located at De Pere, was engaged in making farm gates, trowels, spades, etc. It was organized in 1905. Prior to November 26, 1910, it also made and sold post hole augers and diggers—diggers since 1905 and augers since the beginning of 1909.

During the summer and fall of 1910 appellee was financially embarrassed, its property was under mortgage, and it was in pressing need of ready money. It solicited appellant to buy its digger and auger business, which amounted to about half of its total business. Officers of appellee visited Monticello, officers of appellant examined the property at De Pere, and meetings were had at Milwaukee. On November 26, 1910, appellee sold and conveyed to appellant everything pertaining to the digger and auger business, machinery, tools, dies, finished and unfinished stock, orders, patents, and "the good will of the business." Collateral to the sale of the good will appellee covenanted "to render such assistance as it reasonably can in introducing it (appellant) to the trade and in forwarding to it any orders it may receive for augers and diggers after December 10, 1910," and "not again to go into the manufacture of post hole augers and diggers."

At the time of the sale, when appellee's business in diggers was five years old and in augers two, it had marketed these articles in thirty-four of the United States and in two Canadian provinces. In considerable regions these articles cannot be used. Appellee's sales were entirely to jobbing houses. In addition to seed that had already brought forth fruit, appellee through advertisements, commission men, and the outstretched hands of jobbers had sown other seed, so that we may take the fact to be in accordance with the admitted representation of appellee's treasurer that appellee was trying to sell wherever there was a demand and that by reasonable attention the trade could be expected to extend "throughout all parts of the United States and Canada where augers and diggers can be used." So it is evident that appellee was selling and was covenanting to protect a national and international good will.

Appellant paid the agreed price, $13,500, less deductions, provided for in the contract, of about $3,000 for appellee's failure to turn over the stipulated amount of orders. The evidence in the record warrants the conclusion that appellee under the contract obtained about double the fair selling value of its worn machinery, tools, etc., and that appellant would not have purchased the physical property apart from the good will of the business and appellees' protective covenants.

This purchase was made by appellant because diggers and augers

would fit in well with the lines of farm appliances it was already making and selling. Neither before nor afterwards was appellant a party to any combination or agreement for fixing prices or restraining competition. And consumers have been able to purchase diggers and augers at prices as low as formerly, under competition of the same number of independent manufacturers doing business throughout the country.

Appellant began promptly to manufacture and market the same seven styles that appellee had been supplying to the trade, and under the same seven names, which, except as to "Ideal" and "Western," for which patents were assigned to appellant, had become generic names of styles on which patents had expired.

Within a month or so appellee, with its mortgage discharged and its financial embarrassment relieved, began to manufacture all its former open styles under the old names, and to sell them wherever it could. When appellant learned of this conduct, some six months later, it protested; and, its protest being defied, this suit was begun. * * *

Is appellant remediless? The trial court so decided because the protective covenants are without limitation of either time or place.

In the first reported case, that of John Dier, decided in 1415, Year Book 2 Hen. V, 5, covenants were held to be unenforceable, no matter how limited in time and place. Hull, J., said: "In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law; and (per Dieu) if the plaintiff were here he should go to prison till he paid a fine to the king."[10]

During the generations when an artisan had to pass through apprenticeship into a guild, when he was tied to his trade and place by statutes forbidding him to leave his parish under pain of pillory or prison, when if he could not stand where he was rooted he would become a public charge, it may have been right enough for the king's courts to see no public interest but the artisan's ability to pay taxes and serve the king. If, however, fifteenth century doctrines of absolutism were to govern in twentieth century conditions of democracy, a victim of a covenantor's perfidy might well prefer to settle his legal rights by the fifteenth century wager of battle. But the glory of the common law is its inherent power of growth, its adaptability to new and enlarged conditions of life, its respondence to higher standards

[10] Y. B. 2 Hen. V, pl. 26. Debt was brought on an obligation of one John Dyer, and the defendant, by his attorney, Loddington, alleged a certain indenture, which was set forth, upon condition that if the defendant should not use his art and craft of dyer in the town for half a year the obligation should be null and void, and he said that he had not used his art and craft of dyer within that time, and he asked judgment. Hull, J., said: In my opinion you could have demurred on the ground that the obligation is void, the condition being against the common law, and by God if the plaintiff were here he should go to prison until he made a fine to the king. Strange, for the plaintiff: We allege that the defendant did use his art within the time fixed by the condition. And the others joined issue.

of social and business ethics. And so during the centuries naturally there were developments and departures with respect to this ancient doctrine. It took the courts a long time to get beyond testing the validity of a respective covenant purely by the presence or absence of limitations. If a restraint was unlimited as to both time and place, or was unlimited as to place though not as to time, it was unenforceable; if limited as to both time and place, or if limited as to place, though not as to time, it was valid.

But, beginning about 1830, the advent of the factory system, multifold new machines, railroads, steamships, fast mail and express service, telegraphs, telephones, wireless, trolleys, automobiles, aeroplanes, lessening space, shortening time, offering continually new and widening avenues for both labor and capital, emphasized a point of view that had been suggested in somewhat earlier times; and that is that the validity of a restrictive covenant should be tested by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will. The history of the development, with its waves of progress and recession, may be traced in England and our own country in the following cases:[11] * * *

Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Logically the corollary follows that by the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time and place. A restraint of 500 miles and 50 years on a village doctor, who had only

[11] The court here cited: Dier's Case (1415), supra; Ipswich Taylor's Case, 11 Coke, 53 (1615); Broad v. Jollyfe, Cro. Jac. 596 (1621); Mitchell v. Reynolds, 1 P. Williams, 181 (1711); Bunn v. Guy, 4 East, 190 (1803); Horner v. Graves, 7 Bing. 735 (1831); Whittaker v. Howe, 3 Beavan, 383 (1841); Mallan v. May, 11 M. & W. 653 (1843); Price v. Green, 16 M. & W. 346 (1847); Tallis v. Tallis, 1 El. & El. 391 (1853); Harms v. Parsons, 32 Beavan, 329 (1862); Leather Cloth Co. v. Lorsant, 39 L. J. Ch. 86 (1869); Hagg v. Darley, 47 L. J. Ch. 567 (1878); Rousillon v. Rousillon, 49 L. J. Ch. 338, 14 Ch. D. 351 (1880); Baines v. Geary, 35 Ch. D. 154 (1887); Mills v. Dunham, [1891] 1 Ch. 576; Badische Anilin und Soda Fabrik v. Schott Segner & Co., [1892] 3 Ch. 447; Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co., [1894] App. Cas. 535, 63 L. J. Ch. 908; Dubowski & Sons v. Goldstein, [1896] 1 Q. B. 478; Underwood v. Barker, [1899] 1 Ch. 300: Haynes v. Doman, [1899] 2 Ch. 13; Lamson Pneumatic Tube Co. v. Phillips, 91 L. T. 363 (1904); Dowden & Pook, Limited, v. Pook, [1904] 1 K. B. 45; Henry Leetham & Sons, Limited, v. Johnstone-White, [1907] 1 Ch. 322: Mason v. Provident Clothing & Supply Co., Ltd., [1913] A. C. 724; Nevans & Co. v. Walker & Foreman, [1914] 1 Ch. 413; Oregon Steam Nav. Co. v. Winsor, 20 Wall. (87 U. S.) 64, 22 L. Ed. 315 (1873); Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464 (1887); Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67 (1888); Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979 (1888): Carter v. Alling (C. C.) 43 Fed. 208 (1890); United States Chemical Co. v. Provident Chemical Co. (C. C.) 64 Fed. 946 (1894); Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915 (1902): National Enameling & Stamping Co. v. Haberman (C. C.) 120 Fed. 415 (1903); Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536 (1905): Prame v. Ferrell, 166 Fed. 702, 92 C. C. A. 374 (1909); Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548 (1909).

a local practice, would be unreasonable, because not reasonably necessary to the protection of his successor, while a general covenant by Pears Soap Company should be enforced (at least to the extent of the decreeing court's reach) because the good will of the business is world-wide and of expected indefinite continuance.

In Prame v. Ferrell, supra, a general covenant was enforced. The court construed the covenant "as limiting the restraint to the United States." In the present case the trial court accepted counsel's criticism that our brethren of the Sixth circuit were violating the rule that courts cannot lawfully remake the contract of the parties. But in our judgment the same result of enforceability is reached by taking the covenant as written, without limitation of time or place. For the covenant is neither immoral nor criminal. It stands, unless it must be overthrown on account of the covenantor's objection. His objection is based wholly on our domestic public policy. Our domestic public policy has no extraterritorial force. And therefore the limitation of the decree, if so made, comes from the inherent limitation of the covenantor's objection, not from constructively limiting his unlimited covenant.

In this case, and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenants: Honesty and fidelity among our business men; and the interest of every one, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced. Here, of course, honesty condemns the conduct of appellee. Freedom of alienation is a byword, if appellee may sell property, retain the proceeds, and then repossess itself of the property with impunity. And what injury to the public was done that preponderates over honesty and freedom of alienation in the other scale? Appellee is a corporation. If any stockholder or officer is skilled in any profession or art, he is not restrained from exercising his skill by the corporation's covenant. Even the capital that was at hazard in the digger and auger branch of appellee's factory may be reinvested in the same business by the stockholders individually or collectively outside of appellee corporation. Appellee itself, rescued from financial embarrassment, and with its remaining business made sound by the use of appellant's money has been benefited. Consumers in Wisconsin and everywhere in our country get as fair prices as before, under competition of the same number of independent manufacturers. In our judgment there is no injury to the public, and the scale containing honesty and freedom of alienation strikes bottom. Inasmuch as the collateral covenants are no broader than the conveyed good will, full-grown and embryonic, they should be enforced.

But, apart from the covenants, we think appellant is not remediless. If the covenants were considered void, that would not vitiate the con-

tract in other respects, since there is nothing immoral or criminal in making such covenants. They are merely unenforceable civilly at the worst.[12] * * *

If one should sell a chattel, and then retake it by stealth or force or fraud, both the criminal and the civil law would lay hold. Because the retaking of a conveyed good will has not yet been included in the penal code is no reason, in our judgment, why equity should hesitate to arrest the trespass.

As to appellee corporation the decree is reversed, and the cause remanded for proceedings in consonance with this opinion.

SHUTE v. SHUTE et al.

(Supreme Court of North Carolina, 1918. 176 N. C. 462, 97 S. E. 392.)

Action by J. R. Shute against J. T. Shute and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This was an action to enjoin the erection of a cotton gin in Monroe upon the ground that it was in violation of a contract between the plaintiff and the defendant J. T. Shute.

In May, 1916, J. R. Shute, the plaintiff, entered into a contract with J. T. Shute, his brother, who with his son, J. E. Shute, are the defendants. The contract in question specified that J. R. Shute sold to said J. T. Shute for $4,000 the cotton gin plant in Monroe, specifying the location and its contents, i. e. four 70 brush saw gins and fixtures, one 60 horse power electric motor and fixtures, and other appurtenances, with a provision that said J. T. Shute should have "the exclusive privilege of buying and selling seed cotton and cotton seed so far as the said J. R. Shute is concerned, on the south side of Bear Skin creek for a period of ten years from September 1, 1916." Said J. R. Shute bound himself "neither to build nor cause to be built any ginning plant in Union county on the south side of Bear Skin creek for a period of ten years after September 1, 1916, and not to operate or cause to be operated or be interested in any way with any person, firm, or corporation, in operating any ginning plant in Union county on south side of Bear Skin creek for said period of ten years," and there was a further

[12] The court here cited: Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co. (C. C.) 11 Fed. 1 (1882); Western Union Tel. Co. v. Kansas Pacific Ry. Co. (D. C.) 4 Fed. 284 (1880); Ft. Smith Light & Traction Co. v. Kelley, 94 Ark. 461, 127 S. W. 975 (1910); Dean v. Emerson, 102 Mass. 480 (1869); Peltz v. Eichele, 62 Mo. 171 (1876); Fishell v. Gray, 60 N. J. Law, 5, 37 Atl. 606 (1897); Rosenbaum v. U. S. Credit System Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449 (1901); Union Locomotive & Express Co. v. Erie Ry. Co., 35 N. J. Law, 240 (1871); Smith's Appeal, 113 Pa. 579, 6 Atl. 251 (1886); Mallan v. May, 11 M. & W. 653 (1843); Price v. Green, 16 M. & W. 346 (1847); Chesman v. Nainby, 2 Lord Raym. 1456 (1726); Dubowski & Sons v. Goldstein, [1896] 1 Q. B. 478; Rogers v. Maddocks, [1892] 3 Ch. 346.

provision that the defendant J. T. Shute should not engage or be interested in ginning cotton or buying cotton seed or seed cotton, cotton seed meal, or hulls for the said period of ten years on the north side of Bear Skin creek in said county nor on the site of the gin plant which he was then operating near the railroad depot in Monroe, which he agreed to remove and did remove.

From the judgment dissolving a temporary restraining order and refusing to continue the injunction to the hearing, the plaintiff appealed.

Clark, C. J. Bear Skin creek is practically the northern boundary of Monroe. The contract which the plaintiff, J. R. Shute, is asking the court to enforce, does not contain a provision for the sale of the good will of the gin plant, and besides this action is not brought by the vendee to protect the conveyance of the good will as an exception to the rule against contracts in restraint of trade, but singularly enough it is brought by the vendor to enforce a division of territory by which the vendee was not to engage in the business north of Bear Skin creek nor at the location near railroad depot in Monroe for 10 years, in consideration of the agreement that the plaintiff was not to engage in the same business of ginning or buying cotton seed and seed cotton south of Bear Skin creek.

The agreement sought to be enforced is clearly a division of the territory named, with the creek for a boundary. The sole object is to eliminate competition between the parties. This is an illegal purpose, and the judge properly refused an injunction to the hearing. It is to the interest of the public that there should be the freest competition in a matter of this kind, and a contract to suppress it cannot invoke the aid of the equitable jurisdiction of the court.

One of the oldest and best-settled principles of the common law was that bonds in restraint of trade were illegal. This was held as early as 2 Henry V. (A. D. 1415), and it was then stated in the Year Books to be old and settled law. There was a modification of this rule (Broad v. Jolyffe, Cro. Jac. 506), that a contract not to use a certain trade in a particular place was a reasonable restriction and did not come under the general rule.

In Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, it was held that the sale of the vendor's milling business in Elizabeth City with stipulation against his remaining in the business was not invalid. The court said: "The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is greater than it is necessary to make it in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the business or right of competition bought by him."

In Shute v. Heath, 131 N. C. 281, 42 S. E. 704, the court held: "A provision, in a contract of sale of a business of manufacturing lumber and ginning cotton, that the seller would not engage in the same busi-

ness in any territory in which the seller had secured patronage, is void for indefiniteness as to territory."

The present contract is not void upon that ground but, because it appears upon the face of it that the division of the territory is not for the purpose of conveying to the defendant the right to obtain all the patronage of the establishment which the plaintiff sold to the defendants, but for the purpose of shutting off competition by preventing the defendant from putting up any other plant or being interested in the establishment of any other plant within all that part of the county of Union north of Bear Skin creek. This is clearly against public interest, which is that these ginning plants shall be multiplied according to the needs of the public and shall not be restricted in number by agreement between parties in that line of business.

This court has upheld the theory of a limited and reasonable restraint of trade, in several cases, i. e.: As to sales of stock and livery business. Anders v. Gardner, 151 N. C. 604, 66 S. E. 665; King v. Fountain, 126 N. C. 197, 35 S. E. 427. As to the milling business. Kramer v. Old, 119 N. C. 6, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650. Newspaper business. Cowan v. Fairbrother, 118 N. C. 406. 24 N. E. 212, 32 L. R. A. 829, 54 Am. St. Rep. 733. Saloon business. Jolly v. Brady, 127 N. C. 142, 37 S. E. 153 Medical practice. Hauser v. Harding, 126 N. C. 295, 35 S. E. 586. Drug business. Baker v. Cordon, 86 N. C. 116, 41 Am. Rep. 448. In each of these cases the action was brought by the vendee in order to protect the good will which had been conveyed as an essential element of the business which he had bought.

Even in such cases the test is the reasonableness and bona fides of the contract in question, whether it is for the purpose of securing to the purchaser merely the benefit of the good will of the business sold, or whether it is partly at least for the purpose of suppressing competition. Consequently, such contracts must be considered as to their reasonableness in duration of time, or extent of territory, largely in connection with the nature of the business. A restriction as to territory which would be reasonable in regard to issuing a newspaper which draws from a large territory would not apply to the prohibition of the erection of ginning plants in which business it is burdensome to the public to haul seed cotton any great distance to be ginned.

It appears in this case that J. R. Shute and J. T. Shute ginned at least 80 per cent. of the cotton ginned in Monroe. From the nature of the business, and of the commodities handled, the public had a material interest in the subject-matter of this agreement, and the suppression of all competition with respect to 80 per cent. of all the cotton ginned and opportunites for buying and selling seed cotton and cotton seed in the chief town of one of the largest cotton producing counties of the state necessarily operated against the public interest and convenience. The prohibition on the respective parties to erect any new ginning

plant, or to be interested in the same or in buying cotton seed or seed cotton in all that part of Union county lying north or south, respectively, of Bear Skin creek, was calculated and intended to prevent competition in that business. Still more so was this attempted restriction on the vendee, which could not protect the good will of the business, bought by him. Not only was the territory unnecessarily large for the protection of the buyer against competition by the vendor of the plant, but the period of ten years was also excessive for such purpose.[13] * * *

Affirmed.[14]

[13] The court further held that the contract was made illegal by the statute of the state known as the "Anti-Trust Law."

[14] In the following cases the contract was held to be illegal, as there was no sale of a business with its good will: Shapard v. Lesser, 127 Ark. 590, 198 S. W. 262, 3 A. L. R. 247 (1917), restraining the defendant from erecting a cotton gin and becoming a competitor in the buying of cotton seed; Nester v. Continental Brewing Co., 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247, 41 Am. St. Rep. 894 (1894), 45 brewers agreed to sell no beer in Philadelphia at less than $8 a barrel; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159 (1871), five companies agreed to divide their market and to sell no coal except as determined, both as to amount and as to price, by a common managing committee; Pearson v. Duncan & Son, 198 Ala. 25, 73 South. 406, 3 A. L. R. 242 (1916), a competitor was paid to retire from business; Burns v. Wray Farmers' Grain Co., 65 Colo. 425, 176 Pac. 487 (1918), 230 grain producers agreed to sell to no competitor of a grain corporation in which they were stockholders, with a fixed penalty for breach; American Laundry Co. v. E. & W. Dry-Cleaning Co., 199 Ala. 154, 74 South. 58 (1917), two laundries agreed that one should do no wet washing and the other no dry cleaning; Joseph Evans & Co. v. Heathcote, [1918] 1 K. B. 418, pooling agreement to restrict production and raise prices; Oliver v. Gilmore (C. C.) 52 Fed. 562 (1892); Santa Clara Val. M. & L. Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211 (1888); Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457 (1889); Cummings v. Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655 (1900); Emery v. Ohio Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819 (1890), a pooling agreement to restrict output and maintain prices; Clemons v. Meadows, 123 Ky. 178, 98 S. W. 13, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 339 (1906), payment to competing hotel to induce it to keep closed; U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122 (1898), combination of competitors to raise prices, the cases being thoroughly reviewed by Taft, J.; affirmed 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136 (1899).

The common law appears to afford no remedy other than to declare such contracts illegal and void when suit is brought to enforce them. An injunction in equity was refused in Queen Ins. Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483 (1893). But cf. McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 73 Atl. 80, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048 (1909).

The federal Anti-Trust Law (the Sherman Act of 1890), 26 Stat. 209 (U. S. Comp. St. § 8820 et seq.), provides for criminal prosecution and for tort actions by persons injured. In United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122 (1898), Taft, J., said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. Mogul S. S. Co. v. McGregor, [1892] A. C. 25; Hornby v. Close, L. R. 2 Q. B. 153 (1867); Lord Campbell, C. J., in Hilton v. Eckersley, 6 El. & Bl. 47, 66 (1855); Hannen, J., in Farrer v. Close, L. R. 4 Q. B. 602, 612 (1869). The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those

MORE et al. v. BENNETT et al.

(Supreme Court of Illinois, 1892. 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216.)

This was a suit in assumpsit, brought by R. Wilson More and others, composing the firm of More & Dundas, against J. L. Bennett and others, composing the firm of Bennett, Edwards & Pettit, to recover damages resulting from an alleged breach of certain rules and by-laws of the Chicago Law Stenographers' Association, of which both the plaintiffs and defendants are members. To the declaration, which consists of two special counts, a demurrer was sustained, and, the plaintiffs electing to abide by their declaration, judgment was rendered in favor of the defendants for costs. Said judgment has been affirmed by the appellate court on appeal, and the present appeal is from said judgment of affirmance.

The first count of the declaration alleges, in substance, that the plaintiffs and defendants are all stenographers by profession, and have, from the time of its organization, been members of said association, an association formed to promote the interest of its members by all proper methods, and to establish and maintain reasonable, proper, and uniform rates for stenographic work done by the members of said association, and to secure to judges, lawyers, and citizens of Chicago efficient, competent, and reliable law reporting, at reasonable, proper, and uniform rates, and to furnish them with the means of obtaining efficient and competent reporters, and to increase the efficiency of law reporting in the county of Cook. That, in accordance with its constitution and by-laws, said association had adopted a schedule of rates which were and are fair and reasonable, and had for more than 15 years prior to the organization of said association been the established rates among law stenographers, and had been and are still recognized as reasonable and established rates by judges and members of the legal fraternity, and by law stenographers of the city of Chicago, there having been during said time no material variation from said rates among law stenographers, said rates being less than those established in certain other large cities of the United States for the same class of work.

Said count further alleges that, in consideration of like promises and agreements on the part of the plaintiffs, and like payment of the membership fee of $5 by each of the plaintiffs to become members of said

injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints." For other cases applying this federal statute, see Kales' Cases on Restraint of Trade, chapter II; also L. R. A. 1917A, 376, 379.

There are many state statutes similar to the federal act. See People v. Sheldon, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690 (1893), indictment for conspiracy; Shute v. Shute, supra; note in L. R. A. 1917A, 376.

association, the defendants promised and agreed with the plaintiffs that they would be bound in their charges for work by the schedule of rates adopted by said association. That the defendants might cut rates against persons not members of said association, provided such cutting was in good faith and the rights of the plaintiffs were respected. That in no case where the defendants had any knowledge of the existence of a contract or reporting arrangement between the plaintiffs and any lawyer, corporation, or any other person would they attempt, by underbidding the rate established by said association or other unfair means, to secure such reporting.

That the rates established by said association were as follows: Not less than 20 cents per folio for single copy; not less than 25 cents per folio for two copies; not less than 28 cents per folio for three copies: and the rate of $10 per day for attendance, with the qualification that, if a reporter was engaged by one of the parties to a suit, he or any other reporter, knowing of such engagement, might take the other side of the case for $5 per day; but in no case should the reporter make any offer to any attorney after being informed by such attorney that he had engaged a reporter.

That while said association was in existence, and the plaintiffs and defendants were members thereof, the plaintiffs entered into a contract or reporting arrangement with the county of Cook, by which said county employed the plaintiffs to report the proceedings and furnish transcripts thereof, as said county should require, in a certain celebrated murder case then pending in the criminal court of Cook county, to-wit, the case of People v. O'Sullivan and others, known as the "Cronin Trial," said employment by said county being on the following terms, to-wit, $10 per day for attendance, and the regular rates for transcripts as established by said association, the plaintiffs agreeing with said county to do said work, if the county should demand it, at as low a rate as any reputable and established stenographer or firm of stenographers should in good faith bid for said work.

That the plaintiffs entered upon the performance of said contract, and were engaged in reporting the proceedings at said trial at said regular rates, yet the defendants, well knowing the premises, and the aforesaid contract or reporting arrangement between the plaintiffs and said county, and after the plaintiffs had been engaged on said case for, to-wit, seven weeks, and at a time when defendants well knew that the plaintiff had performed the most unprofitable part of said contract, and not regarding their said promise so made to the plaintiffs, did not respect the rights of the plaintiffs and the schedule rates so adopted by said association, and the fact that they knew that there was a reporting arrangement or contract between the plaintiffs and said county, but solicited said county, and endeavored to secure from said county, by underbidding and other unfair means, employment as law stenographers to report and furnish transcripts of the proceedings

at said trial, and made a certain bid to said county, by which they offered to do said work at a less rate than that established by said association to-wit, $5 per day for attendance, 20 cents per folio for a single copy, 22 cents per folio for two copies, and all copies above two free of charge.

That thereupon the plaintiffs because of said bid of the defendants, were required by said county to meet said bid, or to cease their employment on said trial, as by the terms of said employment said county had a right to do; and that the plaintiffs, for the purpose of remaining in employment on said trial, did meet the said bid of the defendants, and afterwards reported and furnished transcripts of the proceedings on said trial at the rates offered by the defendants; by means whereof they were deprived of divers gains and profits which would have accrued to them from the reporting and furnishing transcripts on said trial under the regular rates of said association, and in accordance with their original bid, and have suffered great loss and damage through the wrongful conduct of the defendants, to the damage of the plaintiffs in the sum of $3,000; and therefore they bring their suit, etc.

The second count contains substantially the same allegations as the first, and also the following: That said association numbers among its members only a small portion of the law stenographers of the city of Chicago, and that said association was formed because a system of ruinous competition had sprung up among the stenographers of said city, by which the prices of stenographic work were depressed below reasonable rates, and also because a discreditable and dishonorable system of solicitation for business had sprung up, by which efforts were made on the part of stenographers to induce attorneys, corporations, and other persons to break their contracts already made with other stenographers, and that the objects of said association were to prevent said discreditable and dishonorable solicitation, and to promote the interests of the members thereof by all proper methods, and to establish and maintain proper and uniform rates for stenographic work done by its members.

Said second count also set out, in extenso, the constitution, by-laws, and schedule of rates of said association, said constitution containing, among other things, the following provisions: "The object of this association shall be to promote the interests of the members thereof by all proper methods, particularly to establish and maintain proper rates for stenographic work done by members of the association. Any reputable stenographer, regularly engaged in law reporting in Cook county, shall be eligible to membership under the rules hereinafter provided. The association may adopt a schedule of rates to be charged by the members for stenographic work done by them, which schedule shall be binding upon every member."

Among the by-laws adopted by said association were the following: "The membership fee shall be $5. The expenses of the association,

above amount received for membership fees, shall be paid out of a fund to be collected by assessment, to be levied by the board of directors from time to time, as may be necessary. The members of this association shall respect each other's rights, and in no case where a member has knowledge of the existence of a contract or reporting arrangement between a fellow-member and a lawyer, corporation, or any other person shall he attempt, by underbidding or other unfair means, to secure such reporting; but members of this association may cut rates against outsiders, if they choose; such cutting, however, must be done in good faith, or the member will be liable to fine, as provided for other violations of the constitution and by-laws."

Said by-laws also provide, in case of any violation of the rules of said association by any of its members, for a trial of the member accused of such violation by a special arbitration committee, and the imposition of a fine, in case of conviction, of not less than $10, nor more than $25, to be paid into the treasury of the association, with the right on the part of the accused to an appeal to a meeting of the entire association to be called for that purpose; and it is further provided that, "in cases where the differences between members require financial adjustment, the said arbitration committee shall decide between the parties," with right of appeal from the decision of said committee to any regular or special meeting of the association, whose decision in the matter is final.

The assignments of error call in question the decision of the circuit court sustaining the demurrer to said declaration.

BAILEY, J. (after stating the facts). The question is raised by counsel, and discussed at some length, whether membership in the Chicago Law Stenographic Association established a contractual relation between the plaintiffs and defendants which gives to the plaintiffs a right of action against the defendants for a violation of any of the rules of said association, as for a breach of contract; and also whether the only remedy for a violation of said rules is not that provided by the by-laws of the association, viz., a fine, to be imposed upon the offender, after a trial and conviction before an arbitration committee, duly appointed for that purpose. But, as we view the case, it will be unnecessary for us to consider these questions; since, admitting that the constitution and by-laws of the association were in the nature of a contract as between the members inter se, we are of the opinion that the contract thus established is so far obnoxious to well-settled rules of public policy as to render it improper for the courts to lend their aid to its enforcement.

Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be bind-

ing upon all its members, and not only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules.

The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not, indeed, a subordinate application of the same rule. As said by Mr. Tiedeman: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities or services. All combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal that agreements to combine cannot be enforced by the courts." Tied. Com. Paper, § 190.

Many cases may be found in which the doctrine here stated has been laid down and enforced. Thus in Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282, where an association among the whole or a large part of the proprietors of boats on the Erie and Oswego canals was formed upon an agreement to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in similar business out of the association, it was held that, as the tendency of such agreement was to increase prices and to prevent wholesome competition, as well as diminish the public revenue, it was against public policy and void, by the principles of the common law.

In Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258, the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals entered into an agreement in which, "for the purpose of establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same," they agreed to run for the residue of the season of navigation at certain rates of freight and passage then fixed upon, but which should be changed whenever the parties should deem expedient, and to divide the net earnings among themselves according to certain fixed proportions; and it was held, in a suit on the agreement against a party who failed to make payment according to its terms, that the agreement was a conspiracy to commit an act injurious to trade, and was illegal and void.

In Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159, five coal companies in Pennsylvania entered into an agreement in New York to divide two coal regions of which they had control; to appoint a committee to take charge of their interest, and de-

cide all questions; and appoint a general agent at a certain point in the state of New York, the coal mined to be delivered through him, each company to deliver its proportion at its own cost at the different markets, at such time and to such persons as the committee should direct, the committee to adjust all prices, rates of freight, etc., and settlements to be made between the several companies monthly; and it was held, in a suit brought by one of said companies against another, to enforce a liability arising under said contract, that the contract was in violation of a statute of New York making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and was also against public policy, and therefore illegal and void; the court laying down the rule, among other things, that every association formed to raise or depress prices beyond what they would be, if left without aid or stimulus, was criminal.

In Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171, a contract was entered into by all the grain dealers in a certain town which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town; and it was held, on bill filed for an accounting and distribution of profits, that such contract was in restraint of trade, and consequently void on grounds of public policy. In discussing the principles involved, this court said: "While these parties were in business in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts for with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, were all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection."

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons, engaged in a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected.

Counsel seek to distinguish this case from those cited by the circumstance, alleged in the second count of the declaration, that but a

small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade, which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good-will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists; the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection.

It may also be observed that, by the constitution of the association, any reputable stenographer, regularly engaged in law reporting in Cook county, is eligible to membership, and, if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters.

We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.[15]

[15] Cf. Collins v. Locke (P. C.) L. R. 4 App. Cas. 674 (1879), where the court said: "The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also it may be to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade." However, the court held that one provision of the contract was unreasonable and void, in that it forbade all the

TODE et al. v. GROSS.

(Court of Appeals of New York, 1891. 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475.)

Appeal by defendant from a judgment of the general term of the supreme court in the second judicial department, affirming a judgment entered upon the decision of the court after a trial without a jury. Affirmed.

Action for breach of covenant to recover the sum of $5,000 as stipulated damages. On the 15th of October, 1884, the defendant owned a cheese factory situate in the town of Monroe, Orange county, comprising two parcels of land, with the buildings thereon, and a quantity of fixtures, machinery, and tools connected therewith. For some time prior, with the assistance of her husband, Conrad Gross, her brother-in-law, August Gross, and her father, John Hoffman, she had been engaged in the business of manufacturing cheeses at said factory known as "Fromage de Brie," "Fromage d'Isigny," and "Neufchatel." Such cheeses were made by a secret process known only to herself and her said agents. On the day last named, she entered into a sealed agreement with the plaintiffs, whereby she agreed to sell and transfer to them the said factory and all its belongings, together with the "good-will, custom, trade-marks, and names used in and belonging to the said business," for the sum of $25,000, to be paid and secured March 1, 1885, when possession was to be given. Said instrument contained a covenant on her part that she would "communicate after the first day of March, 1885, or cause to be communicated, to" said plaintiffs, "by Conrad Gross, John Hoffman, and August Gross, or one or other of them, the secret of the manufacture of the cheeses known as 'Fromage de Brie,' 'Neufchatel,' and 'D'Isigny,' and the recipe therefor, and for each of them, and will instruct or cause to be instructed them, and each of them, in the manufacture thereof. And that she and the said Conrad Gross, John Hoffman, and August Gross will refrain from communicating the secret recipe and instructions for the manufacture of said cheeses, or either of them, to any and all persons other than the above-named parties of the second part, [plaintiffs,] and will also, after the first day of April, 1885, refrain from engaging in the business of making, manufacturing, or vending of said cheeses, or either of them, and from the use of the trade-marks or names, or either of them, hereby agreed to be transferred in con-

stevedores to load a vessel in case the master refused to employ the particular one to whom the ship had been allotted by the association of stevedores. Had it permitted the other stevedores to do the work, even though requiring them to share the compensation with the particular stevedore appointed, it would have been enforced.

An agreement to maintain the closed shop, made by the labor unions and the hat manufacturers of Danbury, was held unlawful in Connors v. Connolly, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564 (1913).

nection with said cheeses, or either of them, or with any similar product, under the penalty of five thousand dollars, which is hereby named as stipulated damages to be paid by the party of the first part, [defendant,] or her heirs, executors, administrators, or assigns, in case of a violation by the party of the first part [defendant] of this covenant, of this contract, or any part thereof, within five years from the date hereof." She further covenanted that she herself, as well as "said Conrad Gross, John Hoffman, and August Gross, during and up to and until the first day of May, 1885, shall continue and remain in said county of Orange, and from time to time, and at all reasonable times during said period, by herself, or by said Conrad Gross, John Hoffman, and August Gross, whenever so requested by the said parties of the second part, [plaintiffs,] impart to them, or either of them, the secret of making such cheeses, and each of them, and instruct them, and each of them, in the process of manufacturing the same, and each of them, as fully as she or the said Conrad Gross, John Hoffman, or August Gross, or either of them, are informed concerning the same."

Both parties appear to have duly kept and performed the agreement, except that, as the trial court found, "subsequently to the 1st day of May, 1885, Conrad Gross, the husband of defendant, went to New York city, and engaged in the business of selling 'foreign and domestic fruits, and all kinds of cheese and sausages, &c.,' * * * and while so engaged * * * sold and personally delivered from his place of business to one John Wassung three boxes of cheese marked and named 'Fromage d'Isigny,' and having substantially the same trademarks thereon as that sold by defendant to plaintiffs, and having stamped thereon the name 'Fromage d'Isigny,' and that said cheese so sold by him to said Wassung was a similar product to that formerly manufactured by defendant." Also, that "said August Gross, the brother-in-law of defendant, subsequent to the 1st day of May, 1885, engaged in the business of retailing fancy groceries in the city of New York, and in and during the fall of 1887, and prior to the commencement of this action, kept for sale at his place of business in New York city boxes of cheese marked or stamped 'Fromage d'Isigny.'" The court further found that the cheese so sold by Conrad Gross under the name of "Fromage d'Isigny," "was never sold by plaintiffs, nor made or manufactured by them, or either of them, but that the same was a similar product." The court found as conclusions of law that said agreement was a reasonable one, and was founded upon a good and sufficient consideration; that said sale by Conrad and said keeping for sale by August Gross was a direct violation of the covenant in question; that the restriction imposed was no more than the interests of the parties required, and that it was not in restraint of trade or against public policy. Judgment was ordered for the plaintiffs for the sum of $5,000 as stipulated damages.

VANN, J. (after stating the facts). The business carried on by the defendant was founded on a secret process known only to her-

self and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practicable extent. She also had the right to sell the business, including as an essential part thereof the secret process, and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction upon either that was not beneficial to the other, by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816; Leslie v. Lorillard, 110 N. Y. 519, 534, 18 N. E. 363, 1 L. R. A. 456; Thermometer Co. v. Pool (Sup.) 4 N. Y. Supp. 861. The restriction under consideration, however, was not unlimited as to time.

The chief reliance of the defendant in this court, where the point seems to have been raised for the first time, is that the covenant, so far as stipulated damages are concerned, is confined to the personal acts of Mrs. Gross, and does not embrace the acts of her agents. A careful reading of the agreement, however, in the light of the circumstances surrounding the parties when it was made, shows that no such result was intended. What was the object of the covenant? It was to keep secret, at all hazards, the process upon which the success of the business depended. On no other basis could the plaintiffs safely buy, or the defendant sell, for what her property was worth. Who had the power to keep the process secret? Clearly the defendant, if any one, as she had confided it to no one except her trusted agents, who were nearly related to her by blood or marriage. But could she covenant against the acts of those over whom she had no control? She had the right to so covenant, by assuming the risk of their actions; and, unless she had done so, presumptively she could not have sold her factory for so large a sum. It was safer for her to sell with such a covenant than it was for the plaintiffs to buy without it. She could exercise some power over her own husband and her father and her husband's brother, all of whom had been associated with her in carrying on the business, and whose actions in certain other respects she assumed to control for a limited time, whereas the plaintiffs were

powerless, unless they had her promise to keep the process secret at the peril of paying heavily if she did not. It is not surprising, therefore, to find that the restrictive part of the covenant applies with the same force to her agents that it does to herself; for she undertakes that neither she nor they will disclose the secret or engage in making or selling either kind of cheese, or use the trade-marks or names connected with the business.

We do not think that a personal act of the defendant is essential to a violation of this covenant by her; for if she permits, or even does not prevent, her agents from doing the prohibited acts, the promise is broken. While it is her exclusive covenant, it relates to the action of others; and, if they do what she agreed that they would not do, it is a breach by her, although not her own act. She violated her agreement, not by selling herself, but by not preventing others from selling. This construction of the restrictive part of the covenant would hardly be open to question, were it not that in the same sentence occurs the reparative or compensatory part designed to make the plaintiffs whole if the defendant either could not or did not keep her agreement. While this provides that any violation involves the penalty of $5,000, it adds, "which sum is hereby named as stipulated damages to be paid" by the defendant in case of a violation by her of the covenant in question. What kind of violation is thus referred to? The defendant says a personal violation by her only, but we think, for the reasons already given, that the spirit of the agreement includes both a violation by her own act and by the act of those whom she did not prevent from selling, although she had agreed that they would not sell. As no one not a party to, a contract can violate it, every act of defendant's former agents contrary to her covenant was a violation thereof by her, whether she knew of it or assented to it or not. Whenever that was done which she agreed should not be done, it was a breach of a covenant by her, even if the act was contrary to her wishes, and in spite of her efforts to prevent it. Her covenant was against a certain act by any one of four persons, including herself. Two of those persons separately did the act which she had agreed that neither of them should do, and thus there was a violation of the covenant by her, the same as if she had done the act in person.

The argument of the learned counsel for the defendant that the contract fixed a sum to be paid in case of a violation by the defendant, but not in case of a violation "by the other parties," while plausible, is unsound, for there were no "other parties" who could break the covenant. She was the sole covenantor, and unless she kept the covenant she broke it; and she did not keep it. As the actual damages for a breach of the covenant would necessarily be "wholly uncertain, and incapable of being ascertained except by conjecture," we think that the parties intended to liquidate them when they provided that the sum named should be "as stipulated damages." The use of the word "penalty" under the circumstances is not controlling. Bagley v. Ped-

die, 16 N. Y. 469, 69 Am. Dec. 713; Dakin v. Williams, 17 Wend. 448, affirmed 22 Wend. 201; Wooster v. Kisch, 26 Hun, 61.

As there is no other question that requires discussion, the judgment should be affirmed, with costs. All concur, except Brown J., not sitting.

SAMUEL STORES, Inc., v. ABRAMS.

(Supreme Court of Errors of Connecticut, 1919. 94 Conn. 248, 108 Atl. 541, 9 A. L. R. 1450.)

Action by the Samuel Stores, Incorporated, against Aaron H. Abrams. Demurrer to complaint sustained, and plaintiff appeals. No error.

Action for an injunction to restrain the defendant from conducting a clothing business in Bridgeport and from soliciting former and present customers of the plaintiff to trade with him.[16] * * *

CURTIS, J. The plaintiff is a corporation of the state of New York engaged in conducting branch clothing stores in various cities.

It employed the defendant as manager of one of its branch stores for the period of one year from September 5, 1918, under the written contract attached to the complaint.

The contract contains the following stipulation on the part of the defendant: "And, whereas, in the course of such employment, Aaron H. Abrams may be assigned to duties that may give him knowledge and information of confidential matters relating to the conduct and details of the business of the Samuel Stores, Incorporated, as to result in the opinion of the Samuel Stores, Incorporated, irremediable injury to it, for which no money damages could adequately compensate, if the said party of the second part should enter the employment of rival concern while this contract was still in effect, the said Aaron H. Abrams agrees not to engage in any other occupation during the life of this contract, and further agrees not to either directly or indirectly connect himself with any firm engaged in business similar to that of the party of the first part, which would compete with the business of the party of the first part, nor will he himself engage in any business that will compete with the business of the party of the first part, for five years after the date of his connection with the party of the first part being severed. The said Aaron H. Abrams agrees to use his best endeavors and his entire time to promote the business and business interests of the Samuel Stores, Incorporated."

The defendant in November, 1918, left the employ of the plaintiff, and on December 9, 1918, opened a store in Bridgeport, and engaged in the business of selling clothing for men, women, and children, and engaged in the same line of business conducted by the plaintiff in Bridgeport, and has advertised himself as formerly with the People's

[16] Part of the statement is omitted.

Store, the same being the trade-name under which the plaintiff has been conducting business in Bridgeport and the defendant has been and is soliciting the customers of the plaintiff to trade with him.

This case presents the question whether or not the restrictive stipulation in the contract between the parties is void as against public policy.

The public policy to be applied is the public policy of the present time. The changing conditions of life modify from time to time the reasons for determining whether the public interest requires that a restrictive stipulation shall be deemed void as against public policy.[17] * * *

The cases in relation to restraints of trade soon disclosed two leading classes of contracts, contracts between the vendor and vendee of a business and its good will, and, on the other hand, contracts between an employer and an employé.

Under the law, restrictive stipulations in agreements between employer and employé are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will.

In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreements between employer and employé.

In a restrictive covenant between a vendor of a business and the vendee, "a large scope for freedom of contract and a correspondingly large restraint of trade" is allowable. In a restrictive covenant between employer and employé on the other hand, there is "small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

In dealing with a restrictive stipulation between an employer and an employé, as in this case, in order that the court may uphold and enforce the restriction, if it is not otherwise contrary to public policy, the court must find that the facts alleged disclose a restriction on the employé "reasonably necessary for the fair protection of the employer's business or rights, and not unreasonably restricting the rights of the employé, due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed." Wm. Rogers Mfg. Co. v. Rogers, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278; Eureka Laundry Co. v. Long, 35 L. R. A. (N. S.) 119, note; Simms v. Burnette, 16 L. R. A. (N. S.) 389, note; Herbert Morris, Limited, v. Saxelby, [1916]. 1 A. C. 688; Mason v. Provident C. & S. Co., [1913] A. C. 724; Nordenfeldt v. Maxim H. G. & A. Co., [1894] A. C. 565; Id., 11 Reports,

[17] The court here quoted from Maxim v. Nordenfeldt, 11 The Reports, 27 (1895).

27; Konski v. Peet, [1915] 1 Ch. 530; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

We are then to determine whether the facts set up in this complaint make it reasonably necessary for the fair protection of the plaintiff's business to hold that the restrictive stipulation in the contract should be enforced.

This stipulation provides, in effect, that the defendant, for five years after he leaves the employ of the plaintiff, shall not either directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, in any city where the plaintiff conducts one of its branch stores.

It appears from the complaint that the services of the defendant contracted for by the plaintiff are not peculiar or individual in their character, nor purely intellectual, nor are they special or extraordinary services or acts.

The defendant's services and the plaintiff's business are not of a character to involve the acquisition of special business secrets of the plaintiff by the defendant. The agreement relates merely to services in a local retail business, and primarily aims to restrict competition.

The plaintiff conducts a local retail clothing business in which the defendant was employed as manager. The situation of manager could have been filled by any person of sufficient business capacity.

The clothing business may be entered upon by any one who desires to enter it, and whether the defendant opened a competitive store or another did so was immaterial to the plaintiff, except that the defendant having acquaintance and knowledge of the plaintiff's customers might solicit their trade.

The restriction in question provides, in substance, that in any city where the plaintiff carries on its business the defendant shall not directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, for five years after his employment with the plaintiff ceases.

This restriction, binding for that period and relating to every city in which the plaintiff has established a branch store, is not reasonably necessary for the fair protection of the plaintiff's business. It covers a number of cities in which the defendant, from his employment in one city, could have had no acquaintance with the local customers.

A restrictive agreement, providing that the defendant, while connected with a competing business, should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might reasonably be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business. Konski v. Peet, [1915] 1 Ch. 530.

Such a restriction obviously would not unduly restrict the rights of the defendant, since it would not otherwise restrict the field of his employment than by prohibiting the solicitation of the clothing trade of a limited number of people in one city.

By the sweeping terms of the restrictive stipulation in question, it is true that the solicitation of such customers of the plaintiff is indirectly prevented. But at what cost to the defendant? He is prohibited from entering or being employed in the clothing business in various cities, the number of which may be large, and the area in which he may exercise such experience in and aptitude for that business as he may possess is greatly limited.

The reasonable and fair protection of the plaintiff's business does not require such an extended restriction of the defendant's field of employment. Public policy requires that the defendant's liberty of action in trading or employment shall not be unduly restricted. To enforce the sweeping terms of this restriction would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading and employment, and an unjustified restraint on competition.

The case at bar illustrates the following comment found in Herreshoff v. Boutineau, 17 R. I. 7, 19 Atl. 713, 8 L. R. A. 469, 33 Am. St. Rep. 850: "Covenantees [in contracts in restraint of trade between employer and employé] desiring the maximum protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp too much, and so lose all."

There is no error.[18]

[18] Restraints were held invalid in the following cases: Ward v. Byrne, 5 M. & W. 548 (1839), coal clerk agreed not to act in coal business anywhere for nine months after leaving; Herbert Morris v. Saxelby, [1916] 1 A. C. 688, employee agreed not to engage in same business within United Kingdom for seven years; service contracts distinguished from sale of good will; reasonable to protect trade secrets and to prevent solicitation of customers, but not to prevent employee from using his skill and experience as a competitor; Hepworth Mfg. Co. v. Ryott, [1920] 1 Ch. 1, agreement of film actor not to use his film name after leaving plaintiff's employ.

The restraint was held valid in Styles v. Lyon, 87 Conn. 23, 86 Atl. 564 (1913), doctor's assistant agreed not to practice in same town after leaving; Heinz v. National Bank of Commerce of St. Louis, 150 C. C. A. 592, 237 Fed. 942 (1916), bank president agreed not to go into another bank in the city for one year; Rowe v. Toon, 185 Iowa, 848, 169 N. W. 38 (1918), doctor's practice sold with restraint over one county; Thorn v. Dinsmoor, 104 Kan. 275, 178 Pac. 445 (1919), sale of lawyer's practice; Madson v. Johnson, 164 Wis. 612, 160 N. W. 1085 (1917), sale of doctor's practice.

Contracts of this kind create restraint on personal liberty; that is, they destroy certain legal privileges, by creating duties not to do certain things. This process might be carried to such an extreme as to cause peonage or practical slavery, if the contract requires permanent service under one employer. This would be unlawful, and is forbidden by the Thirteenth Amendment to the Constitution. See Shaw v. Fisher (S. C.) 102 S. E. 325 (1920); 30 Yale L. Jour. 174. In Trustee of Denny v. Denny, [1919] 1 K. B. 583, it was held that a covenant not to come to London and not to associate with certain named thieves and swindlers was valid, although it might not be if the named persons were honorable men.

GARST v. HARRIS.

(Supreme Judicial Court of Massachusetts, 1900. 177 Mass. 72, 58 N. E. 174.)

Contract, for breach of the following agreement:

"For and in consideration of the per cent deducted from the full retail price, as per list appended hereto, allowed by the Phenyo Caffein Company, the vendee or retailer hereby agrees that he will not sell, nor allow any one in his employ to sell, directly or indirectly, Phenyo Caffein, 25 cent size, for less than 25 cents a single box, five boxes for one dollar, twelve boxes for two dollars and twenty-five cents, nor the 10 cent size for less than the face price.

"The vendee, or retailer, further agrees, that if he violates the terms of this contract, he will pay to the Phenyo Caffein Company the sum of $21, that sum being the agreed amount that the Phenyo Caffein Company would be damaged by a breach of this agreement. This clause, as to the amount of damages, is inserted because it is recognized and agreed that a breach of this agreement would cause the Phenyo Caffein Company to suffer a material loss, and also that it would be very difficult and usually impossible to prove the exact amount of such loss.

"The vendee, or retailer, further agrees that the acceptance of said goods, with the notice of the conditions of sale, shall be held to be an assent on his part to the foregoing terms, and an agreement with the Phenyo Caffein Company, to sell subject to the price restrictions fixed by it.

"This agreement is made subject to the stipulation that in case the vendee, or retailer, should desire to discontinue the sale of Phenyo Caffein, and notifies the Phenyo Caffein Company of that fact, in writing, said company agrees to buy from the vendee, or retailer, any of the said Phenyo Caffein at the net cost price at which it was sold to him."

Then followed a specification of the price and discount to the retail trade.

The case was submitted to the Superior Court, and, after judgment for the plaintiff for $21, by Gaskill, J., to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

HOLMES, C. J. This is an action of contract to recover $21 as liquidated damages for breach of an agreement not to sell Phenyo-Caffein below a stipulated price. Phenyo-Caffein was a proprietary medicine purchased by the defendant of the plaintiff. At the time of the sale, and as a part of it, a written statement of terms, containing this agreement, was read to the defendant, and delivered to him. One stipulation expressed in the document was that the acceptance of the goods, with the notice of the conditions of the sale, should be an assent to the terms. The defendant accepted the goods, and expressed no dissent. There is no question, therefore, that he agreed to those

applicable to our local situation and circumstances, and is not repugnant to the constitution, or to any act of the legislature, of this state. Whether applicable, or not, must necessarily be a question of judicial decision: and this is, probably, the first action, that has ever called upon a court in this state to sanction such a contract of betting. The Judges of the Courts in England have expressed their regret, of late years, that such transactions ever received the sanction of a court of justice: but, they yield to the force of the law, which they consider settled by a train of decisions, extending down from remote antiquity. We feel no such embarrassment, nor are we willing to transmit any such embarrassment to our successors; nor diffuse into society the influence of a rule so demoralizing, as would be the sanction of such a contract. It is honorable to this state, that the industrious and moral habits of our citizens have furnished no occasion to litigate questions of this nature. It is honorable to the legislature, that they have interposed checks to such games and sports as they supposed were creeping into use. By the Statute of 1821, page 268, penalties are affixed to the winning or losing, or betting, in money, goods, or chattels, on any game, or on any horse-race, or other sport, within this state. And said statute makes void any contracts and securities made and given for money won on such games. The species of betting now in question may not come within that statute, giving it the strict construction of a penal statute: yet the good morals of society require, that no encouragement should be afforded to the acquisition of property, otherwise than by honest industry. Time might be occupied in seeking occasions to take advantage of the unwary, and acquiring a skill to take such advantage, which ought to be devoted to better purposes.

In this case, according to the terms of the bet, the plaintiff had acquired a right to the possession of the watch, which the defendant had laid down in the bet, but the plaintiff had not acquired the actual possession, when the defendant resumed his possession. The plaintiff, therefore, had no complete right to the watch, without the sanction of such a contract of betting. That sanction is now withheld, and

The judgment of the County Court is affirmed.[20]

[20] In the United States some courts have followed the English law in holding wagers legal unless prohibited by statute, or, for special reasons, promotive of improper results. Campbell v. Richardson, 10 Johns. (N. Y.) 406 (1813); Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576 (1854); Beadles v. Bless, 27 Ill. 320, 81 Am. Dec. 231 (1862); Henderson v. Stone, 1 Mart. N. S. (La.) 639 (1823), wager on horse race; Moore v. Johnston, 8 La. Ann. 488 (1852), same. But the strong tendency is to declare all wagers (save those for commercial objects) contrary to public policy and void. Love v. Harvey, 114 Mass. 80 (1873); Bernard v. Taylor, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693 (1893); Eldred v. Malloy, 2 Colo. 320, 25 Am. Rep. 752 (1874); Wilkinson v. Tousley, 16 Minn. 299, (Gil. 263), 10 Am. Rep. 139 (1871); Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225 (1884).

American statutes commonly make gambling contracts illegal, as well as void. See Stimson, Am. St. Law, § 4182. By the English statutes, they are

HAMPDEN v. WALSH.

(In the Queen's Bench Division, 1876. 1 Q. B. Div. 189.)

COCKBURN, C. J. This is an action brought to recover the sum of £500 deposited by the plaintiff with the defendant, under the following circumstances:

The plaintiff, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called Scientific Opinion, an advertisement in the following words: "The undersigned is willing to deposit £50 to £500 on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the united kingdom to prove the rotundity and revolution of the world, from scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to shew visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346 Strand, and of Mr. W. Carpenter, of 7 Carlton Terrace, Lewisham Park, or, if they differed, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in shewing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four

void only. For the effect of this, see Hyams v. King, [1908] 2 K. B. 696; Thacker v. Hardy, 4 Q. B. D. 685 (1878).

It is not illegal to lend money to pay a gambling debt, Pennsylvania R. Co. v. Rosenfeld, 249 Fed. 964, 162 C. C. A. 162 (1918); or to lend money with knowledge that the borrower will gamble with it, Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301 (1887); but otherwise, if lent with the purpose that it shall be so used. McKinnell v. Robinson, 3 M. & W. 434 (1838).

Many aleatory commercial contracts (e. g., insurance) are not illegal wagers. Nor is a contract a wager because the sum to be paid will increase in amount in an uncertain event, where the event affects the value of the consideration. Ferguson v. Coleman, 3 Rich. (S. C.) 99, 45 Am. Dec. 761 (1846); Gray v. Gardner, 17 Mass. 188 (1821).

miles, then a further period of one month is to be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was to be at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favour of Mr. Wallace, as having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's Dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the £500 he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of £500 to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agreement amounts in effect to a wager; and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, § 18, is prevented from maintaining this action.

We will, in the first instance, proceed with the case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by the effect of the statutes of 16 Car. II, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there

is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being made null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with the stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in Hodson v. Terrill, 1 Cr. & M. 797, notice had been given to the stakeholder prior to the event being determined, but also, where, as in Hastelow v. Jackson, 8 B. & C. 221, notice was given after the event had come off.

In Hodson v. Terrill, 1 Cr. & M. 797, the deposit had been made on a cricket match for £20 a side, and was therefore unlawful within the statute of Anne. A dispute having arisen in the course of the match, and one side having refused to play it out, the plaintiff, who had paid a deposit, claimed to have it returned, and it was held that he was entitled to recover.

So in Martin v. Hewson, 10 Ex. 737, 24 L. J. (Ex.) 174, in an action for money had and received to plaintiff's use, the defendant having pleaded that the money had been deposited with him to abide the event of a cockfight, the replication, that before the result was ascertained the plaintiff repudiated the wager, and required repayment of the deposit, was held good. In Hastelow v. Jackson, 8 B. & C. 221, the Court of Queen's Bench, following the prior cases of Cotton v. Thurland, 5 T. R. 405, Smith v. Bickmore, 4 Taunt. 474, and Bate v. Cartwright, 7 Price, 540, held that, where, money having been deposited with the stakeholder to abide the event of a boxing match, A., the depositor, claimed the whole sum from the stakeholder, as having won the fight, and threatened him with an action if he paid it over to B., the other combatant, which he nevertheless did by direction of the umpire, A. was entitled to recover the money he had deposited as his own stake as money had and received to his use. "If," says Bayley, J., "a stakeholder, pays over the money without authority from the party and in opposition to his desire, he does so at his own peril." These cases have never been overruled, and must be considered as law; although in Meaning v. Hellings, 14 M. & W. at page 712, Alderson, B., speaks doubtingly of the decision in Hastelow v. Jackson, 8 B. & C. 221, using the expression, "that case does not convince me, it overcomes me." But that case seems to have been decided more on the form of the particulars than anything else, and does not seriously interfere with the authority of Hastelow v. Jackson, 8 B. & C. 221, which seems to us to be good law.

A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager, and others, in which the wager, not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing, who can at any time claim it back before it has been paid over. In the latter, the contract, prior to 8 & 9 Vict. c. 109, § 18, not being invalid, it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to 8 & 9 Vict. c. 109, § 18, money was deposited on a wager not illegal; and the Courts of King's Bench and Exchequer were at variance on this point. In Eltham v. Kingsman, 1 B. & Ald. 683, the Court of King's Bench, consisting of Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ., held, that even where a wager was legal, the authority of a stakeholder, who was also (as is the case with the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here," says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man," says Abbott, J., "who has made a foolish wager may rescind it before any decision has taken place." In the later case of Emery v. Richards, 14 M. & W. 728, the Court of Exchequer, where money had been deposited on a wager of less than £10 on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict., not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of Eltham v. Kingsman, 1 B. & Ald. 683, does not, however, appear to have been brought to the notice of the Court, and in our view the decision of this Court was the sounder one. We cannot concur in what is said in Chitty on Contracts (8th Ed.) p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of Eltham v. Kingsman, 1 B. & Ald. 683, and Hastelow v. Jackson, 8 B. & C. 221; and in that view we concur.

Practically, however, it is now unnecessary to decide this question, if the transaction under consideration is to be looked upon as a wager. For by 8 & 9 Vict. c. 109, § 18, it is enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or main-

tained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action—a question on which a difference of opinion exists. The question arose in Varney v. Hickman, 5 C. B. 271, 17 L. J. (C. P.) 102. The plaintiff and one Isaacs had deposited £20 each with the defendant on the event of a match between two horses. Before the race was run the plaintiff gave notice to the defendant that he declined the bet and demanded back his deposit. The plaintiff not attending to contest the race, Isaacs was declared the winner, and the amount of the two deposits was handed over to him by the defendant. An action for money had and received having been brought by the plaintiff to recover the amount of his deposit, the statute 8 & 9 Vict. c. 109, § 18, was relied upon for the defence. But it was held by the Court, consisting of Maule, Cresswell, and Williams, JJ., that the part of section 18 relating to deposits was meant to apply only to the nonrecovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over.

In the later case of Martin v. Hewson, 10 Ex. 737, 24 L. J. (Ex.) 174, already referred to, the Court of Exchequer adopted the view of the Common Pleas in Varney v. Hickman, 5 C. B. 271, 17 L. J. (C. P.) 102, Parke, B., saying: "According to the context, the statute prohibits the recovery of money which has been won in such a transaction, or has been deposited to abide the event of a wager, but it does not apply to the case where a party seeks to recover his stake upon a repudiation of the wagering contract."

But in Savage v. Madder, 36 L. J. (Ex.) 178, Martin, B., expressed a decided opinion that no action could be brought, either directly upon the contract, or in respect of money deposited by the winner himself in the hands of a stakeholder to abide the event. "It is," said the learned judge, "in fact, expressly within the Act of Parliament; and more than that, it is within what the Act intended to effect. The object of the Act was to prevent trials in courts of law with respect to betting contracts; and rightly so, for they are contracts in relation to transactions with which the time of the courts of law ought not to be occupied. A man who makes bets must take his chance of getting his money. A bet ought to be a contract of honour; and if the loser cannot pay, no action should be maintain-

able in respect of the debt." What was thus said was, however, unnecessary to the decision of the question before the Court. For the plaintiff there claimed the entire stakes as his by the event; he had never repudiated the wager or revoked the authority of the stakeholder. He was seeking to enforce the wager, and was met by the statute and defeated by the effect of the enactment. The question again arose directly in the case of Graham v. Thompson, Ir. Rep. 2 C. L. 64, in the Court of Common Pleas in Ireland, where, in an action for money had and received, the defendant pleaded specially, "that the money was money deposited in the hands of the defendant to abide an event on which a wager had thereupon been made, to wit, &c., and that that wager had not been repudiated, or any demand of the said money, or any part thereof, made upon him by the plaintiff before the event on which the said wager had been made had taken place, and the said wager had been decided." The plaintiff demurred to this defence, on the ground that it was consistent with it that the plaintiff had repudiated the wager before the defendant had paid over the money to the winner. And the Court, taking the same view as had been taken in Varney v. Hickman, 5 C. B. 271, 17 L. J. (Ex.) 174, and Martin v. Hewson, 10 Ex. 737, 24 L. J. (Ex.) 174, held the demurrer good. It is unnecessary to say what our view might have been had the matter been res integra; we are bound by the authority of these decisions, which, if they are to be reviewed, can only be reviewed in a court of appeal.

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favour the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the Court in the cases of Eltham v. Kingsman, 1 B. & Ald. 683, and Hastelow v. Jackson, 8 B. & C. 221, before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer justified in paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

In re GREEN.

(District Court of the United States, W. D. Wisconsin, 1877. 7 Biss. 338, Fed. Cas. No. 5751.)

HOPKINS, District Judge. Richard Green proved a claim of $7,715.16 against the bankrupt's estate, and James Norris of $1,877.23. The assignee moves to expunge Norris' claim and to reduce Green's. The grounds upon which the motion is made are, that the contracts upon which the claims are based were void, first, by the statute of frauds, and second, that they were gaming contracts. In the view I have taken of the case, it is only necessary to consider the latter.

There has been considerable testimony taken, and it is in some respects quite contradictory, but I think the conflict is more apparent than real. The proof shows that the part of the claim of Richard Green which is objected to, and all of Norris' claim, arose out of losses on wheat contracts, and it is claimed that no wheat was in fact bought or intended to be bought, but the transactions were only purchases of options—wagers on the price of wheat at a future day, and void under the statute of this state on the subject of betting and gaming. 2 Taylor's Statutes, p. 1881, § 16. If the contract for the purchase and sale of wheat was only colorable and neither party intended to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, it would be a gaming contract and void. The form of the contract would not be conclusive. Courts would look into the matter and determine whether the parties really meant to purchase and sell, or whether the transaction was but a mere bet upon the future price of the article. This must be determined by the evidence and circumstances attending the making of the contract and the conduct of the parties in reference to it. The form of the contract would not control or be very material if the transaction itself was illegal. Cave's 7th Ed. Addison on Contracts, page 209; Pickering v. Cease, 8 Chicago Legal News, 340; Kirkpatrick v. Bonsall, 72 Pa. 155; Cassard v. Hinman, 14 N. Y. Super. Ct. 107; Grizewood v. Blane, 73 E. C. L. 526; Rourke v. Short, 25 L. J., Q. B. 196; Enderby v. Gilpin, 5 Moore, 571.

The court in 72 Pa. 155, after stating that gambling must not be confounded with mercantile speculation, for that is proper, says, "merchants speculate upon the future price of articles in which they deal, and buy and sell accordingly. They forecast the future and buy and sell in a bona fide way, which is unobjectionable. But," (the court

says) "when ventures are made upon the turn of price only, with no bona fide intent to deal in the article, but merely to risk the difference between the rise and fall at a future time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference or margin as it is figuratively termed. The bargain represents not a transfer of property but a mere stake or wager upon its future price. * * * Such transactions are destructive of good morals and fair dealings, and of the best interests of the community."

Against such transactions the statute is aimed, and when they are proven, the parties must in this state be left without remedy. They are unlawful and void as contravening a sound public policy as well as the statute of the state.

Our statute has gone further than the English statutes on this question; ours makes void all agreements and contracts to pay money lost on a wager either to the party winning or to a party who advances it to aid in the enterprise. It is unlawful to bet and equally so to lend money for that purpose. No cause of action arises in favor of a party to an illegal transaction nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute or a sound public policy or good morals. Ruckman v. Bryan, 3 Denio (N. Y.) 340; Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Hooker v. Knab, 26 Wis. 511.

It has also been held that where a stake-holder pays over the money to a winner by the direction of the loser after the bet is decided that it will not prevent a recovery back of him by the loser. Ruckman v. Pitcher, 1 N. Y. 392. [It is sometimes so provided by statute.]

Having ascertained the law applicable to such transactions, the question recurs upon the evidence: Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void.

It is insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so that, conceding the rule of law to be as above stated, they do not fall within it; that they paid the money to the parties selling to the bankrupt, and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contract, still the bankrupt is liable to them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and it is not within the prohibition of the act. Reliance was placed upon the case of Rosewarne v. Billing, 109 E. C. L. 316, to sustain this claim. That was an action by a broker to recover of his principal money paid by him for differences on illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when

such losses were paid by a party at the request of the defendant, such party could recover. The court hold that such contracts are void, but not illegal, and not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this state declares all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of the gaming or betting to be void. These parties, it seems to me, fall within that statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.

If the bankrupt had requested a party to pay the difference for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to recover. He would be an innocent party. Jessup v. Lutwyche, 10 Ex. 614. In such a case the consideration would not, as to him be illegal; he would not be chargeable with the act declared to be illegal. But here the statute, as before stated, declares all promises or notes to repay money advanced at the time and place, void. The money here was advanced at the time and place. The contracts of purchase were in the names of these claimants. Their claims are not for money loaned to bankrupt to pay differences, but for money paid by them for differences and for which the bankrupt was not liable.

The case of Steers v. Lashley, 6 T. R. 61, very closely resembles this. That was an action on a bill of exchange by an indorsee with knowledge of the consideration. In that case the defendant had engaged in several stock jobbing transactions in which Wilson was employed as his broker, and had paid the differences. Wilson drew the bill for a part of those differences, which defendant accepted; it was then indorsed to the plaintiff but with knowledge of the facts. Lord Kenyon, before whom the case was tried, ordered nonsuit. A motion to set it aside was made on the ground that as the broker had paid the difference for his employer, which was the consideration, the bill was not vitiated by the original transaction, citing Faikney v. Renous, 3 T. R. 418, and Petrie v. Hanney, 4 Burr. 2609. Lord Kenyon denied the motion, and said that in the cases referred to, the money had been loaned to pay the difference, and afterwards the securities were given for the money so loaned. "But here (he said) the bill on which

the action is brought, was given for the very differences which Wilson could not enforce payment of himself," and as the plaintiff took the bill with knowledge he occupies no better position.

If the law was correctly stated in that case, it settles the question that a broker who transacts the illegal business, and pays the differences, cannot recover of the principal the money thus paid; a proposition so clear to my mind that it would hardly seem necessary to quote authority to sustain it. But, plain as it appears, the case of Rosewarne v. Billing, supra, cited by the claimant's counsel, seems to sanction a different doctrine. But I do not think that case can be regarded as the law upon this point in England. There are cases in conflict with it, so I think it may be safely asserted that the weight of English authorities is with Steers v. Lashley, supra.

If transactions like these are illegal I know of no reason why the broker should be favored, or exempted from the usual consequences that attach to other parties aiding or assisting in the commission of unlawful acts. It makes their business quite hazardous, but that grows out of its illegal character. They can refuse to aid in transactions of such a character, and if they would do so, a great deal of that kind of gambling would stop. Parties like this bankrupt living in the country without means or privileges upon the exchange boards could not embark in such gambling business without their aid. Through brokers and commission men they get access to the exchange boards, and by reason of such facilities are enabled to engage in these gaming contracts which generally end like this in ruin and bankruptcy.

To their complaint of hardship it is a sufficient answer that they should not aid and assist parties in transactions condemned both by the law and the principles of sound morality. If they do, they must take the consequences like other transgressors.

Having ascertained that contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are held to be gambling contracts and that the broker stands in no better position than the seller to recover differences, it only remains to examine the testimony and see whether the contracts in this case were such. And upon this point I do not intend to go over the testimony in detail. It is self-evident from the testimony and the condition of the parties that these sales were not bona fide. The bankrupt was not a dealer in grain. He was a country merchant of little or no means; had no money to invest in wheat, that is to pay for wheat, which fact both Richard Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears they did not and it is apparent that he could not, and they knew it.

He did not put up any money even for margins, or but a small amount, if any, and made no arrangements with them to do so. Nor-

ris says the wheat was bought for him in their firm name. That probably may have been so in the sense that term is used "on change," but that there was a bona fide purchase, with the intention that he would take and pay for such large quantities of wheat I do not believe. The purchase it is claimed was made in the name of Norris & Spencer, the brokers, not the bankrupt's, and that they had a number of contracts and perhaps some warehouse receipts for grain is quite probable, and that they might have considered such contracts as the property of the bankrupt, and charged the wheat to him on their books on receiving his order to buy, so as to make a colorable sale, is not improbable, but that they expected payment for the whole, the testimony completely negatives. The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate in and pay only the differences as when the sale was of the article itself. The books would show the differences if it was to pay them, and the profit or loss if it was a genuine sale. The books were properly kept in either case, and do not therefore furnish any evidence as to what the contract was.

But it is said that the bankrupt settled with Norris, and gave him notes, and that these notes are good, if the account was not.

That is not so. If there was no legal liability on the part of the bankrupt to pay the claim, the notes given therefor are void for want of consideration. This point is expressly ruled by the Supreme Court in Hooker v. Knab, 26 Wis. 511. See also Steers v. Lashley, 6 T. R. 61, supra. The question whether the bankrupt could have defended on this ground as against a bona fide holder of the notes, does not arise here, as the original parties are alone before the court. The claim of Norris is therefore invalid, and his proof is rejected.

As to Richard Green's claim, the pretended contracts of purchase were made in his name, and not in the name of the bankrupt, and the testimony shows that as between them, all that either ever contemplated was the payment of differences. Under the evidence this is too plain to admit of question or discussion. His claim so far as such differences on grain contracts, are included, is disallowed and the proof is rejected. But as there are some other items of account that are proper and should be allowed, it will be referred to the Register to take and admit proof of such other items.

The motion of the assignee to expunge the proof of such parties is therefore granted.[21]

[21] Wagers on the future price of a commodity, where the understanding is that no delivery is to be made but that there shall be a mere "settlement of differences," are illegal. Raymond v. Parker, 84 Conn. 694, 81 Atl. 1030 (1911); Lamson Bros. & Co. v. Bane, 206 Fed. 253, 124 C. C. A. 121, 46 L. R. A. (N. S.) 650 (1913); Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862 (1891):

ZEMBLER v. FITZGERALD.

(Supreme Judicial Court of Massachusetts, 1919. 234 Mass. 236, 125 N. E. 299.)

Action by Louis Zembler against William F. Fitzgerald and others. Resulting in judgment for defendants on plaintiff's motion for judgment on the auditor's report. On report to the Supreme Judicial Court. Judgment for defendants.

CARROLL, J.[22] The plaintiff employed the defendants, who are stock brokers, to buy and sell stock on margin. The contract was made February 23, 1916, when the plaintiff deposited $2,000 and received from the defendants a receipt "subject to marginal conditions hereon," to the effect that the amount received was to be used by the defendants as margin or collateral security to protect them from losses in their transactions with the plaintiff, and that they were authorized to sell all the stocks, bonds or other property held by them for the plaintiff's account, at private or public sale, if the amount paid were insufficient to protect them from loss. In the superior court the case was heard on the auditor's report. Judgment was ordered for the defendants and the case reported to the Supreme Judicial Court.

Between February 23, 1916, and February 16, 1917, the plaintiff ordered the defendants to sell or purchase for his account shares of stock of different corporations. In October of 1917 the defendants, at the plaintiff's request, delivered to F. H. Milliken & Co. 20 shares of Alaska, 20 shares of Isle Royal, 30 shares Massachusetts Consolidated, 30 shares of North Butte and 20 shares of Utah Consolidated (which were all the securities then held for the plaintiff's account), and received from F. H. Milliken & Co. the amount of the plaintiff's indebtedness. At no other time did the defendants deliver or tender to the plaintiff or his agent the stocks purchased by them in accordance with his order.

When an order was given to buy or sell, the defendants mailed to the plaintiff a bought or sold slip confirming the transaction. On each of the sale slips there was printed "All orders for the purchase or sale of any security are received and executed with the distinct under-

Harvey v. Merrill, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159 (1889).

"That a contract of sale may be made for the future delivery of produce, or any article of personal property, will not be controverted; and that such a contract, by the agreement of parties, or by the regulations connected with the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover." Beadles v. McElrath, 85 Ky. 230, 3 S. W. 152 (1887). For an ineffective statute against "option" contracts, see Stewart v. Dodson, 282 Ill. 192, 118 N. E. 405, 1 A. L. R. 1544 (1917).

[22] Part of the opinion is omitted.

standing that an actual purchase or sale is contemplated, and that you so understand and agree," and "in the event of your not making delivery of the securities sold, in time for us to comply with the rule for delivery of securities in the exchange in which the same have been sold, we are hereby empowered to make delivery of the same for your account, the said securities to be loaned by us to you for the foregoing purpose and to be returned to us on demand." Upon each of the slips confirming purchases there appeared the printed statement that "all orders for the purchase or sale of any security are received and executed with the distinct understanding that an actual purchase or sale is contemplated," and the further statement, "It is agreed that all securities from time to time carried in your marginal account, or deposited to protect the same, may be loaned or may be pledged by us, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to you." On the 1st of each month, beginning April 1, 1916, the defendants sent to the plaintiff a statement of his account, showing purchases and sales, with the prices, amounts, interest charges and balances. The plaintiff admitted that he read all the printed matter appearing upon the confirmation slips and agreed to all the recitals contained therein.

On April 25, 1916, the plaintiff gave an order to sell 40 shares of Butte & Superior. None of this stock was then held by the defendants for his account. The following day he gave an order to buy 40 shares. This was to protect the order to sell, the plaintiff admitting that the stock bought was to replace that sold. November 27, 1916, he ordered the defendants to sell 20 shares of Pittsburgh Coal. They were then carrying for his account 10 shares of this stock. The following day he gave an order to buy 20 shares of Pittsburgh Coal, which according to the finding of the auditor, was to cover the 10 shares ordered to be sold "beyond the amount which the defendants carried for his account." Except in these two instances, whenever the plaintiff gave an order to sell, he understood that the defendants were carrying for his account on margin the shares which he ordered sold. Whenever an order was given to buy he expected that the defendants would carry out his order by the purchase of shares in accordance with the rules of the stock exchange; and whenever an order was given to sell he intended the defendant would make an actual sale. It was found by the auditor that when the plaintiff opened the account he stated he intended to buy and sell on margin.

R. L. c. 99, § 4, provides so far as material, that whoever employs another to buy or sell for his account any securities, intending at the time there shall be no actual purchase or sale, may recover in an action of contract from the person employed any payment made, if the person so employed had reasonable cause to believe that said intention existed; but there shall be no right of action if in accordance with the terms of the employment an actual purchase or sale of the secu-

rities or a valid contract therefor is made. By section 6 of this statute, if the person employing another to sell for his account did not own the securities at the time and settlements were made without the completion of the purchase or sale, these facts shall be prima facie evidence within the meaning of section 4 that it was intended no actual sales or purchases should be made and there was reasonable cause to believe said intention existed.

The purchase and sale of stocks by a broker who carries them on margin for his customer are not prohibited by this statute. Unless the person employing the broker meant there should be no actual sales or purchases and the broker had reasonable cause to believe that such was the case, the statute is not transgressed. Rice v. Winslow, 180 Mass. 500, 62 N. E. 1057. It is not the unrevealed intention of the plaintiff that is to be proved, but his purpose as appears by the transaction, the acts accompanying it, the means employed, and by all the other circumstances competent as evidence to show his intention and its disclosure to the defendant. See Marks v. Metropolitan Stock Exchange, 181 Mass. 251, 254, 63 N. E. 410; Anderson v. Metropolitan Stock Exchange, 191 Mass. 117, 122, 77 N. E. 706. Unless it appears that the plaintiff intended that a real transaction should not take place by the actual purchase and sale of securities, his case, under the statute, fails. The plaintiff did not show he contemplated there should be no actual sales or purchases by the defendants; the auditor expressly finds as a fact upon all the evidence that the plaintiff expected each time he gave an order to buy that the defendants would execute his order and actually purchase the stocks in accordance with the rules of the stock exchange; and whenever he gave an order to sell that the defendants would sell the stock as directed. Such transactions are not wagering ones, and are not forbidden by the statute, R. L. c. 99, §§ 4, 6; Rice v. Winslow, supra; Post v. Leland, 184 Mass. 601, 604, 605, 69 N. E. 361.[23]

The meaning and the effect of this finding are not diminished by the findings that the defendants had reason to believe the plaintiff did not intend to receive from them or to deliver to them the stocks which he directed them to purchase or to sell; and that between these parties there should be no actual sales or purchases. It is immaterial that between the plaintiff and the defendants there were to be no deliveries. Rice v. Winslow, supra; Post v. Leland, supra. The statute refers to the plaintiff's intention—that intention relates solely to sales and purchases to be made by the defendants, and if the plaintiff intended that actual sales and purchases were to be executed between the defendants and those from whom they bought and to whom they sold, the statute does not give the plaintiff a remedy.

In each of the two instances when the 40 shares of Butte & Superior and the 20 shares of Pittsburg Coal were ordered to be sold by

[23] In accord: Hopkins v. O'Kane, 169 Pa. 478, 32 Atl. 421 (1895).

the plaintiff, on the following day orders were given by him to buy a like amount to take their place. The slips confirming the sales contained the provision that if delivery was not made by the plaintiff the defendants were authorized to make delivery for his account and to loan the securities for this purpose. The plaintiff read these conditions: he gave no notice that they were adverse to his contract and he testified that he agreed to them. This finding is not inconsistent with the finding that he intended actual sales and purchases should be made, and he failed to show that the transaction was a wagering contract, under the statute he cannot recover. See Chandler v. Prince, 221 Mass. 495, 109 N. E. 374.

As it was contemplated that there should be actual purchases and sales of the stock, as found by the auditor, it is immaterial that the defendants did not set apart for the plaintiff the specific shares bought for him. See Davy v. Bangs, 174 Mass. 238, 54 N. E. 536; Chase v. Boston, 180 Mass. 458, 460, 62 N. E. 1059; Rice v. Winslow, supra. * * *

Judgment for defendants.

SECTION 3.—CHAMPERTY AND MAINTENANCE

HUTLEY v. HUTLEY.

(In the Queen's Bench, 1873. L. R. 8 Q. B. Cas. 112.)

Declaration that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir at law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purpose and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of the deceased. Allegation

of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

BLACKBURN, J.[24] The question is whether the contract disclosed on this declaration is such as can be enforced in a court of law. Putting out of the question, for the moment, the position of the plaintiff it alleges that the defendant is heir at law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate, which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal: Sprye v. Porter, 7 E. & B. 58, 81, 26 L. J. (Q. B.) 64, 71, was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the Court says: "Here we have maintenance in its worst aspect, the plaintiff and Rosaz, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one fifth of the property when so recovered: and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, evidence; and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal; and Stanley v. Jones, 7 Bing. 369, is an express authority to that effect." Putting aside that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far as that the present plaintiff only agrees to obtain evidence, whereas in Sprye v. Porter, 7 E. & B. 58, 26 L. J. (Q. B.) 64, the plaintiff undertakes to supply

[24] The concurring opinions of Lush and Archibald, JJ., are omitted.

evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said shewed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in Findon v. Parker, 11 M. & W. 675, 679, that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit; I can not see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject matter of the suit were true, that would not justify or make legal the agreement to share in the property to be recovered by the defendant.

There must, therefore, be judgment for the defendant.[25] * * *

[25] See, also, Johnson v. Van Wyck, 4 App. D. C. 294, 41 L. R. A. 520 (1894). There is no champerty, unless the compensation for conducting the suit is to be a share of that which is recovered by the judgment. The agreement is not champertous merely because the fee is to be contingent on success and the amount is dependent upon the amount recovered and the judgment is assigned as security for the fee. Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99 (1887); Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009 (1901); Bennett v. Tighe, 224 Mass. 159, 112 N. E. 629 (1916).

It is generally held that maintenance is an essential part of champerty, and that the agreement is not illegal, unless he who is to be paid by a share of the proceeds of the suit also is to pay the expense of the litigation. Phillips v. South Park Com'rs, 119 Ill. 626, 10 N. E. 230 (1887); Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302 (1897); Hart v. State ex rel. Rock, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151 (1889); Jewel v. Neidy, 61 Iowa, 299, 16 N. W. 141 (1883); Northwestern S. S. Co. v. Cochran, 191 Fed. 146, 111 C. C. A. 626 (1911); Brown v. Ginn, 66 Ohio St. 316, 64 N. E. 123

WILHITE v. ROBERTS.

(Court of Appeals of Kentucky, 1836. 4 Dana, 172.)

EWING, J.[26] George Roberts, as the survivor of Roberts and Rudd, brought an action of debt against Presley Wilhite, on a penal bond for four hundred dollars, to which the following condition is attached:

"The condition of the above obligation is such that whereas the above named Roberts and Rudd, as my attorneys, have, for me, commenced an action of ejectment in the Nelson Circuit Court. * * * Now, if the said Rudd and Roberts shall succeed in recovering possession of said lot of ground, on the demise aforesaid, then I oblige myself to pay them to the amount of one half of the value of the above mentioned ground." * * *

The defendant * * * filed the following plea: "that said Roberts and Rudd, at the time of the date of said covenant, had commenced, and were prosecuting, a suit in ejectment, on the demise of plaintiff's wife etc. for a lot of ground, and that, contrary to the law of the land against champerty and maintenance, it was illegally agreed between the said Roberts and Rudd on the one part, and the defendant on the other, that the said defendant should give and convey one half of said lot of ground to said Roberts and Rudd, for their services in prosecuting said suit, and that said obligation was procured, by the said Roberts and Rudd, as a security for the performance by the said defendant, of said illegal agreement, and was taken in the form in which it is written, fraudulently, for the purpose of evading the force of the law against champerty and maintenance, and that the same was given without any other consideration; and this he is ready to verify."

To this plea a demurrer was filed by the plaintiff, and joined, and the demurrer sustained by the Court. And the most important question arising on the record, is as to the sufficiency of this plea to bar the plaintiff's action.

It is provided in the second section of the act "to revive and amend the champerty and maintenance law" (Stat. Law, 286) that "it shall not be lawful for any person or persons, to contract, or to undertake to recover, or carry on any suit for the recovery of any such pretended right or title to land as aforesaid, of which adverse possession is held under conflicting title as aforesaid, for or in consideration to have part or profit thereof; and the parties to such contract shall forfeit all right, title, interest or claim in or to the land claimed under such pretended right or title, and all right to maintain any action or suit at law or equity, upon such pretended right or title; and such right, title or claim

(1902); Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181 (1884); Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733 (1896). Contra: Ackert v. Barker, 131 Mass. 436 (1881).

[26] Parts of the report have been omitted.

shall vest in the Commonwealth, and enure to the benefit of the person in possession without office found." [27]

We have no idea, that the bond sued on, contains any stipulation, on its face, in conflict with the provisions of the foregoing section. It is as competent for a litigant to regulate the amount of his attorney's fee, by the value or half the value of the property in contest, as to regulate it by the value, or half the value, of any other piece of property.

Whether he regulates it by the one or the other, or agrees to pay a contingent fee in money, agreed upon by the parties at the time, he is not subject to the denunciations of the statute,—provided he is not to give a part or profit out of the thing in contest.

But champerty is the most odious species of maintenance, and was an offence at common law, and has been denounced by various highly penal statutes, in aid of the common law. It always has been regarded as an offence against the peace of society, the administration of impartial justice, and tending to the encouragement of litigation and the oppression of the weak. And the courts have been uniformly vigilant, where the peace and quietude and justice of the country are regarded, not only in enforcing their penalties, but in declaring void all contracts made in derogation of their provisions. If the contract contained any stipulation on its face in derogation of their provisions, we should find no difficulty in treating it as a nullity, and refusing all aid from the law and the Courts in enforcing it, or any stipulation in it however lawful. * * *

But there being no stipulation or recital in this bond, evidencing a violation of the statute of champerty, the question occurs, if there be a secret agreement between the parties, whereby the plaintiff was to receive part or profit of the property in contest, and the written contract was based upon it, and fraudulently exacted as a penalty or security to enforce a compliance with its illegal terms, whether this secret contract can be averred and proved, and if so, will such averment and proof invalidate the written contract?

We can perceive no principle of reason or law that inhibits the averment and proof. Though it be a general rule that nothing can be averred and proved against the stipulations of a written contract, this rule does not apply where the contract is illegal, or against the positive prohibitions of a penal statute. Hence in the case of usury, though a contract in writing be fair on its face, or import a consideration or contract perfectly legal, the real transaction may be averred and proved, by parol testimony.

[27] This statute goes much beyond the common law. Blackstone defined champerty as a "species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant campum partire, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense." See Thompson v. Reynolds, 73 Ill. 11 (1874), where a lawyer agreed to bring suit, pay all expenses, and to receive one half of whatever should be recovered.

No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law.

It would only be necessary, for the parties, as is alleged in the case before the Court, to have a secret, illegal understanding, and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasion. * * *

It follows that the facts alleged in the plea, if true, are a good bar to the plaintiff's action, and the demurrer should have been overruled. * * *

ELLIS v. FRAWLEY et al.

(Supreme Court of Wisconsin, 1917. 165 Wis. 381, 161 N. W. 364.)

Action by L. Olson Ellis against William H. Frawley and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with direction to dismiss the complaint on the merits.

Action for an accounting and settlement of the affairs of a joint business venture or partnership. The plaintiff is a lawyer residing and practicing at Black River Falls; the defendants are lawyers residing and practicing at Eau Claire. In October, 1911, a destructive flood occurred in the Black river by which much private and public property was destroyed in the city of Black River Falls. It was claimed generally that the flood resulted from the negligence of the La Crosse Water Power Company in the operation of its dam across said river. The complaint charged that in April, 1912, the plaintiff and defendants made a partnership agreement by which they were to act jointly as attorneys in prosecuting claims for all persons who might employ them to sue for and collect their claims against the power company arising out of said flood, and that in pursuance of that agreement the partnership brought suits for a large number of such claimants and performed professional services in such suits and finally effected a settlement of such claims for a large sum of money, and that the defendants received in payment for such partnership services more than $20,000, of which one-half belongs to the plaintiff; but that said defendants refuse to pay the plaintiff any part thereof. The defendants denied the existence of any such partnership. The action was tried by the court without a jury, and the court found that no partnership was formed, but "that plaintiff at the request of the defendants rendered services to the defendants in inducing flood sufferers to retain the defendants to prosecute their claims and in procuring assignments

of such claims, that he continued to render services to the defendants during the years 1912 and 1913 with reference to the losses sustained and claims made by such flood sufferers which defendants were seeking to recover through actions brought by them acting as attorneys for such flood sufferers"; also, "that said services rendered by the plaintiff to the defendants at their special instance and request are reasonably worth the sum of $975." There is no bill of exceptions. The defendants appeal from judgment against them in accordance with the findings.

WINSLOW, C. J.[28] (after stating the facts as above). There being no bill of exceptions, the only inquiry presented is whether, upon the facts found by the trial court, the judgment is right. Those facts are: A firm of lawyers requested another lawyer to go around among the flood sufferers and persuade them to employ the firm to prosecute their damage claims and to execute assignments of their claims to one person for the purpose of facilitating the litigation; the second lawyer undertook the task, was successful in his work, and has recovered the value thereof.

The judgment is right unless the arrangement between the parties was against public policy; if it was, the judgment is wrong and must be reversed, even though the objection be now made for the first time. Jacobson v. Bentzler, 127 Wis. 566, 107 N. W. 7, 4 L. R. A. (N. S.) 1151, 115 Am. St. Rep. 1052, 7 Ann. Cas. 633. The court will not allow itself to be used as the means of carrying into effect a contract which is essentially contrary to morality or to public policy, even though no objection be made by the parties. Wight v. Rindskopf, 43 Wis. 344. It seems that the arrangement was clearly against public policy.

The mere intermeddler, the officious stirrer up of litigation in which he has no interest save the possibility of a commission or a fee, has been condemned by courts and legislators since the earliest times. This is so because the practice of the law is not a trade but a ministry. * * *

It is stated in respondent's brief that the claims secured by the aid of the plaintiff were all assigned to one person, that one action was commenced thereon, but that before trial a settlement was made for a sum somewhere between $50,000 and $60,000, out of which the defendants, by virtue of their contracts with the claimants, retained 40 per cent., or about $22,000. These facts are not in evidence, but they may properly be assumed as true as against the party who asserts them. This then was the scheme to the consummation of which the plaintiff agreed to contribute, i. e., a scheme to get hold of all the claims possible, and in case of success 40 per cent. of the proceeds was to go to the lawyers and 60 per cent. (probably after payment of costs) to the people whose property had been swept away.

Attorneys are entitled to good pay, for their work is hard; but they

[28] Part of the opinion is omitted.

are not entitled to fly the black flag of piracy. Such contracts as are here in question tend to make the lawyer forget his high duty as a minister of Justice and to convert him into a mere grubber for money in the muck-heaps of the world. They also tend to make the name of lawyer a proverb and a byword among laymen.

A number of courts have condemned contracts of this nature. 2 Thornton on Attorneys, § 436; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1037; Holland v. Sheehan, 108 Minn. 1, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687; Ingersoll v. Coal Co., 117 Tenn. 263, 98 S. W. 179, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899; Ford v. Munroe (Tex. Civ. App.) 144 S. W. 349.

In most of the cases cited the party soliciting the business was a layman, but it is not perceived how this fact affects the principle involved. If it is against public policy for a layman to foment litigation and make a claim bureau of himself under contract with a law firm, it would seem to be fully as much so for a lawyer to do the same thing.

The contract being against public policy, the courts will affirmatively assist neither party, but will leave them where it finds them. * * *

Reversed with direction to dismiss the complaint.

JOHNSON et al. v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, 1915. 128 Minn. 365, 151 N. W. 125, L. R. A. 1917B, 1140.)

Action by Christ Johnson against the Great Northern Railway Company, wherein John I. Davis and Davis & Michel, employed as attorneys for plaintiff on a contingent fee, petitioned for judgment against defendant, which had settled with plaintiff without the knowledge or consent of his attorneys. Judgment ordered for petitioners, and defendant appeals. Affirmed.

BUNN, J.[29] John I. Davis and Davis & Michel were the attorneys for Christ Johnson in an action brought by him against defendant to recover for personal injuries. Before the case came to trial, defendant settled with Johnson without the knowledge or consent of his attorneys. The terms of the settlement were these: Defendant agreed to pay Johnson $4,500 in cash, to reimburse him for any sum he should be compelled to pay his attorneys, to pay all hospital and doctor's bills, and to furnish him free of charge with an artificial leg when he was in condition to use one. The $4,500 was paid to Johnson, and the suit and cause of action compromised and settled.

The attorneys were employed by Johnson under a contingent fee contract, by the terms of which they were to receive for their services 33⅓ per cent. of any amount recovered by settlement or suit. The

[29] Part of the opinion is omitted.

contract provided that any moneys advanced by the attorneys for expenses were to be deducted from the gross amount received by settlement or suit. It also provided that no settlement was to be made without the consent of Johnson.

This proceeding was by a complaint or petition filed by the attorneys, and was entitled in the main action. The petition set forth in detail the contract between Johnson and the petitioners, the commencement of the personal injury action, the settlement thereof, and its terms. Fraud was also alleged. Judgment against defendant for $2,000 and interest was demanded. Defendant filed an answer to the petition which, after admitting the commencement of the action and the settlement, proceeded to charge that petitioners were, and had been for a long time, engaged in "the business and conspiracy of unlawfully stirring up strife and contention and vexatious and speculative litigation between the defendant and persons having personal injury claims against this defendant, and preventing the amicable compromise of said claims without litigation"; that petitioners, in soliciting and obtaining claims against defendant traveled from place to place and employed for such purpose a large number of laymen as agents and solicitors; that, for the purpose of obtaining cases against defendant, they have unlawfully paid to claimants large sums of money for the support and maintenance of claimants during the litigation; that they pay all costs and disbursements connected with litigation on the understanding with claimants that the latter, in case there is no recovery, shall not be liable therefor, and that petitioners will reimburse themselves, for the money so advanced, out of the proceeds of the litigation.

The answer further charged petitioners with preventing the amicable settlement of claims by advising all claimants that they are entitled to sums of money greatly in excess of the actual damages suffered, thus unlawfully fomenting litigation against defendant. Thus far the charges made were general in their nature, and had no reference to this particular case. The answer then proceeded to allege that petitioners solicited the claim of Johnson, wrongfully persuaded him not to make an amicable settlement, by promising to obtain a recovery largely in excess of compensation, to advance large sums for his living expenses, and to pay all costs and expenses of the litigation, and to reimburse themselves solely out of the amount recovered from defendant. It was alleged that, had it not been for these representations and promises, the claim would have been amicably settled without suit for substantially the amount actually paid; that the unlawful conduct of petitioners "in this case and the whole course of unlawful conduct of the petitioners in soliciting and obtaining personal injury cases against this defendant and other corporations has resulted in constant, needless strife and contention between this defendant and its employés and other claimants, in unnecessary and speculative litigation much to the

champerty and maintenance. Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Gammons v. Johnson, 69 Minn. 488, 72 N. W. 563; Id., 76 Minn. 76, 78 N. W. 1035; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779; Holland v. Sheehan, 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687. These cases in no way touch the case at bar. There was no illegality in the written contract between Johnson and the petitioners, and no offer to prove any facts that would have made the contract illegal as against public policy. * * *

Affirmed.

FOWLER v. CALLAN.

(Court of Appeals of New York, 1886. 102 N. Y. 395, 7 N. E. 169.)

FINCH, J. It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. Sedgwick v. Stanton, 14 N. Y. 289. The attorney may agree upon his compensation; and it may be contingent upon his success, and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and, while their propriety has been vehemently debated, they are not illegal, and, when fairly made, are steadily enforced. In substance, that was the contract here made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation, and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant, as devisee under a will, was entitled to certain real estate; his right dependent upon the validity of the will, and in some manner threatened by proceedings before the surrogate, which put his interest in peril, and made a defense essential to its protection. In this emergency he sought the aid and professional service of the plaintiff, and retained him as attorney. The latter neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised or was out of possession, but he gave to the attorney a deed of the one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability.

The agreement appears to have been purely one for compensation.

If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The contract in no respect induced the litigation. That was already begun, and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff, therefore, stirred up no strife, induced no litigation, but merely agreed to take for his compensation so much of the value of the land conveyed to him as might remain after, out of that value, the costs and expenses had been paid.

We do not think the statute condemns such an agreement. 3 Rev. St. (6th Ed.) p. 449, §§ 59, 60; Code, §§ 73, 74. The Code revision changed somewhat the language of the prohibition, but nevertheless must be deemed a substantial re-enactment of the earlier sections. Browning v. Marvin, 100 N. Y. 148, 2 N. E. 635. They forbid—First, the purchase of obligations named by an attorney for the purpose and with the intent of bringing a suit thereon; and, second, any loan or advance, or agreement to loan or advance, "as an inducement to the placing, or in consideration of having placed, in the hands of such attorney" any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney; and in which the latter, by officious interference, procures the suit to be brought, and obtains a retainer in it. The statute speaks of a "demand" which, by enforcement, will end in a "collection;" phrases which have no aptness to the situation of one simply defending a good title to land against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no "loan or advance," in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which the latter was bound to reimburse. Simply, he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses.

The facts before us are not within the terms of the statutes, as it respects a "demand" which is the subject of "collection;" but our conclusion rests more strongly upon the conviction that the agreement

made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

The judgment should be reversed, and a new trial granted; costs to abide the event. All concur.[31]

BURNES v. SCOTT et al.

(Supreme Court of the United States, 1886. 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991.)

This was an action at law brought by Milton Courtright against James N. Burnes, the plaintiff in error, upon the note of the latter made at Chicago, and dated October 10, 1872, whereby he promised to pay, 30 days after date, to the order of F. H. Winston, $7,333, at the Cook County National Bank, in Chicago. Courtright, by indorsement and transfer, became the owner and holder of the note. The defendant pleaded four pleas: * * *

The last plea was that the suit was prosecuted under an agreement between the plaintiff and George W. De Camp, his attorney, whereby the latter undertook to prosecute the suit, and pay all the expenses incident to its prosecution, in consideration that he should receive four-tenths of the amount recovered.[32]

The parties waived a trial by jury, and submitted the issues of fact, as well as of law, to the court, which made a general finding for the plaintiff, and entered judgment thereon in his favor against the defendant, Burnes, for $11,401.60, who thereupon sued out this writ of error. After the record was filed in this court Courtright died, and the executors of his last will were made defendants in error in his stead.

WOODS, J. * * * It further appears from the bill of exceptions that, in support of the plea that the plaintiff had made a champertous agreement with his counsel for the prosecution of this suit, the defendant offered evidence which tended to prove a contract made by the

[31] In some states it is declared that the common-law doctrines of maintenance and champerty are unknown, Mathewson v. Fitch, 22 Cal. 86 (1863); Smits v. Hogan, 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297 (1904); and in most there is a marked tendency to narrow the doctrines of champerty or to evade them, Reece v. Kyle, 49 Ohio St. 475, 31 N. E. 747, 16 L. R. A. 723 (1892); Dunne v. Herrick, 37 Ill. App. 180 (1890); Manning v. Sprague. 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516, 12 Am. St. Rep. 508 (1888); Richardson v. Rowland, 40 Conn. 565 (1873). See 12 L. R. A. (N. S.) 606.

The subject is quite often regulated by statute, as it is in New York. Irwin v. Curie, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 830 (1902). Thus in Michigan it is provided "that all existing laws, rules, and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties." See Lehman v. Detroit G. H. & M. R. Co., 180 Mich. 362, 147 N. W. 628 (1914); Johnson v. Missouri Pac. R. Co., 139 Ark. 507, 214 S. W. 17 (1919).

[32] The statement of facts is condensed and only so much of the opinion as relates to this plea is here printed.

plaintiff with his counsel, George W. De Camp, by which the latter agreed to prosecute the suit and defray all the expenses thereof, in consideration of which he was to receive a certain proportion of the sum recovered. The court, however, did not give effect to this plea, and overruled a motion made by the defendant to dismiss the action on the ground that the plaintiff had made such champertous contract. This action of the court the defendant assigns for error.

At common law and by statute, both in England and in many of the United States, champerty was a criminal offense. But at the present time, in most of the states, to aid the lawful suit of another with money or services, in consideration of a share in the recovery, is not considered or punished as a crime. But in many of the states champertous contracts are considered void. This is the case in Missouri, where the present case was tried; the supreme court so holding on the ground that the common law had been adopted by statute in that state. See Duke v. Harper, 66 Mo. 51, 27 Am. Rep. 314. The defendant now asks us to go a long step beyond this ruling.

The question raised by the present assignment of error is not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates. We must answer this question in the negative. It was wisely said by the supreme court of New York, in the case of Thallhimer v. Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 308, that "the right of litigation may be abused, and proper remedies for groundless and vexatious litigation must exist; but the remedies for the abuse of this right should be such as not to impair the free use of the right itself. As the justice or injustice of the claim cannot be known before the termination of the cause, the checks upon unjust litigation must in general consist, not in excluding the suit or the suitor from the courts, but in redress following the decision of justice upon the merits of the case." This is in accord with the views of this court.

The precise question under consideration was decided in the case of Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388. That was a bill in equity to establish the title to a tract of 700 acres of land in Bourbon county, in the state of Kentucky. Among other defenses it was alleged that an agreement in writing had been made between Boone, the plaintiff, and one Engles, by which Engles undertook, at his own expense, to prosecute a suit for the 700 acres in dispute, and, as a consideration for his trouble, was to have one-half of the land, and that the suit was prosecuted under that agreement; that it was therefore a case of champerty and maintenance forbidden by law, in which the court could give no relief. But the court held that, although the English statutes, which had been adopted in Kentucky, punished the offense, and declared the contract for maintenance void between the parties, the right of the plaintiff was not forfeited by such an agreement, and it might be asserted against the defendants whether the

contract with Engles was valid or void. The same rule has been declared in other American cases. Whitney v. Kirtland, 27 N. J. Eq. 333; Robison v. Beall, 26 Ga. 17; Allison v. Chicago & N. W. R. Co., 42 Iowa, 274. So, in Hilton v. Woods, L. R. 4 Eq. 432, it was strenuously urged that the bargain between the plaintiff and Mr. Wright, under which the suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue, and that the court was bound to dismiss the bill. But the vice-chancellor said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that, whenever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met any, which goes the length of deciding that when a plaintiff has an original good title to property he becomes disqualified to sue for it by having ventured into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." There was therefore a decree for the plaintiff, though without costs. In Elborough v. Ayres, L. R. 10 Eq. 367, it was conceded that the fact that the plaintiff, in an action for malicious prosecution, had been maintained, would be no bar to the action, and the vice-chancellor held that such maintenance would be no ground for the interference of a court of equity to prevent the action from going on, citing Vice-chancellor Wigram in Evans v. Prothero.

The only cases to which we have been referred in which the rule insisted on by the defendant has been maintained were two cases decided in the supreme court of Wisconsin: Barker v. Barker, 14 Wis. 131, and Allard v. Lamirande, 29 Wis. 502.

We think, therefore, that both upon reason and weight of authority the court did not err in refusing to give effect to the fourth plea of the defendant, or in refusing to dismiss the suit because it was prosecuted under a champertous agreement between the plaintiff and his counsel. Judgment affirmed.[38]

[38] In accord: Staub v. Sewanee Coal, Coke & Land Co., 140 Tenn. 505, 205 S. W. 320 (1918); Powell v. Bowen, 279 Mo. 280, 214 S. W. 142; Sims v. Stovall, 127 Ark. 186, 191 S. W. 954 (1917); Small v. C., R. I. & P. R. Co., 55 Iowa, 583, 8 N. W. 437 (1881); Bigelow v. Old Dominion Copper Mining & Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153 (1908).

But if the plaintiff sues as assignee, and the assignment is void because of champerty, the assignee paying the expenses solely for what he can make out of the suit as a speculation, this is a good defense. Hudson v. Sheafe, 41 S. D. 475, 171 N. W. 320 (1919); Miles v. Mutual Reserve Fund Life Ass'n, 108 Wis. 421, 84 N. W. 159 (1901); Sampliner v. Motion Picture Patents Co., 255 Fed. 242, 168 C. C. A. 202 (1918), reversed by the U. S. Supreme Court in 1920 on the ground that the assignment was in satisfaction of a pre-existing debt, and not solely for speculation in litigation.

A solicitor was disbarred for one year for organizing a debt-collecting agency and conducting the litigation on a percentage basis. In re A Solicitor, [1912] 1 K. B. 302.

SECTION 4.—AGREEMENTS TO STIFLE A PROSECUTION

JONES v. RICE.

(Supreme Judicial Court of Massachusetts, 1837. 18 Pick. 440, 29 Am. Dec. 612.)

Assumpsit on a promissory note, dated January 1st, 1835, made by the defendant to the plaintiff, for $147.

At the trial, before Shaw, C. J., it appeared that on the night of December 31st, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of $184; that of this amount the sum of $40 was for damages sustained by three individuals, $10 for the services of the officer, and $2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted by those assembled at the ball, that if the accused would pay the sum proposed or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms and paid about $40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party"; and that in consequence of this arrangement the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The Chief Justice was of opinion, that the plaintiff was not entitled to recover, because the evidence proved a want of consideration or a bad consideration for the note; and the plaintiff consented to a nonsuit, subject to the opinion of the whole court.

PUTNAM, J. delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offence against the public. The sum of $52 was given for the damages and expenses, and $132 for the compounding of the misdemeanor; part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In Drage v. Ibberson, 2 Esp. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of Fallowes v. Taylor, 7 Term R. 745, proceeds upon the same principle. It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions and who was directed to prosecute the defendant for a public nuisance,) conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think, that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russ. Crimes, 210; Edgcombe v. Rodd, 5 East. 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial; for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

We are all of opinion, that the nonsuit must stand.[34]

[34] In accord: Berry v. Dunn, 201 Ala. 275, 78 South. 51, L. R. A. 1918D, 939 (1918), seduction; Winter v. Lewis, 132 Ark. 399, 200 S. W. 981 (1918), false pretenses; Sanders v. McKee, 145 Ga. 507, 89 S. E. 484 (1916), swindling; Partridge v. Hood, 120 Mass. 403, 21 Am. Rep. 524 (1876); Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815 (1886); Insurance Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 46 Am. St. Rep. 571 (1894); Graham v. Hiesel, 73 Neb. 433, 102 N. W. 1010 (1905). But a prosecuting officer may agree to dismiss a prosecution in consideration of the accused giving testimony against other offenders. Nickelson v. Wilson, 60 N. Y. 362 (1875).

In Kerridge v. Simmonds (Australia) 4 C. L. R. 253 (1906), after reviewing certain English cases, the court held "that the law allows the compromise of a prosecution for oral defamation for which the injured party can sue and recover damages. Here the plaintiff was entitled to sue for damages for the oral slander. Can it then make any difference that she had laid a com-

BOARD OF EDUCATION OF DISTRICT OF NORTHFORK v. ANGEL et al.

(Supreme Court of Appeals of West Virginia, 1915. 75 W. Va. 747, 84 S. E. 747, L. R. A. 1915E, 139.)

Action by the Board of Education of the District of Northfork against C. S. Angel and others. Judgment for plaintiff, and defendants bring error. Affirmed.

MILLER, J.[35] Defendants, Angel, Toney, Kaufman and Strudwick, seek reversal of a judgment against them on a note dated October 30, 1903, made by one Roberts, payable sixty days after date, to one E. T. Sprinkle, Sheriff of McDowell County, for nine hundred and twenty one dollars and five cents, negotiable and payable at the McDowell County Bank, Welch, West Virginia, and endorsed by them and also by their codefendants, Tipton, Roberts, Ballard and Botsford.

Besides, the general issue and the plea of the statute of limitations of ten years, plaintiffs in error interposed as defenses, by special plea number 2, "that if they signed the note sued upon as endorsers thereon, the said note was given and their endorsements obtained for an illegal consideration, to-wit: to suppress a criminal prosecution for a felony begun and put on foot against the maker of said note, F. G. Roberts, and this they are ready to verify." * * *

The real and only question of merit presented by plea, and by an instruction given by the court in lieu of instruction number 1, requested by plaintiff, and defendants' instructions numbered 2 and 3, rejected, is whether, as alleged in the plea, and as assumed by defendants' two instructions rejected, said note and the endorsements thereon were given or procured in consideration of the suppression of a criminal prosecution for a felony begun and put on foot against said Roberts, as alleged in said plea, or to stop such intended prosecution, as assumed in said instructions.

The evidence is that the note was made by Roberts, who had been

plaint for the slander upon the same day on which the agreement was signed? On that complaint the defendant might have been punished by a fine, or committed for trial, but the injury complained of was a purely personal injury. I can draw no distinction between a case of defamation and a case of common assault from the point of view of public concern. For these reasons I am of opinion that it is not unlawful for a person defamed, or who has sustained purely personal injury, to withdraw a prosecution already instituted for such an offence, or to agree not to institute such a prosecution. Where a person is entitled to recover pecuniary damages the suggestion that there is a social duty incumbent upon him to prosecute is untenable. The law allows him either to prosecute or to sue for damages, and I can see nothing to prevent him from agreeing to receive an indemnity for the personal injury he has sustained, leaving the representatives of the public to prosecute if they think fit. If, as in some cases, he is the only person entitled to institute the prosecution, then a fortiori it is a matter of private, and not of public, concern."

[35] Part of the opinion is omitted.

secretary of said board of education, to cover the amount of certain orders drawn by him on said sheriff, as treasurer ex officio of the school funds of said district, and on which he had forged the name of the president, and had thereby fraudulently procured and embezzled money and funds belonging to said school district, and that at the time he executed said note with the endorsers he had been arrested and was then in the custody of a constable on a warrant sworn out by the prosecuting attorney, and who also represented the said board of education in the taking of said note.

It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled, or fraudulently procured, may contract with such wrongdoer for re-payment or satisfaction of the loss, and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed. 9 Cyc. 506, and notes, citing cases; Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Portner v. Kirschner, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925; 1 Page on Const. sec. 418; Tecumseh National Bank v. Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811; Fosdick v. Van Arsdale, 74 Mich. 302, 41 N. W. 931.

On the other hand, it is equally well settled, that if such an unlawful promise or agreement constitutes any part of the consideration for the promise or agreement of the wrongdoer or his sureties, the contract is wholly void and will not be enforced by the courts. All such contracts are deemed contrary to good morals and public policy, and as to which the courts will turn a deaf ear, when their enforcement is sought therein. And this rule of law as between the parties thereto is applicable to the making and enforcement of negotiable instruments. 1 Daniel on Neg. Inst. (6th Ed.) section 196a and notes; 3 R. C. L. p. 957; Norton on Bills and Notes, 268, 277, 278; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; 1 Chit. Com. L. 4; 4 Am. & Eng. Ency. Law, 191.

The evidence is clear and convincing that as between Roberts, the offender, and maker of the note, and the board of education, and the sheriff, the nominal payee in the note, not a word of communication was had. No promise or agreement, written or verbal, was made between them, directly at least, in regard to the pending prosecution, or what was to become of it, on execution and endorsement of the note. The prosecuting attorney in charge of the prosecution, and representing the board of education, admits a conversation with the members of the board who were together conferring on the subject on the day the note was executed and endorsed, in which they indicated to him that so far as they were concerned, if Roberts would secure them by a note

with good security, they would not insist on his being prosecuted. This conference and communication, however, was wholly private, and between the board and prosecutor, and was not communicated in any way, so far as the record shows, to maker or endorsers of the note, and the prosecuting attorney swears positively that he at no time made any promises to Roberts or his endorsers that Roberts would not be prosecuted. He said on cross-examination that his recollection was that Roberts wanted to pay the board the money he admitted he had taken, and wanted these defendants as his friends to endorse the note as an accommodation to him, and he was satisfied that no promise not to prosecute Roberts was made to maker or endorsers, or either of them, as part consideration for the execution of the note by them. Plaintiffs in error, Angel, Toney and Kaufman, the only defendants who gave testimony on the trial, do not swear that any promises not to prosecute Roberts were made to them; and all they did say on the subject was that they endorsed the note to keep Roberts out of jail. Neither of them swore that the prosecuting attorney, or the board of education, or the sheriff who was not present, made any promise not to prosecute Roberts. It is conceded, however, that immediately after the note was made and endorsed Roberts was released from custody, and contrary to his representations that he proposed to go to work and pay the note to the relief and discharge of his sureties, he left the State the same night by a freight train, and never returned. This fact is referred to by plaintiff's counsel as corroborative of the fact that no promise not to prosecute him was made as part consideration for the note. Certainly there is no evidence of an express promise. That is expressly and positively denied. True such a promise and agreement may be inferred from the facts relating to the transaction; but such inference is one of fact for the jury, and not of law for the court, and as their verdict was for plaintiff, we must assume that they decided the issue in favor of plaintiff, and the validity of the note. * * *

We are of opinion to affirm the judgment.[36]

[36] In accord: Ogden v. Ford, 179 Cal. 243, 176 Pac. 165 (1918). If the verdict had been for the defendants, no doubt it would have been sustained. Promises not to prosecute are often not express, but they may be inferred from all the facts. See Williams v. Bayley, L. R. 1 H. L. 200 (1866), a veiled threat of prosecution in order to induce embezzler's mother to give security; McKenzie v. Lynch, 167 Mich. 583, 133 N. W. 490, settlement of crim. con., with promise not to "do anything whereby this matter will acquire any publicity whatever."

Contracts to Procure Evidence.—A promise to pay a contingent fee to one who will procure or will give certain testimony is generally illegal. Goodrich v. Tenney, 144 Ill. 422, 32 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459 (1893); Davis v. Smoot, 176 N. C. 538, 97 S. E. 488 (1918); Neece v. Joseph, 95 Ark. 552, 129 S. W. 797, 30 L. R. A. (N. S.) 278, Ann. Cas. 1912A, 655 (1910); Manufacturers' & Merchants' Inspection Bureau v. Everwear Hoisery Co., 152 Wis. 73, 138 N. W. 624, 42 L. R. A. (N. S.) 847, Ann. Cas. 1914C, 449 (1913).

A contract to shadow a party to a divorce suit and to report the facts observed is not illegal, if payment is not contingent on success, and there is no agreement to secure specific evidence. Hare v. McGue, 178 Cal. 740, 174 Pac. 663 (1918).

SECTION 5.—AGREEMENTS OUSTING THE COURTS OF JURISDICTION

(Arbitration Agreements)

NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER CO.

(Supreme Judicial Court of Massachusetts, 1916. 223 Mass. 8, 111 N. E. 678, L. R. A. 1916D, 691.)

Action by the Nashua River Paper Company against the Hammermill Paper Company. Demurrers to defendant's answer in abatement and answer in bar overruled, and case reported. Demurrers sustained, and case to stand on answer to the merits.

RUGG, C. J. The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that "no action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any Circuit or District Court of the courts of the United States against the company other than in the courts of the common pleas of the state of Pennsylvania." This stipulation occurs in an ordinary commercial contract between a corporation domiciled in this commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding, and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not given decisive weight. Chief Justice Shaw, in concluding the discussion, said: "The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies."

In Hall v. People's Mut. Fire Ins. Co., 6 Gray, 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the county of Worcester.

Chief Justice Shaw, in giving the opinion of the court, after adverting to Nute v. Hamilton Mut. Ins. Co. as substantially deciding the question, said: "The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought. * * * It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts, where the law has not given it; and it seems to follow, from the same course of reasoning, that parties cannot take away jurisdiction, where the law has given it."

The same point was decided in Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray, 596, 603. In Roberts v. Knights, 7 Allen, 449, it was held that a British subject, who had shipped in England as seaman for an entire voyage under a statutory law which provided that under such contract no seaman should sue for wages in any court abroad except in case of discharge or danger to life, nevertheless might bring an action against the master of the vessel although both parties were residents of Great Britain. It commonly has been thought that "such law enters into the terms of the contract and becomes a part of its obligation." Hanscom v. Malden & Melrose Gaslight Co., 220 Mass. 1, 7, 107 N. E. 426, Ann. Cas. 1917A, 145. Therefore the refusal of the court to give any heed to the British statute is significant, although there was no discussion of the point here raised. These cases generally have been understood as supporting the proposition that parties could not contract that their disputes arising under the contract should be litigated in a single court or in the courts of a particular jurisdiction.

It was held in Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365, that a statute making it a condition precedent to the granting of the privilege to a foreign corporation to do business within a state, that it would not remove suits from state to federal courts, was unconstitutional and a contract to that effect was invalid. It there was said, at page 451 of 20 Wall., 22 L. Ed. 365: "A man may not barter away his life or his freedom, or his substantial rights. * * * In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." [37] * * *

[37] The court here cited in accord: Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148 (1876); Prince Steam Shipping Co. v. Lehman (D. C.)

It was held in Benson v. Eastern Building & Loan Ass'n, 174 N. Y. 83, 86, 66 N. E. 627, in substance that parties cannot in the ordinary case by contract deprive courts of competent jurisdiction of their power to adjudicate causes on the ground that that jurisdiction is prescribed by law and it cannot be increased or diminished by agreement of parties. In Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 Fed. 508, at page 510, 27 C. C.A. 212, at 214, it was said by Lurton, J.: "The policy [of insurance] * * * contained a stipulation that no suit in law or equity should be brought upon it except in the Circuit Court of the United States. This provision intended to oust the jurisdiction of all state courts is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy and should not be enforced."[38] * * *

In many of these cases the opinion of this court by Chief Justice Shaw in Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, has been cited and relied on as an authority. Attempts to place limitations by contract of the parties upon the powers of courts as to actions growing out of the particular contract, or to oust appropriate courts of their jurisdiction, have been regarded with disfavor and commonly have been held invalid. Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & Melrose R. R. Co., 139 U. S. 127, 140, 11 Sup. Ct. 512, 35 L. Ed. 116; Meacham v. Jamestown, Franklin & Clearfield R. R., 211 N. Y. 346, 352, 353, 105 N. E. 653, Ann. Cas. 1915C, 851. It might be argued with force that the law as to the enforcement of rights arising out of personal injuries was imported into the terms of a contract for hire. Yet it has been decided that statutory limitations to the effect, that a right of action for personal injuries shall be confined to the state where it occurred, are invalid. Atchison, Topeka & Santa Fé Ry. v. Sowers, 213 U. S. 55, 70, 29 Sup. Ct. 397, 53 L. Ed. 695; Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685.

So far as we are aware, the current of authority (with the exceptions

39 Fed. 704, 5 L. R. A. 464 (1889); Slocum v. Western Assur. Co. (D. C.) 42 Fed. 235 (1890). The Etona (D. C.) 64 Fed. 880 (1894); Gough v. Hamburg-Amerikanische Packet fahrt Aktiengesellschaft (D. C.) 158 Fed. 174 (1907); U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd. (D. C.) 222 Fed. 1006 (1915).

[38] The court here cited, to the same effect, Savage v. People's Building, Loan & Savings Ass'n, 45 W. Va. 275, 282, 31 S. E. 991 (1898); Bartlett v. Union Mut. Fire Ins. Co., 46 Me. 500 (1859); Reichard v. Manhattan Life Ins. Co., 31 Mo. 518 (1862); Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25 (1855); Baltimore & Ohio R. R. v Stankard, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745 (1897); Owsley v. Yerkes, 187 Fed. 560, 109 C. C. A. 250 (1911); First Nat. Bank of Kansas City v. White, 220 Mo. 717, 737, 120 S. W. 36, 132 Am. St. Rep. 612, 16 Ann. Cas. 889 (1909); Healy v. Eastern Building & Loan Ass'n, 17 Pa. Super. Ct. 385, 392, 393 (1901); Matt v. Iowa Mut. Aid Ass'n, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483 (1890); Shuttleworth & Co. v. J. Marx & Co., 159 Ala. 418, 428, South. 88 (1900).

presently to be noted) is unbroken in support of the principle laid down in Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd. (D. C.) 222 Fed. 1006. There are two of our own cases where the principle was not applied and which appear to be exceptions to it.[39] * * *

In Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404, the parties were both nonresidents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the king of Italy, had his home and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various states of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were nonresidents, they had no standing in the courts of this state as matter of strict right, but only as matter of comity. National Telephone Mfg. Co. v. Du Bois, 165 Mass. 117, 42 N. E. 510, 30 L. R. A. 628, 52 Am. St. Rep. 503. It, therefore, was regarded as appropriate to yield to the terms of a contract between the parties having such obvious foundation in convenience and reason, although the court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens. Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174, was referred to in the opinion and not treated as overruled. In this connection Palmer v. Lavers, 218 Mass. 286, 291, 105 N. E. 1000, 1002, may be adverted to, where it was said that: "Where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of a court of first instance shall be final, that agreement does not come within that principle [that is, the principle of Nute v. Hamilton Mut. Ins. Co., 6 Gray, 174], and that it is an agreement which is binding and will be enforced."

That decision has no relevancy to the question now presented. Nor is the question here raised, whether the parties may by contract provide that their respective rights growing out of the agreement shall be determined according to the law of a particular jurisdiction. See Brandeis v. Atkins, 204 Mass. 471, 476, 90 N. E. 861, 26 L. R. A.

[39] The court here discussed Daley v. People's Building, Loan & Saving Ass'n, 178 Mass. 13, 59 N. E. 452 (1901), arguing that it was based on an erroneous conception of the law of New York, as shown in Benson v. Eastern Building & Loan Ass'n, 174 N. Y. 83, 66 N. E. 627 (1903).

(N. S.) 230; Pritchard v. Norton, 106 U. S. 124, 136, 1 Sup. Ct. 102, 27 L. Ed. 104; Greer v. Poole, 5 Q. B. D. 272, 274.

The Daley and Mittenthal Cases, as to the points adjudicated, while not extending the doctrine of the Nute Case, do not overrule it and are not inconsistent with it. All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. The Nute Case lays down the general principle. The other two cases stand as sound upon their several states of facts. To extend them to the present case involves overruling the Nute Case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court, in Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; and Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148. The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable and that, therefore, the action can be maintained in the courts of this commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and to the part of the answer in bar setting up the same matter must be sustained. The case is to stand for disposition upon the issues raised by the answer to the merits. So ordered.[40] * * *

MEACHAM v. JAMESTOWN, F. & C. R. CO.

(Court of Appeals of New York, 1914. 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851.)

Action by Harry W. Meacham against the Jamestown, Franklin & Clearfield Railroad Company. From an order of the Appellate Division of the Supreme Court, First Department (151 App. Div. 941, 136 N. Y. Supp. 1141), affirming a judgment dismissing the complaint entered upon the decision of the trial justice before whom the issues were severed under section 973 of the Code, plaintiff appeals. Reversed, and new trial ordered.

This action was brought by the plaintiff to recover of defendant the sum of $30,079.29, claimed to be due plaintiff as assignee for certain work performed, and materials furnished, by the Thomas McNally Company, a corporation organized under and by virtue of the laws of the state of Pennsylvania.

[40] In accord: Kuhnhold v. Compagnie Générale Transatlantique (D. C.) 251 Fed. 387 (1918), provision making foreign court the sole forum. Cf. Texas Moline Plow Co. v. Biggerstaff (Tex. Civ. App.) 185 S. W. 341 (1916).

The Franklin & Clearfield Railroad Company was a corporation organized under the laws of the state of Pennsylvania, and, together with other railroad corporations, was consolidated under the name of the present defendant, respondent, a corporation organized under the laws of Pennsylvania, which assumed all of the debts, liabilities, and obligations of the Franklin & Clearfield Railroad Company, including the claim in suit.

In August, 1905, the Franklin & Clearfield Railroad Company and the Thomas McNally Company made a contract in writing for the construction of a section of the Franklin & Clearfield Company's road in the state of Pennsylvania, and thereafter, as alleged by the plaintiff, the Thomas McNally Company performed work and furnished materials under said contract.

The contract in question was executed on behalf of the railroad company by its chief engineer, and on the part of the McNally Company by its president and general manager. It was conceded in the case that the contract was executed in the state of Ohio.

The contract contained the following provisions: "In order to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, it is mutually understood and agreed that the said chief engineer shall be and hereby is made arbitrator to decide all matters in dispute arising or growing out of this contract between them, and the decision of said chief engineer on any point or matter touching this contract shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator."

The trial justice before whom the issue was submitted determined as matter of law that submission to the arbitrator named in the contract, the chief engineer, and an award by him was and is a valid condition precedent to the plaintiff's right to sue.

The chief engineer of the railroad company at the time of the making of the contract subsequently died and another engineer assumed the duties of his office. The trial justice held as matter of law that the person who held the office of chief engineer at the time the submission should have been made was the proper person to whom such submission should have been made, and such submission to and award by him, or offer and tender of such submission on the part of the plaintiff, was and is a valid condition precedent to plaintiff's right to sue and dismissed the plaintiff's complaint.

The judgment entered was unanimously affirmed by the Appellate Division, and plaintiff appealed to this court.

HOGAN, J. (after stating the facts as above). The trial justice held that the contract in question was to be wholly performed in the state of Pennsylvania, and, the law of that state holding the contract valid

and enforceable governed its operation and effect, consequently the plaintiff could not succeed in this action for the reason that submission to arbitration was a valid condition precedent which had not been complied with.

The clause of the contract, quoted in the statement of facts, confers upon the engineer, the arbitrator, power to determine the effect of any stipulation of the contract and whether or not there has been a performance of the same by either party, and to decide "all matters in dispute arising or growing out of the contract." It further provides not only that the decision of the engineer as arbitrator shall be final and conclusive between the parties, but each party "waives all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator."

Numerous cases involving contracts containing clauses relating to arbitration have been before this court for consideration. In Prest., etc., Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250, the question was fully considered, and a distinction made between the provisions of a contract providing that before a right of action shall accrue certain facts shall be determined, or amounts or values ascertained, and an independent covenant or agreement to provide for the adjustment and settlement of all disputes and differences by arbitration to the exclusion of the courts. In subsequent decisions the distinction thus pointed out had been recognized and approved. Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Sweet v. Morrison, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376; National Contracting Co. v. H. R. W. P. Co., 170 N. Y. 439, 63 N. E. 450; Id. 192 N. Y. 209, 84 N. E. 965.

In Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. R. Co., 139 U. S. 137-142, 11 Sup. Ct. 512, 35 L. Ed. 116, an action brought to foreclose a mortgage which provided therein that the mode of sale set forth "shall be exclusive of all others," the court held that such clause was invalid, as tending to oust the jurisdiction of the courts. In Sanford v. Accident Association, 147 N. Y. 326, 41 N. E. 694, the action was brought to recover on a certificate of insurance which contained the following clause: "It is hereby stipulated and agreed, by and between this association and the member named herein and his beneficiary, that the issues in any action brought against it under this certificate shall, on the demand of this association or its attorney, be referred for trial to a referee to be appointed by the court in which such action is brought." An order of reference made against the objection of plaintiff was reversed by the General Term, and the latter order was affirmed by this court, which held that the clause of the contract above quoted was contrary to public policy and not binding on the parties thereto.

Tested by the principles of the cases cited, we conclude that the language employed in the contract in question is susceptible of but one

construction, namely, an attempt on the part of the parties to the same to enter into an independent covenant or agreement to provide for an adjustment of all questions of difference arising between the parties by arbitration to the exclusion of jurisdiction by the courts.

Notwithstanding the decisions of the courts of Pennsylvania that the contract as to arbitration was valid and enforceable in that state, judicial comity does not require us to hold that such provision of a contract which is contrary to a declared policy of our courts (White v. Howard, 46 N. Y. 144; Despard v. Churchill, 53 N. Y. 192; Faulkner v. Hart, 82 N. Y. 413, 37 Am. Rep. 574; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654; Dearing v. McKinnon D. & H. Co., 165 N. Y. 78, 58 N. E. 773, 80 Am. St. Rep. 708; Hutchinson v. Ward, 192 N. Y. 375, 85 N. E. 390, 127 Am. St. Rep. 909) shall be enforced as between nonresidents of our jurisdiction in cases where the contract is executed and to be performed without this state, and denied enforcement when made and performed within our state.

As a new trial must be ordered in this case, we conclude that the engineer mentioned in the contract in controversy between the parties had reference to the engineer at the time that the several acts were to be performed by such officer, and that the decease of the first engineer did not prevent his successor from performing all of the obligations of the contract to be performed by him.

The judgment should be reversed, and a new trial ordered; costs to abide the event.[41]

CARDOZO, J. (concurring). An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had, not so much to the form of the agreement, as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned (Benson v. Eastern B. & L. Ass'n, 174 N. Y. 83, 66 N. E. 627; Nute v. Ins. Co., 6 Gray [Mass.] 174, 180; Slocum v. Western Assur. Co. [D. C.] 42 Fed. 235; Gough v. Hamburg Am. Co. [D. C.] 158 Fed. 174), it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long survive if it were subject to be avoided by so facile a device. Such a contract, whatever form it may assume, affects in its operation the remedy alone. When resort is had to the foreign tribunal for the purpose of determining whether certain things do or do not constitute a breach, the cause of action must in the nature of things be complete before jurisdiction is invok-

[41] In accord: Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115 (1897); Ison v. Wright (Ky.) 55 S. W. 202 (1900). See extended note in 47 L. R. A. (N. S.) 337.

ed, and cannot be postponed by the declaration that it shall not be deemed to have matured until after judgment has been rendered.

This must be so whether the tribunal is a court or a board of arbitrators. Indeed, the considerations adverse to the validity of the contract are more potent in the latter circumstances, for in the one case we yield to regular and duly organized agencies of the state and in the other to informal and in a sense irregular tribunals. Mittenthal v. Mascagni, 183 Mass. 19, 23, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404. In each case, however, the fundamental purpose of the contract is the same—to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court we do not need to determine. There may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction. Mittenthal v. Mascagni, supra. If any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators. Whether the attempt to bring about this result takes the form of a condition precedent or a covenant it is equally ineffective.

A very similar question was involved in Benson v. Eastern Bldg. & L. Ass'n, 174 N. Y. 83, 86, 66 N. E. 627, 628. It was there argued that a provision requiring a trial in a certain county was intended, not as a limitation of the remedy, but as a condition precedent to a cause of action. Cullen, J., writing for this court, disposed of the point in a few words: "We think this argument proves too much. It is difficult to see why it would not uphold an agreement that all claims against the parties should be determined by arbitrators and not by the courts. It might be said with as much force in such a case as in the one now before us that the cause of action could, under the agreement, accrue only on the decision of the arbitrators. Yet nothing is better settled than that agreements of the character mentioned are void. Greason v. Keteltas, 17 N. Y. 491; Prest, etc., D. & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250. We think the doctrine of the Nute Case, 6 Gray [Mass.] 174, is the true one, that the stipulation affects the remedy, not the cause of action."

Building contracts are made in New York to be performed all over the United States. If the judgment of the court below is to stand, jurisdiction over controversies arising under such contracts may be withdrawn from our courts and the litigation remitted to arbitrators in distant states. The presence of the parties here, the ownership of property in this jurisdiction, these and other circumstances may make resort to our courts essential to the attainment of justice. If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some

judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. Sanford v. Commercial Travelers' Mut. Acc. Ass'n, 86 Hun, 380, 33 N. Y. Supp. 512; Id., 147 N. Y. 326, 41 N. E. 694; Nat. Contracting Co. v. Hudson R. W. P. Co., 192 N. Y. 209, 84 N. E. 965. See, also, Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428. The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties.

I concur with Judge HOGAN and vote for reversal.[42]

GRADY v. HOME FIRE & MARINE INS. CO.

(Supreme Court of Rhode Island, 1906. 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 288.)

Action by Daniel F. Grady against the Home Fire & Marine Insurance Company. Verdict was rendered in favor of plaintiff, and defendant petitioned for a new trial. Granted.

JOHNSON, J.[43] The action was upon a policy of fire insurance which contained the following provisions: * * * "In the event of disagreement as to the amount of loss the same shall, as above provided, be

[42] In Myers v. Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613 (1900), the plaintiff sued a local lodge of Odd Fellows for sick benefits due. The rules of the society, to which the plaintiff had agreed, required him to seek his "remedy for all rights on account of said membership or connection therewith in the tribunals of the order only, without resorting for their enforcement in any court or for any purpose to the civil courts". Concerning this the court said: "After a right has accrued or an obligation has been incurred a party may waive his rights or refuse and neglect to enforce them, or he may by contract bind himself to submit the matter to arbitration or other special remedy. But a party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs. If this could be done an association might be formed in the state which would renounce our constitution and laws, and set up a different system of government for themselves, and, in case of wrongs and oppression, they would be debarred from resorting to our courts, and would be compelled to submit to the decisions of their own tribunals, and would most likely become dissatisfied and disorderly, resulting in riot and bloodshed. The whole state has an interest in all its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract, in advance, deprive himself of the right to appeal to them."

For cases not altogether in harmony with this, see Fillmore v. Great Camp of Knights of Maccabees, 103 Mich. 437, 61 N. W. 785 (1894); Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 254 (1897); Robinson v. Templar Lodge No. 17, I. O. O. F., 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193 (1897); President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250 (1872); Addison C. Burnham in 11 Harvard Law Review, 234. See the detailed note in 15 L. R. A. (N. S.) 1055, stating the older and narrower view.

[43] Part of the opinion is omitted.

ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * * No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The property covered by this policy having been destroyed by fire, the parties entered into an agreement of submission to arbitration, in accordance with the terms of the policy. The arbitrators selected appointed an umpire and proceeded with the appraisal. An award in writing, dated April 23, 1902, was signed by the two arbitrators and the umpire. Subsequently one of the arbitrators erased his name and appended the following memorandum: "Signature erased a/c disagreement 5—27—'02." The defendant offered to abide by the award, although admitting its insufficiency; and, its offer in that regard being rejected, demanded a new appraisal and named its arbitrator. The plaintiff refused to submit to a new appraisal, and subsequently this action was commenced.

The declaration contained no reference to the arbitration clause of the policy, nor to the attempted arbitration under it. The defendant filed the general issue only. The parties, however, stipulated that the defendant might, under the general issue, make any defense which it might make under any plea in bar, of which the defendant should give the plaintiff notice in writing, "and especially the defense that the parties failed to agree as to the amount of loss, and therefore a determination of the amount of loss by appraisers is a condition precedent to the plaintiff's right of action and that no such determination has been made." It was admitted by the parties that the award was not in accordance with the provisions of the agreement of submission to arbitration, and was invalid.

The case was tried with a jury in the common pleas division, and at the close of the testimony the defendant moved the court to direct a verdict upon the following grounds: (1) That, upon the evidence, an appraisal in accordance with the terms of the policy is a condition pre-

cedent to the right of the plaintiff to recover. (2) That there having been an agreement for arbitration, and the arbitration having failed without the fault of either party, the plaintiff must comply with the defendant's request for a resubmission before he can maintain his action. This motion was denied, and the defendant thereupon excepted. The defendant then presented to the presiding justice requests to charge the jury as follows: "(1) By the terms of the policy the determination of the amount of the loss by arbitration is a condition precedent to the plaintiff's right to sue, and, in order to recover, it is incumbent upon the plaintiff either to aver and prove the determination of the amount of the loss in that manner, or to aver and prove facts which excuse him from procuring such determination by arbitration. (2) Where an attempt has been made by the insured and the company to have the amount of loss determined by arbitration in accordance with the terms of the policy, and the arbitration fails without misconduct on the part of the company, and the company seasonably notifies the assured that it requires arbitration in accordance with the terms of the policy and names an arbitrator, no action will lie against the company until such arbitration shall be had or shall have failed through the misconduct of the company. (3) The notice from the company to the assured that arbitration is required by it and the nomination by the company of an arbitrator as disclosed by the evidence was seasonable." The court granted the third of these requests, but refused the first and second requests, and the defendant excepted. The jury returned a verdict for the plaintiff for $960.83, and the case is now before us on the defendant's petition for a new trial upon the grounds of the refusal of the presiding justice to direct a verdict for the defendant, and his refusal to direct and charge the jury in accordance with the first and second requests above quoted.

It is well settled, both in this country and in England, that a stipulation in a contract providing that all controversies and disputes which may subsequently arise between the parties shall be settled by arbitration is invalid because its effect would be to oust the courts of their jurisdiction. It is, however, equally well settled that if the arbitration agreement relates only to some preliminary matter, such as the ascertainment and determination of the amount of damages to be recovered, and does not apply to the whole question of liability, such an agreement providing a reasonable and definite method for choosing arbitrators is valid and enforceable.[44] * * *

[44] The court here cited Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419 (1890); Scott v. Avery, 5 H. L. Cas. 811 (1856); Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055 (1890); Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428 (1901); Wolff v. Liverpool & L. & G. Ins. Co., 50 N. J. Law, 453, 14 Atl. 561 (1888); Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855 (1896); Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. Law Rev. 356; Westenhaver v. German-American Ins. Co., 113 Iowa, 726, 84 N. W. 717 (1900); Viney v. Bignold, 20 Q. B. D. 172 (1887); President, etc., of Delaware & H. Canal Co.

Furthermore, the policy in this case was in the standard form prescribed by chapter 183, p. 578 of the General Laws 1896; and, even if the validity of such a stipulation were less strongly supported by the authorities, it could not well be argued that a contract made in the express terms required by the statute was void as against public policy. A provision in a contract that preliminary matters about which differences may arise between the parties shall be determined by arbitration may go to the extent of making such determination a condition precedent to a right of action upon the contract, or may be simply a collateral and independent agreement which will not be a bar to an action on the principal contract, but would be a basis for a separate action in case of breach.

In Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 283, 85 Am. St. Rep. 428, the court says: "The general principle is, as decided in Roper v. Lendon, 1 El. & El. 825, that such a condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but, unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract. * * * And it is settled beyond controversy that, when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action." In Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 255, 10 Sup. Ct. 949, 34 L. Ed. 419; Mr. Justice Gray, speaking to this very point, says: "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. * * * The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' U. S. v. Robeson, 9 Pet. (U. S.) 319, 327, 9 L. Ed. 142."

In the contract before us the parties have stipulated that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have

v. Pennsylvania Coal Co., 50 N. Y. 250 (1872); Reed v. Washington Fire & Marine Ins. Co., 138 Mass. 572, 576 (1885); Hall v. Norwalk Fire Ins. Co., 57 Conn. 105, 114, 17 Atl. 356 (1888). See, also, Brown v. Roger Williams Ins. Co., 5 R. I. 394, 401, 402 (1858). American cases are collected in 47 L. R. A. (N. S.) 387, note XVI.

been received by this company, including an award by appraisers when appraisal has been required," and also that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." These provisions clearly constitute a condition precedent to the right of action. Hamilton v. Liverpool, etc., Ins. Co., supra; Fisher v. Merchants' Ins. Co., supra; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Reed v. Washington Ins. Co., supra; Hutchinson v. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558. Levine v. Insurance Co., 66 Minn. 138, 68 N. W. 855; Westenhaver v. Ins. Co., 113 Iowa, 726, 84 N. W. 717. A valid agreement, therefore, having been made by the parties that in case of loss no action shall be sustainable until the amount of loss has been first ascertained in the manner provided in the policy, the question arises whether the attempted arbitration, which it is admitted failed without the fault of the defendant, was such a compliance with the contract as will permit the plaintiff to maintain this action, which is brought to recover, not the award contemplated by the contract, but such loss or damage as he has sustained irrespective of the award. We think that it clearly is not. If the arbitration had failed through the fault of the defendant, the case would be different. There is, however, no allegation that the defendant was at fault in the matter or that arbitration had become impossible. This very question was decided in Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428.[45] * * *

The cases relied on by the plaintiff do not support his contention. Those which are in point clearly recognize the distinction between a collateral and independent provision for arbitration and one which makes an award a condition precedent to the right of maintaining an action upon the contract. In Pepin v. Societe St. Jean Baptiste, 23 R. I. 84, 49 Atl. 387, 91 Am. St. Rep. 620, the by-law under consideration required every contestation between the society and a member to be referred to a committee whose decision should be final. Such a contract is clearly invalid as ousting the courts of their jurisdiction, and was so held. In Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55, the court clearly recognized the distinction made by the authorities, saying (page 70): "While parties may impose as a condition precedent to application to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law." Chippewa Lumber Co. v. Phenix Ins. Co. is clearly in point, and supports our conclusion. We have cited it, supra. In passing upon an arbitration provision, substantially like the one in the case at bar, the court says (page 121 of 80 Mich., page 1056 of 44 N. W.): "Plaintiff and defendant deliberately agreed to this method of ascertaining the damages. * * * They deliberately provided a penalty for failure to comply with this obligation. If plain-

[45] The court's discussion of this point is omitted.

tiff refused compliance, then it could not bring suit. If defendant refused compliance, then suit could be brought against it immediately. We hold the agreement reasonable and legal. It is sustained by the clear weight of authority."

In Liverpool, etc., Ins. Co. v. Creighton, 51 Ga. 95, the court, speaking of such a stipulation, says (page 110) it does not bar the insured of his right of action without such reference, "unless the stipulation amounts to a condition precedent to his right to resort to the courts, or makes such submission the only mode by which the amount of damage is to be ascertained, or by which the liability of the company can be fixed. Either of these two latter provisions would, at last, be equivalent to making the submission a condition to be performed before suit." In Reed v. Washington Ins. Co., supra, the court say of the provision in the policy before it (pages 576, 577 of 138 Mass): "And it is simply an agreement to refer that matter to arbitration, without any agreement by the plaintiff not to sue. There is nothing to bring it within any of the cases in which a provision to refer has been held to be a condition, such as Scott v. Avery * * * in England, and Hood v. Hartshorn, ubi supra, in this commonwealth." In Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623, the court says (61 Fed. 755, 9 C. C. A. 626): "It is undoubtedly true that a policy of insurance may contain a valid provision which prohibits the insured from maintaining an action until the amount of loss shall have been first submitted to arbitration, and an award shall have been made. In such a case the determination of the amount by arbitration is recognized as a condition precedent to the right to bring suit. * * * But, in order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy or necessarily implied from its terms. A mere provision in the policy that the amount to be paid, in case of disagreement, shall be submitted to arbitration, does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until after award. * * * There is nothing in the terms of this policy which expressly or by implication forbids the insured from bringing suit until after the amount of loss has been submitted to arbitration and an award has been made, and therefore we must consider the provisions in the policy relating to this subject as constituting a collateral and independent agreement, and not one which was a condition precedent to the right of maintaining an action."

The plaintiff argues that, in accordance with the general rule, the agreement is revocable at any time before an award is made. That, however, does not help the plaintiff. A revocation of the authority of the arbitrators would only stop the proceedings under that arbitration. The provision of the policy requiring an award as a condition precedent to a right of action would still be in force. The revocation, therefore, would only make it necessary to begin the arbitration anew. An

award by arbitration having been made by the policy a condition precedent to the right of action, it was incumbent on the plaintiff to allege and prove such award; or, if the award was invalid, then to allege and prove either that the amount of loss had been determined by other arbitrators selected according to the provisions of the policy, or that for some valid reason such determination had become unnecessary or impossible.

The request that a verdict be directed for the defendant should have been granted. And when the case was given to the jury the instructions requested should have been given.

Defendant's exceptions sustained. Petition for new trial granted. Case remitted to the superior court, with direction to enter judgment for the defendant.[46]

LIVINGSTON v. RALLI.

(In the Queen's Bench, 1855. 5 El. & Bl. 132.)

Count that, by a contract, plaintiff agreed to buy of defendant, and defendant to sell to plaintiff, a cargo of wheat, on certain terms mentioned in the contract, "and that, should any difference arise as to that contract, the same should be left to arbitration in London, in the usual manner; that is to say the arbitration of two London corn factors, one to be chosen by plaintiff and the other by defendant, or an umpire to be chosen by such arbitrators in case of difference." Averment that the cargo of wheat arrived, and was accepted, and the price paid by plaintiff to defendant according to the agreement, and that a difference thereupon and before this suit arose between plaintiff and defendant as to the said contract, which difference ought to have been left to arbitration in manner so agreed as aforesaid. General averment of performance by plaintiff and of lapse of reasonable time for appointing an arbitrator. Breach: that defendant refused to concur with plaintiff in referring the said difference, or procuring it to be disposed of by arbitration in the usual manner, and wrongfully hindered and prevented its being so left or disposed of. * * *

Lord CAMPBELL, C. J.[47] I have a very great respect for the doubts of Lord Eldon; and he seems, in Tattersall v. Groote, 2 B. & P. 131, to doubt much whether such a contract as the present was not alto-

[46] If arbitration is not expressly made a condition precedent, it will seldom be held to be one by implication or construction. Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935, 163 C. C. A. 185, Ann. Cas. 1918E, 491 (1918); North America Dredging Co. of Nevada v. Outer Harbor Dock & Wharf Co., 178 Cal. 406, 173 Pac. 756 (1918); Hamilton v. Home Ins. Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708 (1890); Hill v. More, 40 Me. 515 (1855); Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115 (1897); Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350 (1851).

[47] The statement of facts and the opinions are omitted in part. Erle and Crompton, JJ., concurred.

gether nugatory; but I cannot bring myself to doubt that on principle, an action lies on it. There is a sufficient consideration to support any promise; and there is an express promise to refer any disputes that may arise. Why should not such a promise be binding, and one for the breach of which an action would lie? Can it be said that such an agreement is void as being immoral, or as contrary to public policy? It seems to me, on the contrary, that it is a very judicious and proper arrangement, and that it would be a strange restriction on the liberty of the subject if parties could not make such an agreement if they please.

Then, as to the authorities. It certainly seems that, in Tattersall v. Groote, 2 B. & P. 131, Lord Eldon expressed much doubt; but neither in that case nor in any other was there a decision that an action could not be maintained on such an agreement: and ever since I have known Westminster Hall at least, the opinion of the profession has been that, though such a prospective agreement of reference could not bar an action in the Courts of law, yet an action was maintainable for the breach of it. There seems at one time to have prevailed in our Courts a horror of a domestic forum which I can neither sympathise with nor account for; but the Legislature has recently, in The Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) sect. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shews the opinion of the Legislature that such agreements are not contrary to public policy. For these reasons I entertain no doubt that the action lies.[48] * * *

COLERIDGE, J. * * * The fallacy of the argument consists in confounding two separate cases; one where the defendant relies on such an agreement as a bar to an action, a defence which, if successful, would oust the Court of its jurisdiction; the other, which is the present case, where the plaintiff seeks damages for not fulfilling the agreement. It is said that the damages in such a case can be only nominal: supposing it were so, that would not bar the action: but it seems to me very difficult to maintain that the damages in such a case may not be substantial. * * *

[48] In accord: Pond v. Harris, 113 Mass. 114 (1873), agreement to arbitrate certain existing disputes; Vynior's Case, 8 Co. 81b (1610), bond forfeited for wrongfully revoking the arbitration; Warburton v. Storr, 4 B. & C. 102 (1825), same; Miller v. President, etc., of Junction Canal Co., 53 Barb. (N. Y.) 590 (1868). See further 47 L. R. A. (N. S.) 408, note XIX.

Arbitration agreements are not specifically enforced in equity. Milnes v. Gery, 14 Ves. Jr. 400 (1807); note in 47 L. R. A. (N. S.) 364. But by statute a remedy of this sort exists. Belfield v. Bourne, [1894] 1 Ch. 521, 69 L. T. 786; California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855 (1893).

Courts of equity have occasionally decreed specific performance of leasing contracts, where the rent to be paid was to be fixed by arbitration, but the court itself then assumes the role of arbitrator. Houston v. Barnett, 90 Or. 94, 175 Pac. 619 (1918); Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129, 67 L. R. A. 353, 103 Am. St. Rep. 988 (1904); Kelso v. Kelly, 1 Daly (N. Y.) 419 (1860); Gregory v. Mighell, 18 Ves. 328 (1811); Johnson v. Conger, 14 Abb. Prac. (N. Y.) 195 (1861).

NORCROSS v. WYMAN.

(Supreme Judicial Court of Massachusetts, 1904. 187 Mass. 25, 72 N. E. 347.)

Action by O. W. Norcross against H. Wyman. Judgment entered in accordance with an arbitrator's report in favor of plaintiff. Case reported. Judgment for plaintiff.

BRALEY, J. Under the contract, which included the specifications and plans, the plaintiff was required to provide a suitable foundation for the building to be erected, but the nature of the soil to be excavated was such that more work was ultimately required for this purpose than he originally anticipated. It is his contention that this work is not covered by the contract, and that he is entitled to extra compensation for its performance. By the specifications it was provided that: "The architects shall have the sole interpretation of their drawings and these specifications, except as otherwise provided or specified. Their decision upon all questions relative to drawings, specifications, or contract for the said building shall be final, and binding upon the owner and contractor." While putting in the foundation the plaintiff discovered a quicksand, and asked the architects subject to whose supervision the work was being done for instructions. Upon the evidence before him, the arbitrator finds as a fact that the architects decided that the clause in the specifications relating to the excavation required was not inserted with the intent that the expense of the work made necessary by the quicksand should be borne by the plaintiff, as this circumstance was unforeseen by him or them, and that the extra work so caused was not included within the terms of the contract. If the architects were clothed with authority to make this decision, it is conclusive between the parties. The clause which defined their powers and duties was contained in a contract under seal, voluntarily entered into by the parties, and provided a simple and convenient method for the settlement of any questions that, as the work proceeded, might arise over the interpretation of the contract or of the drawings and specifications. Or, in other words, whenever it became necessary, whether for the information of the plaintiff, who had stipulated to work under their direction, or for the benefit of the defendant in securing a strict compliance with the terms of the contract, it was left to the architects to finally determine what their drawings and specifications covered as to the quantity and quality of the work that was required to be done by the plaintiff. In the practical working of this plan of supervision and adjustment of differences the cumbersome formalities of a notice to or a hearing of the parties before making decision were evidently not contemplated, as such a requirement is not found in any provision of the contract. Neither was it required by the character of the undertaking. For the purposes of their decision they were free to adopt such legal principles as they honestly believed applicable, and to act on such evidence as they chose to receive. Boston

Water Power Co. v. Gray, 6 Metc. 131, 169; Flint v. Gibson, 106 Mass. 391, 395.

Although the defendant, when notified, declined to be bound by their award, this action was taken after it had been communicated to the plaintiff, and, if it is treated as an attempt to formally revoke the power previously given, it came too late. Wallis v. Carpenter, 13 Allen. 19, 24. Besides, his attempted rescission would not work a revocation of the authority of the architects, for this was conferred by one part of an agreement, which as a whole he was not entitled to rescind. Haley v. Bellamy, 137 Mass. 357, 359. It does not become important to decide how far an agreement for the arbitrament of the construction of a written contract, or of the quantity and value of work to be performed under it, could be effectually pleaded in bar to a suit on the contract itself, or enforced by a bill in equity for specific performance. Miles v. Schmidt, 168 Mass. 339, 340, 47 N. E. 115. Not only had the decision been made, but the question decided, if not treated as technically submitted to them as arbitrators, was one which the parties could leave to the determination of the architects. Palmer v. Clark, 106 Mass. 373; Robbins v. Clark, 129 Mass. 145; McMahon v. New York & Erie Railroad Company, 20 N. Y. 463, 465; Omaha v. Hammond, 94 U. S. 98, 24 L. Ed. 70. See White v. Middlesex Railroad, 135 Mass. 216, 220, and cases cited. Compare Smith v. Boston, Concord & Montreal Railroad, 36 N. H. 458 489, 490. The arbitrator, therefore, correctly ruled that the architects were authorized to act on the question submitted to them, and their decision thereon was binding on the defendant. As the award can well rest on this ground, it becomes of no consequence to consider whether the contract, fairly construed, required the plaintiff to excavate through the quicksand, although on this question the arbitrator ruled in his favor. See Stuart v. Cambridge, 125 Mass. 102.

Award of the arbitrator accepted for the full amount, and judgment ordered thereon for the plaintiff.[49]

[49] The decision of an architect or engineer or the award of an arbitrator, when once properly made, is final, if such was the agreement of the parties; and this is true, irrespective of the question whether the courts were ousted of jurisdiction prior to the decision or award. Mayor and City Council of Baltimore City v. M. A. Talbott Co. of Baltimore City, 133 Md. 226, 105 Atl. 149 (1918); Adinolfi v. Hazlett, 242 Pa. 25, 88 Atl. 869, 48 L. R. A. (N. S.) 885 (1913), holding unconstitutional a statute forbidding such agreements; Marsch v. Southern New England R. Corporation, 230 Mass. 483, 120 N. E. 120 (1918); Keachie v. Starkweather Drainage Dist., 168 Wis. 298, 170 N. W. 236 (1919); N. P. Sloan Co. v. Standard Chemical & Oil Co., 256 Fed. 451, 167 C. C. A. 579 (1918); Benbow v. Jones, 14 M. & W. 193 (1845).

An agreement that an architect's decision shall be final differs from an ordinary arbitration, in that no formal hearing or notice is necessary, no controversy or dispute is necessary prior to the decision, and the power of the architect is not revocable. Palmer v. Clark, 106 Mass. 373 (1871); Boettler v. Tendick, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270 (1889); Hathaway v. Stone, 215 Mass. 212, 102 N. E. 461 (1913), architect a "quasi arbitrator";

SECTION 6.—CONTRACTS AFFECTING MARRIAGE

LOWE v. DOREMUS.

(Court of Errors and Appeals of New Jersey, 1913. 84 N. J. Law, 658, 87 Atl. 459, 49 L. R. A. [N. S.] 632.)

Action by May Lowe against Cornelius Doremus, executor, etc. Judgment for plaintiff, and defendant brings error. Reversed.

This suit was brought to recover the sum due on a promissory note made by Henry Van Riper, during his lifetime, of which the following is a copy:

"Paterson, N. J., August 28, 1909.

"Thirty days after death, I promise, or authorize my executor or administrator, to pay to the order of May Wood, the sum of three

American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 513, 133 Pac. 280, Ann. Cas. 1916C, 44 (1913). "It is not, strictly speaking, a common-law award."

New York Arbitration Statute.—In Herman Berkovitz v. Arbib & Houlberg, 130 N. E. 288 (1921), Cardozo, J., said:

"Section 2 of the statute (Laws 1920, c. 275; Consol. Laws, c. 72) declares a new public policy, and abrogates an ancient rule. 'A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title 8 of chapter 17 of the Code of Civil Procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.' Arbitration Law, § 2. * * *

"We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250, at page 258 (1872); Fudickar v. Guardian Mutual Life Ins. Co., 62 N. Y. 392, 399 (1875); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C.) 222 Fed. 1006 (1915), and cases there cited. It was followed with frequent protest in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. Scott v. Avery, 5 H. L. Cas. 811 (1856); London Tramways Co. v. Bailey, L. R. 3 Q. B. D. 217, 221 (1877); Spackman v. Plumstead District Board of Works, L. R. 10 App. Cas. 229 (1885); Trainor v. Phœnix Assur. Co., 65 L. T. Rep. 825 (1892). No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation. Alexander v. Bennett, 60 N. Y. 204, 206, 207 (1875)."

thousand ($3,000) dollars at the First National Bank of Paterson. Value received. Henry Van Riper.

"Witness: James F. Carroll.

"Indorsements:

"May Wood.

"May Lowe."

May Lowe is the married name of the plaintiff.

In answer to the interrogatories presented to the plaintiff she stated that the consideration for the making and delivery of the note was "continuing and staying in the employ of, and not marrying until after the death of the maker, Henry Van Riper, and attending to and caring for the wants of said Henry Van Riper until his death."

At the close of the testimony, defendant's counsel moved for the direction of a verdict upon the ground, inter alia, that the contract sued on was in general restraint of marriage and void as against public policy. The trial court denied the motion, and of its own motion directed a verdict for the plaintiff and allowed an exception to the defendant who assigns error thereon.

GARRISON, J. (after stating the facts as above). It was an error to direct a verdict for the plaintiff, and it was likewise error to refuse to direct a verdict for the defendant.

The contract sued on was in general restraint of marriage, and consequently void. In Sterling v. Sinnickson, 5 N. J. Law, 871, *756, the action was on a sealed bill, the maker of which promised to pay $1,000 to the payee provided he (the payee) was not lawfully married in the course of six months from the date thereof.

It was held that the agreement was void.

The grounds of this decision as stated by Chief Justice Kirkpatrick was that the law regards marriage as at the foundation of the social order, and hence removes out of the way every unreasonable restraint upon it; and that a restraint "upon the freedom of choice and of action in a case where the law wills that all shall be free" is an unreasonable restraint as against public policy.

That case is not so strong as this, for there the sealed bill implied a legal consideration, and the restraint was for but six months, whereas here the consideration that had to be proved was a restraint of indefinite duration.

This early New Jersey case is cited in the note to Lowe v. Peers, in 6 Eng. Ru. Cas. 347, where the English and American authorities are collected.

The trial judge was influenced by the argument that the consideration of the note was severable into three distinct undertakings, the performance of any of which would constitute a good consideration. This clearly is not so. The consideration was the services of an unmarried woman, who was to continue as such during the term of her employment. If the plaintiff had married the day after she got the note she could not, by merely tendering her services as a married wo-

man, have maintained an action upon the note, if such services were declined by the maker thereof.

Whether it was not in any event a question for the jury whether the note had in fact the consideration sworn to by the plaintiff, or whether it was not an attempted testamentary gift is not now before us in view of our decision of the more fundamental question.

The record before us not being such that a final judgment can be entered upon it, the judgment below is reversed, and a venire de novo awarded.[50]

BOWDEN v. BOWDEN.

(Supreme Court of California, 1917. 175 Cal. 711, 167 Pac. 154, L. R. A. 1918A, 380.)

Action by Ottillie K. Bowden against Rolandus F. Bowden. From judgment for plaintiff and an order denying new trial, defendant appeals. Judgment and order affirmed.

HENSHAW, J. Differences had arisen between Ottillie K. Bowden, plaintiff herein, and Rolandus F. Bowden, defendant herein, which resulted in an action for divorce commenced by the wife against her husband in October, 1909. At the time they held community interests in property, real and personal. While this action was pending, on No-

[50] Promises and conditions directly in restraint of marriage are void and unenforceable. Lowe v. Peers, 4 Burr. 2225 (1768); Sterling v. Sinnickson, 5 N. J. Law, 756 (1820); Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586 (1883). It does not follow from this, however, that such a provision invalidates the other terms of a contract. The void promise not to marry is itself inoperative as a consideration; but it is often held that a return promise is enforceable, if there is another sufficient consideration. Forbearance to marry is not in itself illegal; so that where substantial service has been rendered as a consideration, and forbearance to marry has been fulfilled as a condition, a return promise to pay has been enforced. King v. King, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635 (1900); Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446, L. R. A. 1918C, 331 (1917); Crowder-Jones v. Sullivan, 9 Ont. L. R. 27, 4 Ann. Cas. 729 (1904). Cf. McCoy v. Flynn, 169 Iowa, 622, 151 N. W. 465, L. R. A. 1915D, 1064.

Contracts for a separation of husband and wife, to take place in the future, are void. Stratton v. Wilson, 170 Ky. 61, 185 S. W. 522, Ann. Cas. 1918B, 917 (1916).

Contracts not to contest a divorce suit are frequently held illegal. Bergevin v. Bergevin, 168 Wis. 466, 170 N. W. 820 (1919); Lanktree v. Lanktree (Cal. App.) 183 Pac. 954 (1919); Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689 (1918), but a contract between husband and wife, already living apart, for division of property and care of children, is valid; Klampe v. Klampe, 137 Minn. 227, 163 N. W. 295 (1917), contract to facilitate divorce; Schley v. Andrews, 225 N. Y. 110, 121 N. E. 812 (1919), payment to wife to induce her to obtain divorce.

Agreements fixing alimony to be paid are valid, if not for the purpose of facilitating divorce. Maisch v. Maisch, 87 Conn. 377, 87 Atl. 729 (1913); Palmer v. Fagerlin, 163 Mich. 345, 128 N. W. 207 (1910).

Marriage brokage contracts are illegal. Duval v. Wellman, 124 N. Y. 156, 26 N. E. 343 (1891); Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95 (1896); Hermann v. Charlesworth, [1905] 2 K. B. 123, 93 L. T. 284; In re Grobe's Estate, 127 Iowa, 121, 162 N. W. 804 (1905).

ther might commit against the marriage status, but simply to impose upon the husband the duty, in addition to that which the law imposes, of observing his marital vows and obligations, or, failing to do so, to pay to the mistreated wife something in addition to that which the law would award her in her action based upon such mistreatment either for divorce or for separate maintenance. It is impossible to read this contract in any other light. So far from the consideration being base, it is worthy and commendable. It neither asks nor invites the husband to do a wrong. It endeavors to deter him from doing wrong by making him liable to a penalty in addition to that imposed by law if he does do wrong.

On principle, therefore, we hold that neither the consideration nor the purpose of this contract is base, but that both are worthy, and that, whatever may be said touching the invalidity for lack of consideration only of such a contract, if it be an antenuptial contract, it is not without consideration where a wife has suffered such wrongs from her husband and has condoned his offenses, has resumed with him the marriage relation, and re-established the marriage status, all of which the law favors, upon condition, not improperly imposed by virtue of sad experience, that he shall not again offend. Such a wife had found the legal obligation to be insufficient. It would indeed be a harsh rule which after such an experience should say that she may not invoke other aids in her efforts to induce her husband thereafter to remain true to his marriage vows. The cases that hold that an antenuptial agreement to this effect is without consideration are based upon the view that at the outset of the relationship the law itself imposes the prescribed duty upon both spouses, and that therefore there is no consideration where one spouse agrees that if he does offend in the future he will pay a penalty in addition to that which the law may exact. We need not discuss nor even collate these cases, as they are not addressed to the situation here before us.

But, upon the other hand, cases which are addressed to the situation here presented are numerous, and overwhelmingly they uphold the validity of contracts such as this. It may be well to consider briefly a few of them. Thus in Terkelsen v. Peterson, 216 Mass. 531, 104 N. E. 351, the husband and wife had separated because of his faults. An agreement was entered into through the medium of a trustee looking to the resumption of marital relations, and under this agreement it was covenanted that the husband would comport himself in all respects as it was his duty to do, and that, in the "event of his drinking or ill treating the wife resulting in her leaving him again, he would be liable for her comfortable maintenance and support." The Supreme Court of Massachusetts, in an opinion written by Rugg, Chief Justice, held that the consideration for such an agreement was not the performance by either the husband or wife of their marital duty, nor was it invalid as an agreement to separate, but that it would be sustained as an agreement for the re-establishment of the family and to make better provi-

sion for the wife's support in the event that the husband again offended.

In Duffy v. White, 115 Mich. 264, 73 N. W. 363, the Supreme Court of Michigan was called upon to consider the same question. There the husband discovered his wife's infidelity and had separated from her. Afterward, by mutual agreement, the parties resumed marital relations under a written trust in pursuance of which a portion of the separate property of the wife was conveyed by her through a trustee to the husband, the trust providing that out of the income the husband should deposit monthly to his wife's account one-half of the income, and the remaining one-half should be used for the maintenance of their minor child and for himself. Later the wife eloped with another man, and subsequently sought to avoid this agreement upon the ground that its consideration was without validity. The Supreme Court of Michigan declared: "It has been held in this state that a conveyance of property by a husband to his wife in consideration of the discontinuance of a meritorious suit for divorce, and the resumption of marital relations, was upon a valid and sufficient consideration; and the same has been held elsewhere, almost without exception. * * * In Burkholder's Appeal, 105 Pa. 33, the contract provided among other things, for the payment of certain sums in case of a subsequent separation. The case arose after the termination of the marriage by death, and the contract was enforced." The court said upon this point: "The provision in the contract in the present case is peculiar. It does not offer any premium to the wife to bring about a separation. On the contrary it places a penalty upon it. So it cannot be said to be a contract 'looking to and favoring a separation' at her instance. As to the husband, it does not enlarge his right to a separation beyond that given by law, if we construe the contract in the light of surrounding circumstances. A proper inference from its provisions, and the circumstances under which it was made, justify us in a restriction of the term 'flagrant misbehavior or desertion' to such as would be ground for divorce. If this claim does not enlarge his rights beyond those existing by law, we do not see how it can be said that the provision was illegal and void as against public policy."

Changing the sex of the spouses, the language of the Pennsylvania case has direct applicability to the present one.[51] * * *

Affirmed.[52]

[51] The court then reviewed the following similar cases: Hite v. Hite, 136 Ky. 529, 124 S. W. 815 (1910); Montgomery v. Montgomery, 142 Mo. App. 481, 127 S. W. 118 (1910); Howell v. Howell, 42 Okl. 286, 141 Pac. 412 (1914); Reamey v. Bayley (Pa.) 11 Atl. 438 (1887); Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. Supp. 444 (1903).

[52] In accord: Rodgers v. Rodgers, 186 App. Div. 77, 174 N. Y. Supp. 24 (1919). Cf. Merrill v. Peaslee, 146 Mass. 460, 16 N. E. 271, 4 Am. St. Rep. 334 (1888); McKay v. McKay (Tex. Civ. App.) 189 S. W. 520 (1916).

SECTION 7.—SUNDAY LAWS

SKINNER IRR. CO. v. BURKE.

(Supreme Judicial Court of Massachusetts, 1919. 231 Mass. 555, 121 N. E. 427.)

Action by the Skinner Irrigation Company against Charles S. Burke, resulting in judgment for plaintiff. The case was reported to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendant appeals. Order dismissing report affirmed.

PIERCE, J. This is an action of contract to recover $218 for the installation of a system of irrigation on the land of the defendant. The answer sets up in defense "that if any contract was made by the plaintiff and the defendant, it was made on the Lord's Day, and cannot be enforced."

The facts, so far as they are material to the determination of the single question raised by the answer and argued in the brief of the defendant, are in substance as follows: On Sunday, June 27, 1915, the duly authorized agent of the plaintiff met the defendant and they made an oral agreement for the installation of the irrigation system at a fixed price. This contract was void in its inception and could not be ratified because its validity did not depend in any degree on the choice of the defendant. "The law annulled it, and there was no subject of ratification." Day v. McAllister, 15 Gray, 433, 434. On Monday, June 28, 1915, the agent wrote the defendant a letter which began: "We wish to confirm agreement which we reached yesterday regarding the installation * * * of irrigation at your place. * * *" In the paragraphs which followed the work which the plaintiff agreed to perform and accomplish was set out in minute detail, as was the "price for this work, installed complete as outlined." The defendant received the letter but did not reply to it. There was evidence that thereafter, in good faith, the plaintiff installed on the defendant's premises a system of irrigation, substantially in accordance with his letter of June 28, 1915; and that the defendant, as he testified, was present at times during the installation of the system and knew that it was being done. There was also evidence that the fair value of the system as installed was the contract price, $218. Later, on August 9, 1915, the defendant wrote the agent that he had examined the plant and had found a leak which he had not the necessary tools to tighten, and concluded the letter by saying, "I guess you will have to send your man down to see just what the trouble is." On September 13, 1915, the defendant wrote the plaintiff company that "when all the pipes are working I can't cover the ground as your guarantee said it would."

In response to this last letter the plaintiff proposed to visit and inspect the plant on Sunday, September 19, 1915; and did in fact inspect it on Sunday, September 26, 1915.

On the foregoing facts, we think the contract under which the irrigation system was installed was not the oral contract of Sunday, June 27, 1915, but was a new contract adopted on Monday, June 28, 1915, upon the terms and conditions stated in the letter of the plaintiff to the defendant on the last-named date. See Miles v. Janvrin, 200 Mass. 514, 517, 86 N. E. 785, and cases cited. The fact that, after the work was completed and the right to receive the agreed price had accrued, the plaintiff, on a Sunday, examined and tested the plant on the defendant's complaint of an insufficiency which the judge of the municipal court found was not due to any defect in the system itself or its method of installation or any other fault of the plaintiff, does not by relation affect the validity of the contract or the plaintiff's right to recover the agreed price, and distinguishes the case at bar from the cases of Stewart v. Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; and Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020.

The judge refused rightly to rule as requested that "on all the evidence the plaintiff cannot recover," and that "the offer contained in the letter of the plaintiff to the defendant of June 28, 1915, not having been accepted by the defendant, only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover."

Order dismissing report affirmed.[58]

[58] Contracts made on Sunday and contracts to do work on Sunday were not invalid at common law. There are statutes invalidating such contracts, but their provisions vary widely. See Handy v. St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695 (1889), publishing Sunday newspaper (cf. Pulitzer Pub. Co. v. McNichols [Mo.] 181 S. W. 1, L. R. A. 1916C, 1148 [1915]); Reynolds v. Stevenson, 4 Ind. 619 (1853); Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292 (1864); Bryan v. Watson, 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63 (1890), contract for a charitable purpose valid; Lyon v. Strong, 6 Vt. 219 (1834); Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020 (1898), contract indivisible and no recovery in quantum meruit for week-day services.

A contract is not illegal in case the negotiations were on Sunday, but the final acceptance was on a week day. Berry v. O'Neill, 92 N. J. Law, 63, 104 Atl. 25 (1918). A contract signed on a week day, was expressly conditional upon the written approval of C.; the property was examined by C., and his approval given in writing on Sunday; and the contract was held void: County Engineering Co. v. West, 88 N. J. Eq. 109, 102 Atl. 668 (1917). Observe that the offer and acceptance were completed and valid acts.

SECTION 8.—CONTRACTS INDUCING CRIME OR PRIVATE WRONG

(Lobbying—Fraud—Breach of Trust and Official Duty)

COLLINS v. WILLS et ux.

(In the Queen's Bench, 1601. Cro. Eliz. 774.)

Assumpsit. And declares, that whereas the defendant Wills was a suitor to the other defendant (his now wife, and the plaintiff's daughter), and the plaintiff offered to give with her in marriage £80 and would give no more; and Wills, the other defendant, required £90 and without that would not marry; and the feme, before marriage, in consideration that the plaintiff would give the other £10 at her request, to make the £80 £90 assumed, and promised to repay it within a month after she should be required: and alleged in facto, that he thereupon gave £90 to the defendant Wills in marriage, &c. and alledgeth request after marriage, &c. The defendant pleaded non assumpsit and found against him; and judgment entered accordingly. without privity of the Court. And it was now alleged, that this was an insufficient and unlawful consideration to ground this action, and made only in deceit of the defendant, who was her husband.—And of that opinion was the whole Court; for as well as she may promise the repayment of £10 she may promise the repayment of all, or more, so as her husband should be defrauded of all: and that which is given in marriage, cannot be a consideration to ground a promise; especially to charge the baron with that promise. Wherefore, in regard the judgment was entered this term, and the record is yet in their breasts. it was adjudged that it should be altered, and made quod querens nihil capiat per billam. And a supersedeas was awarded to stay execution.

ATKINS v. JOHNSON.

(Supreme Court of Vermont, 1870. 43 Vt. 78, 5 Am. Rep. 260.)

PIERPOINT, C. J.[54] The case comes into this court upon a general demurrer to the plaintiff's declaration.

The declaration alleges that "on the 22d day of July, 1867, the defendant, by his agreement in writing of that date, undertook and promised the plaintiff that, in consideration that the plaintiff would print and publish an article in the Argus & Patriot, a weekly newspaper published in Montpelier by the plaintiff, entitled 'A Jack at all

[54] Part of the opinion is omitted.

Trades Exposed,' that said article was all true, that there was enough to back it up, &c., and that he, the said defendant, would defend and save harmless the plaintiff from all damage and harm that might accrue to the plaintiff in consequence of publishing said article. That said article, if untrue, was a libel upon the character of one John Gregory; that relying upon the said promises of the defendant he published the article; that after said publication the said Gregory called upon the plaintiff for the name of the writer of the article; that thereupon the defendant requested the plaintiff not to give the said Gregory the name of the writer, and, in consideration thereof, promised the plaintiff that he would save him from all harm; that if said Gregory sued the plaintiff, that he, the defendant, would defend the suit, prove the charges, and save the plaintiff from all trouble and expense in the premises. The plaintiff, relying thereon, withheld the name of the defendant as the author of said article; that the said Gregory sued the plaintiff; that the defendant failed to defend the said suit, and the said Gregory recovered a judgment against the plaintiff, which he has been compelled to pay, and the defendant refuses to indemnify him."

The plaintiff is here seeking to compel the defendant to indemnify him for the damage which he has sustained, in consequence of publishing a libel, at the request of the defendant, and from the consequences of which the defendant agreed to save him harmless.

The question is, whether such an agreement as the plaintiff sets out in his declaration can be legally enforced.

The general principle, that there can be no contribution or indemnity, as between joint wrong-doers, is too well settled to require either argument or authority.

To this rule there are many exceptions, and prominent among them is the class of cases where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves, but which prove in the end to be in violation of the rights of the other party, and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff, such as, Betts v. Gibbins; Adamson v. Jarvis; Wooley v. Batte; Avery v. Halsey, &c. But we apprehend that no exception has ever been recognized broad enough to embrace a case like the present; indeed such an exception would be a virtual abrogation of the rule.

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages,

but also to a public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not inquire which of the two is most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it finds them, to adjust their differences between themselves, as they best may. * * *

The position, in which the facts confessed upon the record place the defendant, is not an enviable one. He seems to have originated the mischief—to have induced the plaintiff to aid him in carrying it into effect by assurance of the truth of the statements, and a promise of indemnity, and after standing by and seeing the plaintiff amerced in damages takes advantage of a strictly legal defense, and throws the whole responsibility upon the plaintiff. Personally, it would have given me satisfaction to have decided the case for the plaintiff, if it could have been done without violating well-established and salutary rules of law.

Judgment of the county court is affirmed.[55]

[55] A contract to publish a book not yet written is not made invalid merely because it contains a provision for indemnity against libel suits, where no libel was published and it is not shown that any was intended. Jewett Pub. Co. v. Butler, 159 Mass. 517, 34 N. E. 1087 (1893). A contract by a seller of a soft drink to indemnify the buyer against damages that might come from prosecution for violation of a prohibitory law is not illegal, no intent to sell intoxicating liquor being shown. Owens v. Henderson Brewing Co., 185 Ky. 477, 215 S. W. 90 (1919). Contra: Smith v. Clinton, 25 T. L. R. 34 (1908).

Any contract to commit a crime or a tort is illegal. The Highwayman's Case (Exch.) 2 Evans' Pothier on Oblig., 3, N. 1 (1725), Scott's Cases on Quasi Contracts, 666; Allen v. Rescous, 2 Lev. 174 (1675), to commit an assault. The commonest example is a contract the purpose of which is to defraud or injure a third person financially. Clay v. Yates, 1 H. & N. 73 (1856); American Mfg. Co. v. Crescent Drug Co., 113 Miss. 130, 73 South. 883, L. R. A. 1917D, 482 (1917); Materne v. Horwitz, 101 N. Y. 469, 5 N. E. 331 (1886); Merrill v. Packer, 80 Iowa, 542, 45 N. W. 1076 (1890); Church v.

PROVIDENCE TOOL CO. v. NORRIS.

(Supreme Court of the United States, 1864. 2 Wall. 45, 17 L. Ed. 868.)

In July, 1861, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a contract with the government, through the secretary of war, to deliver to officers of the United States, within certain stated periods, twenty-five thousand muskets, of a specified pattern, at the rate of twenty dollars a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, and the defendant in error in this court, upon a previous agreement with the corporation, through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to its extent.

Norris himself, it appeared,—though not having any imputation on his moral character,—was a person who had led a somewhat miscellaneous sort of a life, in Europe and America. Soon after the rebellion broke out, he found himself in Washington. He was there without any special purpose, but, as he stated, with a view of "making business—anything generally;" "soliciting acquaintances;" "getting letters;" "getting an office," &c. Finding that the government was in need of arms to suppress the rebellion, which had now become organized, he applied to the Providence Tool Company, already mentioned, to see if they wanted a job, and made the contingent sort of contract with them just referred to. He then set himself to work at what he called, "concentrating influence at the war department;" that is to say, to getting letters from people who might be supposed to have influence with Mr. Cameron, at that time secretary of war, recommending him and his objects. Among other means, he applied to the Rhode Island senators, Messrs. Anthony and Simmons, with whom he had got acquainted, to go with him to the war office. Mr. Anthony declined to go; stating that since he had been senator he had been applied to some hundred times, in like manner, and had invariably declined; thinking it discreditable to any senator to intermeddle with the business of the departments. "You will certainly not decline to go with me, and introduce me to the secretary, and to state that the Providence Tool Company is a responsible corporation." "I will give you a note," said Mr. Anthony. "I do not want a note," was the reply; "I want the weight of your presence with me. I want the influence of a senator." "Well," said Mr. Anthony, "go

Proctor, 66 Fed. 240, 13 C. C. A. 426 (1895); Randall v. Howard, 67 U. S. (2 Black) 585, 17 L. Ed. 269 (1862); Wanderer's Hockey Club v. Johnson, 18 Brit. Col. 367, 25 West. L. R. 434 (1913), contract the purpose of which is to induce a breach of a contract with a third person; Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 112 N. W. 940 (1907), same; McNair v. Parr, 177 Mich. 327, 143 N. W. 42 (1913), contract between family doctor and a surgeon to split the fee; Smith v. Rose, 192 Mo. App. 580, 184 S. W. 910 (1916), clairvoyant agreed to advise purchase of certain mining stock.

to Simmons." By one means and another, Norris got influential introduction to Mr. Secretary Cameron, and got the contract, a very profitable one; the secretary, whom on leaving he warmly thanked, "hoping that he would make a great deal of money out of it."

But a dispute now arose between Norris and the tool company, as to the amount of compensation to be paid. Norris insisted that by the agreement with him he was to receive $75,000; the difference between the contract price and seventeen dollars a musket; whilst the corporation, on the other hand, contended, that it had only promised "a liberal compensation" in case of success. Some negotiation on the subject was had between them; but it failed to produce a settlement, and Norris instituted the present action to recover the full amount claimed by him.

The declaration contained several counts; the first and second ones, special; the third, fourth, and fifth, general. The special ones set forth specifically a contract, that if he, Norris, procured the government to give the order to the company, the company would pay to him, Norris, "for his services, in obtaining, or causing and procuring to be obtained, such order, all that the government might, by the terms of their arrangement with the company, agree to pay above $17 for each musket." The general counts were in the usual form of quantum meruit, &c.; but in these counts, as in the special ones, a contract was set forth on the basis of a compensation, contingent upon Norris's procuring an order from the government for muskets for the tool company; reliance on this contingent sort of contract running through all the counts of the declaration. There was no pretence that the plaintiff had rendered any other service than that which resulted in the contract for the muskets.

On the trial in the circuit court for the Rhode Island district, the counsel of the tool company requested the court to instruct the jury, that a contract like that declared on in the first and second counts was against public policy, and void; which instruction the court refused to give. The same counsel requested the court to charge, "that upon the quantum meruit count the plaintiff was not entitled in law to recover any other sum of money, for services rendered to the tool company in procuring a contract for making arms, than a fair and reasonable compensation for the time, speech, labor performed, and expenses incurred in performing such services, to be computed at a price for which similar services could have been obtained from others." The court gave this instruction, with the exception of the last nine words. The jury found for the defendant on the first and second—that is to say, upon the special—counts, and for the plaintiff on the others, and judgment was entered on $13,500 for the plaintiff. The case came, by writ of error, here.

Mr. Justice FIELD delivered the opinion of the court.

Several grounds were taken, in the court below, in defence of this action; and, among others, the corporation relied upon the proposi-

tion of law, that an agreement of the character stated,—that is, an agreement for compensation to procure a contract from the government to furnish its supplies,—is against public policy, and void. This proposition is the question for the consideration of the court. It arises upon the refusal of the court below to give one of the instructions asked.

A suggestion was made on the argument, though not much pressed, that the instruction involving the proposition cannot properly be regarded, inasmuch as it was directed in terms to the agreement set forth in the special counts of the declaration, upon which the jury found for the defendants. There would be much force in this suggestion, if the general counts, upon which the verdict passed for the plaintiff, did not also aver that his services were rendered in procuring the same contract from the government. The instruction was directed especially to the legality of a contract of that kind, which having been once refused with reference to some of the counts, it was not necessary for counsel to renew with reference to the other counts to which it was equally applicable. The subsequent instructions were, therefore, directed to other matters.

It was not claimed, on the trial, that the plaintiff had rendered any other services than those which resulted in the procurement of the contract for the muskets. We are of opinion, therefore, that the proposition of law is fairly presented by the record, and is before us for consideration.

The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency

of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements. Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953; Harris v. Roof's Ex'rs, 10 Barb. (N. Y.) 489; Fuller v. Dame, 18 Pick. (Mass.) 472.

The same principle has also been applied, in numerous instances, to agreements for compensation to procure appointments to public offices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy. Gray v. Hook, 4 N. Y. 449.

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.[56]

[56] In accord: Montefiore v. Menday Motor C. Co. (K. B.) 119 L. T. 340 (1918), to use personal influence in getting money from the government to finance aircraft company; Crocker v. U. S., 240 U. S. 74, 36 Sup. Ct. 245, 60 L. Ed. 533 (1915); Beck v. Bauman, 105 Misc. Rep. 584, 173 N. Y. Supp.

TRIST v. CHILD.

(Supreme Court of the United States, 1874. 21 Wall. 441, 22 L. Ed. 623.)

Appeal from the supreme court of the District of Columbia; the case being thus:

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadalupe Hidalgo—a claim which the government had not recognized—resolved, in 1866–7 to submit it to congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent. of whatever sum congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, congress appropriated the sum of $14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent. stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the treasury department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the $14,559 from the treasury until he had complied with his agreement about the compensation,

772 (1919), to pay 2 per cent. on any contract with the federal government for war supplies; Glenn v. Southwestern Gravel Co. (Okl.) 177 Pac. 586 (1919), contingent fee for securing city ordinance for a street improvement in which one party is interested as contractor; Hyland v. Oregon Hassam Paving Co., 74 Or. 1, 144 Pac. 1160, L. R. A. 1915C, 823, Ann. Cas. 1916E, 941 (1914), to "do everything in his power" to obtain a municipal contract, at a 3 per cent. commission; Oliver v. Wilder, 27 Colo. App. 337, 149 Pac. 275 (1915), secretary of state let contracts for the publication of constitutional amendments at maximum statutory figure—in fact 20 times market value—the county paper agreeing to divide the money with all other local papers who would support the entire Democratic ticket.

On the lawful side of the line, not always easily distinguishable, see Anderson v. Blair, 202 Ala. 209, 80 South. 31 (1918), joint adventure to help get a contract from the government for construction of a camp, to help in its performance, for a share of the profits, nothing indicating the use of improper influence; Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502; Id., 36 N. Y. 682 (1867), commission for obtaining a government contract; Kerr v. American Pneumatic Service Co., 188 Mass. 27, 73 N. E. 857 (1905); Mechem Agency (2d Ed.) § 100.

and that a decree might pass commanding him to pay to the complainant $5,000, and for general relief.

The defendant answered the bill, asserting, with other defences going to the merits, that all the services as set forth in their bill were "of such a nature as to give no cause of action in any court either of common law or equity."

The case was heard upon the pleadings and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see various members of congress, soliciting their influence in behalf of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case: "From Child, Jr., to Trist. House of Representatives, Washington, D. C., Feb. 20th, 1871. Mr. Trist: Everything looks very favorable. I found that my father has spoken to C—— and B——, and other members of the House. Mr. B—— says he will try hard to get it before the House. He has two more chances, or rather 'morning hours,' before Congress adjourns. A—— will go in for it. D—— promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference. Yours, &c., L. M. Child."

The court below decreed:

1st. That Trist should pay to the complainant $3,639, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury "any of the moneys appropriated to him" by the above act of congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Mr. Justice SWAYNE, delivered the opinion of the court.[57] * * *

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of congress, from whom he had received favorable

[57] Part of the opinion is omitted.

assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst. lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (Jones v. Randall, 1 Cowp. 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff, Swayze v. Hull, 8 N. J. Law, 54, 14 Am. Dec. 399, to pay for resigning a public position to make room for another; Eddy v. Capron, 4 R. I. 395, 67 Am. Dec. 541; Parsons v. Thompson, 1 H. Bl. 322; to pay for not bidding at a sheriff's sale of real property, Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134; to pay for not bidding for articles to be sold by the government at auction, Doolin v. Ward, 6 Johns. (N. Y.) 194; to pay for not bidding for a contract to carry the mail on a specified route, Gulick v. Bailey, 10 N. J. Law, 87, 18 Am. Dec. 389; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, Gray v. Hook, 4 N. Y. 449; to pay for procuring a contract from the government, Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; to pay for procuring signatures to a petition to the governor for a pardon, Hatzfield v. Gulden, 7 Watts (Pa.) 152, 31 Am. Dec. 750; to sell land to a particular person when the surrogate's order to sell should have been obtained, Overseers of Bridgewater v. Overseers of Brookfield, 3 Cow. (N. Y.) 299; to pay for suppressing evidence and compounding a felony, Collins v. Blantern, 2 Wils. 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, Boynton v. Hubbard, 7 Mass. 112; to pay for promoting a marriage, Scribblehill v. Brett, 4 Brown Parl. Cas. 144; Arundel v. Trevillian, 1 Ch. Rep. 47; to influence the disposition of property by will in a particular way, Debenham v. Ox. 1 Ves. 276. See, also, Add. Cont. 91; 1 Story, Eq. c. 7; Collins v. Blantern, 1 Smith Lead. Cas. 676, Am. note.

The question now before us has been decided in four American

cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & S. (Pa.) 315, 40 Am. Dec. 519; Harris v. Roof's Ex'r, 10 Barb. (N. Y.) 489; Rose & Hawley v. Truax, 21 Barb. (N. Y.) 361; Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character.[58] All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to

[58] In accord: Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 107 N. W. 125, 4 L. R. A. (N. S.) 212, 121 Am. St. Rep. 713 (1905); Houlton v. Nichol, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928 (1896); Kansas City Paper House v. Foley Ry. Printing Co., 85 Kan. 678, 118 Pac. 1056, 39 L. R. A. (N. S.) 747, Ann. Cas. 1913A, 294 (1911); Moyers v. City of Memphis, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918C, 854 (1916).

the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and

confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, potior conditio defendentis. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to dismiss the bill.[59]

MEGUIRE v. CORWINE.

(Supreme Court of the United States, 1879. 101 U. S. 108, 25 L. Ed. 899.)

Mr. Justice SWAYNE delivered the opinion of the court.

The plaintiff in the court below is the plaintiff in error here.

The first count of the declaration avers that in consideration of the assistance to be rendered by him to the defendants' testator in procuring him to be appointed special counsel of the United States in certain litigated cases known as the "Farragut prize cases," and also in consideration of the assistance to be rendered by the plaintiff in managing and carrying on the defence in those cases,—which assistance was accordingly rendered,—the testator promised the plaintiff to pay him one-half of all fees which the testator should receive as such special counsel, and that the testator did receive as such special counsel in those cases $29,950, of which sum the plaintiff was entitled to be paid one-half, &c.

The second count is substantially the same with the first, except that it avers the consideration of the contract to have been the assistance to be rendered by the plaintiff in the defence of the cases named, and is silent as to the stipulation that he was to assist in procuring the appointment of the testator as special counsel for the government.

[59] Other lobbying contracts were held unlawful in Adams v. East Boston Co., 236 Mass. 121, 127 N. E. 628 (1920); Buchanan v. Farmer, 122 Ark. 562, 184 S. W. 33 (1916); Hogston v. Bell, 185 Ind. 536, 112 N. E. 883 (1916); Owens v. Wilkinson, 20 App. D. C. 51 (1902); Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347 (1898). contingent fee for procuring city ordinance: Richardson v. Scott's Bluff County, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682 (1899); Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535 (1869); Spalding v. Ewing, 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. Rep. 608 (1892); Coquillard's Adm'r v. Bearss, 21 Ind. 479, 83 Am. Dec. 362 (1863).

The third is a common count alleging the indebtedness of the testator to the defendant for work and labor to the amount of $12,975.

It appears by the bill of exceptions that the plaintiff called three witnesses to establish the contract upon which he sought to recover. Lovel testified that "the testator also stated that he had agreed to pay the plaintiff one-half of all the fees he should receive in said cases, for his aid in getting the appointment of special counsel and for the assistance which the plaintiff was to render in procuring testimony and giving information for the management of the defence in said cases."

"On cross-examination, the witness said he knew, before his said conversation with R. M. Corwine, and before Corwine was employed, that Mr. Meguire, the plaintiff, had the selection of counsel in said cases, the Treasury Department only restricting him to the selection of a man who was familiar with admiralty practice, and Mr. Meguire was to utilize the information he professed to have at that time. The bargain, as witness understood it, was that in consideration of Meguire's procuring Corwine to be employed as special counsel in those cases, and of assisting him in getting evidence and information, Corwine agreed to pay to the plaintiff (Meguire) one-half of the fees which he (Corwine) might receive from the United States for services in said cases.

"The plaintiff then called Lewis S. Wells, another witness in his behalf, who, being duly sworn, stated that since the commencement of this suit—he thought some time last year—he met the testator (R. M. Corwine, deceased) in the Treasury Department, and had a conversation with him about the plaintiff and the Farragut cases. Mr. Corwine was very angry, and said that he had agreed to pay Mr. Meguire one-half of his fees in the Farragut cases, and had paid him one-half the retainer received in 1869, and $4,000 in July, 1873, and had taken his receipt in full. That he had found out that plaintiff had not been the means of his appointment as special counsel, and he thought he had paid the plaintiff enough."

Wells testified further that upon two occasions the testator told him the plaintiff was assisting him in the preparation of the defence in the Farragut cases, and that he had agreed to pay to the plaintiff one-half of his fees for the plaintiff's services. This is all that is found in the record touching the terms and consideration of the contract. It was in proof by a late solicitor of the treasury that the plaintiff strongly urged on him the employment of the testator as special counsel, and that at the instance of the plaintiff he called the attention of the Secretary of the Treasury to the subject, and that the appointment of the testator was thus brought about. The plaintiff had been a clerk in New Orleans, in the office of Colonel Holabird, Chief Quartermaster of the Department of the Gulf, during the war, and had possession of Holabird's papers, from which he derived the facts communicated to the testator for the defence of government in the prize suits in question. It was not controverted that the amount of fees received by the

testator was $25,950, and that he paid over to the plaintiff $4,475 before the breach occurred between them. The further sum of $8,500 was claimed by the plaintiff, and this suit was brought to recover it. The learned counsel for plaintiff in error complains in his brief that "in the charge of the court, page 10, the jury were instructed that 'the contract set out in the first count of the declaration was illegal and void, and that the plaintiff could not recover on the second count unless the jury should find that the parties made another and a distinct contract;' 'and in the first instruction asked by the defendants and given by the court the jury were told that such an arrangement is void, because it is contrary to public policy, and the plaintiff cannot recover in any form of action for any services rendered or labor performed in pursuance thereof.' * * * 'There can be no doubt that this charge was fatal to the plaintiff's whole case. The jury were not allowed to infer, as they well might have done from the testimony of more than one of the witnesses, that the testator, after his appointment as special counsel, recognized an implied agreement to pay the plaintiff half of his fees for the services of the latter rendered during the progress of the business.' "

In our view of the record this is the turning-point of the case. The objection taken to the instructions referred to is not so much to them in the abstract as the concrete. The complaint is that they closed the door against the inference of another contract which the jury might have drawn from the testimony in the case. To this there are several answers. If there were such testimony, it should have been set forth in the record. After a careful examination, we have been unable to find any. The instructions expressly saved the right of the jury to find another and a different contract, and their attention was called to the subject. They found none. The contract objected to by the court as fatally tainted was proved by witnesses called by the plaintiff himself. He neither proved nor attempted to prove any other. It was, then, neither claimed nor intimated that any other had been made. After the views of the court were announced, it was too late for the plaintiff to change his position and claim for the jury the right to wander at large in the field of conjecture and find as a fact what the evidence wholly failed to establish, and which, if found, would have thrown on the court the necessity to set aside the verdict and award a new trial.

A judge has no right to submit a question where the state of the evidence forbids it. Michigan Bank v. Eldred, 9 Wall. 544, 19 L. Ed. 763. On the contrary, where there is an entire absence of testimony, or it is all one way, and its conclusiveness is free from doubt, it is competent for the court to direct the jury to find accordingly. Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008. The practice condemned in Michigan Bank v. Eldred is fraught with evil. It tends to create doubts which otherwise might not, and ought not to exist, and may confuse the minds of the jury and lead them to wrong conclu-

sions. If the instructions here under consideration are liable to any criticism, it is that they were more favorable to the plaintiff in error than he had a right to claim.

The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. Marshall v. Baltimore & Ohio Railroad Co., 16 How. 314, 14 L. Ed. 953; Tool Company v. Norris, 2 Wall. 45, 17 L. Ed. 868; Trist v. Child, 21 Wall. 441, 22 L. Ed. 623; Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those by whom it is administered. Corruption is always the forerunner of despotism.

In Trist v. Child (supra), while recognizing the validity of an honest claim for services honestly rendered, this court said: "But they are blended and confused with those which are forbidden; the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. * * * Where the taint exists it affects fatally, in all its parts, the entire body of the contract. In all such cases potior conditio defendentis. Where there is turpitude, the law will help neither party." These remarks apply here. The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fundamentally and fatally defective, he could not recover. Conceding all his exceptions, other than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view, these alleged errors are an immaterial element in the case. Barth v. Clise, Sheriff, 12 Wall. 400, 20 L. Ed. 393.

Judgment affirmed.[60]

[60] See also Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17 (1880), agreement to appoint to a public office; Martin v. Royster, 8 Ark. 74 (1847); Stroud v. Smith, 4 Houst. (Del.) 448 (1872); Martin v. Francis, 173 Ky. 529, 191 S. W. 259, L. R. A. 1918F, 966, Ann. Cas. 1918E, 289 (1917), rival candidates agreed that one should withdraw, should later be appointed deputy, and should divide fees; Hand v. Willard F. Bailey Co., 103 Neb. 450, 172 N. W. 356 (1919), same; Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880), agreement to pay a Turkish consul a commission if he would induce his government to buy rifles; Osborne v. Amal. Soc. of Ry. Servants, [1910] A. C. 87, member of Parliament agreed to vote as directed by his union; Western Indemnity Co. v. Crafts, 240 Fed. 1, 153 C. C. A. 37 (1917), surety bond to induce illegal deposit of state funds.

GRANGER v. FRENCH, City Comptroller, et al.

(Supreme Court of Michigan, 1908. 152 Mich. 356, 116 N. W. 181, 125 Am. St. Rep. 416.)

Mandamus by Orley C. Granger against Rufus S. French, city comptroller of Grand Rapids, and another to compel respondents to pay relator's salary. There was a judgment denying the writ, and, relator brings certiorari. Reversed.

OSTRANDER, J.[61] Relator, a justice of the peace of the city of Grand Rapids, with an official salary of $1,300 a year, payable monthly out of the city treasury, assigned unearned salary to obtain money and credit to relieve his financial embarrassment. Respondents are respectively the comptroller and city clerk of the city of Grand Rapids, and have refused to issue to relator the usual checks or warrants for his salary, or to countersign or pay such checks because said assignments of relator's salary have been filed in the comptroller's office. Relator applied to the superior court for a writ of mandamus to compel respondents to perform their duties in the premises. The writ, after a hearing, was denied. The court found the assignments to have been given to persons who in reliance upon them and in perfect good faith advanced money or credit to relator, and in the opinion the learned judge said: "I cannot bring myself to feel that a court of justice is called upon to lend its aid to the relator in depriving his creditors of the opportunity of getting from him what he had solemnly promised to give them."

I think the writ of mandamus should have been granted, not in indorsement and appreciation of relator's conduct, nor in furtherance of relator's private interest, but because to deny it is, in effect, to refuse to enforce a rule of sound public policy. Mandamus is the proper remedy to enforce the payment by a municipal corporation of a salary, the amount of which is fixed. McBride v. Grand Rapids, 47 Mich. 236, 10 N. W. 353; Speed v. Common Council of the City of Detroit and the City Comptroller, 100 Mich. 92, 58 N. W. 638. The assignments of his salary which relator gave are void. The rule, with copious references to authorities, is stated in 2 Am. & Eng. Ency. of Law (2d Ed.) 1033, as follows: "It is well settled, both in England and the United States, that a public officer cannot assign by anticipation the salary and fees paid to him for the purpose of maintaining the dignity of his office and securing the due discharge of its duties. The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for

[61] Part of the opinion is omitted.

their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void both in law and equity as being against public policy." See, also, 4 Cyc. 19; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; In re King's Estate, 110 Mich. 203, 68 N. W. 154. * * *

Reversed.[62]

BAIRD v. SALINA NORTHERN R. CO. et al.

(Supreme Court of Kansas, 1918. 103 Kan. 452, 173 Pac. 1069, L. R. A. 1918F, 1201.)

Action by James A. Baird against the Salina Northern Railroad Company and others. Demurrer to petition overruled, and defendants appeal. Reversed, and cause remanded, with direction to sustain the demurrer.

BURCH, J. The action was one for damages for breach of a contract to locate and maintain a depot and other shipping facilities. A demurrer to the petition was overruled, and the defendant appeals.

The contract provided that the railroad company should permanently establish and maintain, on described land of the plaintiff, a passenger and freight depot and station, stockyards, side tracks, and other shipping facilities, refrain from ever establishing or maintaining a depot, station, or siding facilities between Ash Grove in Lincoln county, and the proposed station in Mitchell county, or within 10 miles of the proposed station, do all in its power to obtain for the proposed station post office and express office facilities, to the end that there might be established on the real estate described a town equipped with the necessary shipping, express, and postal facilities, and at the time when the proposed station should be completed, run an excursion train for, or assist in advertising, a sale of town lots, free of cost. The consideration was the execution and delivery to the railroad company of sub-

[62] In accord: Anderson v. Branstrom, 173 Mich. 157, 139 N. W. 40, 43 L. R. A. (N. S.) 422, Ann. Cas. 1914D, 817 (1912), pooling of fees by a prosecuting attorney with his law partners; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273 (1874); Fidelity & Deposit Co. of Maryland v. Long, 138 Tenn. 43, 195 S. W. 766 (1917); State v. Williamson, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358 (1893); Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963 (1884); Wells v. Foster, 8 M. & W. 151 (1841).

Pensions to soldiers and sailors are made unassignable by Rev. St. U. S. § 4745 (U. S. Comp. St. § 9077).

A contract by a public officer for a salary either less or more than that fixed by law is void. Rhodes v. City of Tacoma, 97 Wash. 341, 166 Pac. 647 (1917), less; Dodson v. McCurnin, 178 Iowa, 1211, 160 N. W. 927, L. R. A. 1917C, 1084 (1917), more; State ex rel. Attorney General, v. Collier, 72 Mo. 13, 37 Am. Rep. 417 (1880); Brown v. First Nat. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206 (1893): Southern Bell Telephone & Telegraph Co. v. Mitchell, 145 Ga. 539, 89 S. E. 514 (1916), justice of peace agreed to charge no fees, if plaintiff would bring suits in his court.

scription notes in the sum of $10,000, with an option to give notes to the amount of $5,000 and subscribe $10,000 to a bond issue of the railroad company. Should the railroad company default in performing any portion of the contract, it was to pay the plaintiff the sum of $5,000 as liquidated damages.

The petition set out the contract, pleaded performance by the plaintiff and breach by the defendant, and prayed for the stipulated damages. The contract was void, because contrary to public policy, and the demurrer to the petition should have been sustained.

The plaintiff argues that it is not per se against public policy to bargain with a railroad company for the location of a station at a particular place; that stations may, of course, always be discontinued when it is proper to do so, and consequently the stipulation for a permanent station may be ignored; and that the admittedly void stipulation not to establish other stations is severable. The plaintiff is not able to point out what part of his subscription was made in consideration of the naked location of a station on his land, with accompanying shipping facilities. On the face of the contract material portions of the consideration on which the plaintiff made his subscription were that the station should not be discontinued as soon as established, or at any later time, but should be permanent, and that no other station should be located within competing distance. To interpret the contract otherwise would be to make a decidedly different engagement between the parties than that expressed by the instrument. The supposedly legal and the illegal things to be done by the railroad company constituted a unit of performance on its part, just as the plaintiff's subscription constituted a unit of performance on his part, and the entire contract was void.

The court does not agree that the contract would have been valid if it had contemplated no more than the establishing of the station and shipping facilities described. The public has an interest in the location of stations on a line of railroad, with the accompanying facilities for serving the public. That interest is paramount to the interest of stockholders of the railroad company, and the temptation to gratify private greed, rather than satisfy public need, by selling out railroad facilities, is just great enough that railroad officers and agents ought not to be permitted to expose themselves to it. The authorities on the subject of the validity of station contracts are not in harmony, and it is not strange that this should be so. On one side transportation by rail is private enterprise; on the other public service; and the supremacy of the public interest was not always clearly visualized. Indeed, it was often difficult to do so in the early days of railroad building through great areas of undeveloped territory. Public policy as an operative legal principle was not always clearly visualized. Sometimes the statutory privileges enjoyed by railroad builders and the statutory privileges permitted municipal and quasi municipal corporations in

securing the extension to them of railroad facilities confused the application of the doctrine of public policy to private contracts.[63] * * *

Some state and federal courts hold that, because municipal and quasi municipal corporations may contract for the location of stations, the general public policy of the state is thereby established, and private individuals have the same right. This reasoning is quite fallacious. In one case a public body, the municipal authorities, acting ordinarily on a vote of the qualified electors is permitted to contract according to the interest of the locality. In the other, private individuals, in furtherance of their own selfish ends, strive to secure especial advantages and privileges, without regard to the public welfare.

The decisions noted are all that have been rendered by this court throwing direct light on the subject under consideration. They do not commit the court to a holding that a town-site promoter like the plaintiff may secure a lawful contract binding the railroad company to establish on his land a passenger and freight depot and station, stock yards, and other shipping facilities, and the court declines so to hold. It is a mere quibble to speak of establishing structures and facilities of the character described, as distinct from maintaining them, because to establish is to fix with appropriate permanence. The field was open to rival promoters to offer more alluring inducements to the railroad company to champion their town sites, and in such a contest the public interest is too likely to be found trailing after the successful bidder.

The judgment of the district court is reversed, and the cause is remanded, with direction to sustain the demurrer to the petition. All the Justices concurring.[64]

PALMBAUM v. MAGULSKY.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 306, 104 N. E. 746, Ann. Cas. 1915D, 799.)

Action by Joseph Palmbaum against Abraham M. Magulsky. There was a verdict for defendant, and plaintiff brings exceptions. Sustained, and judgment entered for plaintiff.

[63] The court here reviewed earlier Kansas decisions.

[64] Contracts to induce the location of a post office. Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746 (1884); Benson v. Bawden, 149 Mich. 584, 113 N. W. 20, 13 L. R. A. (N. S.) 721 (1907); Davis v. Bolon (Okl.) 177 Pac. 903 (1919), contract to use "pull" with the Post Office Department.

Contracts tending to induce a public service corporation to neglect its public duty. New York Central R. Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627 (1873), contract to exempt carrier from liability for negligence; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819 (1889), payment to induce the location of a railroad at a certain place; Fuller v. Dame, 18 Pick. (Mass.) 472 (1836), location of depot. But it is not illegal for a town to make a subscription to a railway company to induce the construction of a road there. Farrington v. Stucky, 165 Fed. 325, 91 C. C. A. 311 (1908).

CROSBY, J.[65] This is an action of contract upon a promissory note executed and delivered by the defendant to the plaintiff for money advanced by him (the plaintiff) to the defendant, with which he (the defendant) purchased certain shares of stock in a corporation known as the American Biscuit Company, in which the plaintiff and one Hoffman were also shareholders. The stock so purchased by the defendant was held by the plaintiff by assignment to secure the payment of the note. It appeared at the trial that about two years after the note was given the defendant agreed with the plaintiff, in consideration of the plaintiff's surrendering the note, to attend a stockholders' meeting of the corporation and vote with the plaintiff to dispose of all the assets of the corporation which, according to the report, amounted to several thousand dollars. Among other defenses in his answer and amended answer, the defendant alleged that he had performed his part of the foregoing agreement. The exceptions set forth substantially all the evidence introduced at the trial. from which it appears that the defendant is liable upon the note, unless his performance of the agreement is a valid defense.

The defendant testified to the making of the agreement and that he had carried out his part thereof, and offered other evidence to the same effect. There was no evidence that the only other stockholder. Hoffman, assented to the agreement or had any knowledge of it. * * *

The court instructed the jury that the agreement, if proved, constituted a defense to the action, to which the plaintiff excepted.

In our opinion the court should have ruled that the agreement was not a defense. and should have instructed the jury to return a verdict for the plaintiff in accordance with his first request.

It is the duty of a stockholder of a corporation, in attendance at meetings of the stockholders, to act fairly and in good faith. He is not justified in entering into any agreement to vote so as to perpetrate a fraud upon another stockholder. The defendant's vote to dispose of all the assets of the corporation was in consideration of the surrender of the note to him by the plaintiff. This was illegal, and the agreement was void as against public policy.

As was said by Colt, J., in Guernsey v. Cook, 120 Mass. 501, 502: "It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers. He was in a relation of trust and confidence. which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated

[65] Part of the opinion is omitted.

as a fraud upon his associates." The contract in the case now before us operated as a fraud upon Hoffman.

Where an agreement is made which is either contrary to public policy or fraudulent as to third parties, it will not be enforced, although in the particular instance no injury may have resulted. Gibbs v. Smith, 115 Mass. 592.

In the case of Woodruff v. Wentworth, 133 Mass. 309, this court held that the agreement of a stockholder in a private business corporation to vote for a certain person as manager, and to vote to increase the salaries of the officers including that of the manager, was void as against public policy, unless it was consented to by all the stockholders of the corporation.

In the case at bar the agreement of the defendant to vote to dispose of all the assets of the corporation without the knowledge or assent of Hoffman was a corrupt bargain and unlawful, and cannot be availed of by him as a defense to the note. See West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 198, 199, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Northwest Transportation Co., Limited, v. Beatty, 12 App. Cas. 589; Costello v. London General Omnibus Co., 107 L. T. 575.

The exceptions should be sustained, and as substantially all the evidence in the case is before us, and as it appears therefrom that there was no defense to the note, judgment should be entered for the plaintiff under St. 1909, c. 236.

So ordered.[66]

[66] See, also, Timme v. Kopmeier, 162 Wis. 571, 156 N. W. 961, L. R. A. 1916D, 1114 (1916), contract by director of a corporation with its manager to buy the latter's stock at a fixed price whenever the latter should cease to be manager; Guernsey v. Cook, 120 Mass. 501 (1876), same; Kregor v. Hollins (C. A.) 109 L. T. 225 (1913), rule is otherwise, if all the stockholders consent; Thomas v. Matthews, 94 Ohio St. 32, 113 N. E. 669, L. R. A. 1917A, 1068 (1916), payment to a director to influence his action; Moss v. Copelof, 231 Mass. 513, 121 N. E. 508 (1919); West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254 (1890); Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376 (1917); Scripps v. Sweeney, 160 Mich. 161, 125 N. W. 78 (1910).

An agreement between stockholders that the president and directors should be merely nominal or "dummy" officers, the real control being in one stockholder, is illegal. "Clearly the law does not permit the stockholders to create a sterilized board of directors." Manson v. Curtis, 223 N. Y. 313, 119 N. E. 559, Ann. Cas. 1918E, 247 (1918).

A voting trust agreement whereby the stockholders deprive themselves of voting power and confer it upon trustees is not invalid when done for a proper purpose. Clark v. Foster, 98 Wash. 241, 167 Pac. 908 (1917); Ecker v. Kentucky Refining Co., 144 Ky. 264, 138 S. W. 264 (1911).

EBERT v. HASKELL.

(Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 209, 104 N. E. 556.)

Action by Clarence E. Ebert against George D. Haskell. Verdict for defendant, and case reported. Judgment ordered to be entered for defendant on the verdict.

The second count of the declaration was as follows:

"Now comes the plaintiff in the above-entitled action and says that on or about October 1, 1909, having been duly authorized by the trustees of the Young Men's Christian Association of the city of Boston to sell some property situated at that time at the corner of Berkeley and Boylston streets, he offered said property for sale to the defendant and that the defendant promised him that if he, the defendant, could effect a sale of the property to any of his, the defendant's, clients, he would pay the plaintiff one per cent. of the purchase price, provided however, that the plaintiff would promise not to mention to the trustees of the Y. M. C. A. the fact that the defendant was considering a purchase of the property; that the plaintiff did so promise and did faithfully keep said promise. That thereafter the defendants did effect a sale of said property to one of his, the defendant's, clients, whereupon the one per cent. of the purchase price became due and payable to the plaintiff. That although the plaintiff has demanded of the defendant said one per cent. of the purchase price he has utterly failed to pay the same. Wherefore the defendant owes the plaintiff one per cent. of the purchase price of the property with interest. That throughout the whole proceedings heretofore mentioned the plaintiff has fully kept his side of the bargain and all promises made by him, whereas the defendant has broken his promises and has failed to keep his side of the bargain."

SHELDON, J.[67] The plaintiff was not a mere middleman charged with no other duty than that of bringing possible purchasers into communication with the owner of the property. In the second count of his declaration, the only one upon which he relied at the trial, he averred that he had been authorized by the trustees of the Young Men's Christian Association to sell the property, and that he offered it for sale to the defendant. His testimony at the trial, although apparently he sometimes sought to avoid calling himself a broker, was to the same effect. But in legal intendment he described himself always as an agent or broker, and not as a mere middleman. Accordingly he owed to the owner all the duties of a broker employed to sell the property, and not merely those of a middleman who undertakes nothing more than to bring the parties together and leave them to make their own bargains. It follows that such cases as Rupp v. Sampson, 16 Gray, 398, 77 Am. Dec. 416, can give him no comfort.

As such a broker the plaintiff was bound not to put himself in a posi-

[67] Part of the opinion is omitted.

tion antagonistic to the owner's interests. Quinn v. Burton, 195 Mass. 277, 81 N. E. 257. And he could not enforce against any party to the transaction an agreement by which he should pledge himself to conduct inconsistent with this obligation on his part. There was a fiduciary relation between the plaintiff and his principal, the owner of the property, and he was bound, not only to exert his skill and best efforts for the benefit of his principal, but to disclose to the latter all facts material to the transaction which should come to his own knowledge. Young v. Hughes, 32 N. J. Eq. 372; Beury v. Davis, 111 Va. 581, 588, 69 S. E. 1050; Pratt v. Patterson, 112 Pa. 475, 3 Atl. 858; Hobart v. Sherburne. 66 Minn. 171, 68 N. W. 841. He can enforce no agreement relating to the sale of the property, made by him either with his principal or with a third party, by which he undertakes to do anything or to subject himself to the temptation of doing anything inconsistent with the full discharge of his obligations towards his principal. Sullivan v. Tufts, 203 Mass. 155, 89 N. E. 239. The courts will refuse to enforce such a contract, not merely if its avowed purpose is to bring about the doing of unlawful acts, but if by making it and complying with it the plaintiff put himself into a position where there was a strong inducement for him to violate his duty to his principal, where he became subject to a wrong influence to do what might affect injuriously the interests of his principal. Fuller v. Dame, 18 Pick. 472, 481. If this was the case, it is not material whether the principal actually suffered loss or injury. Quinn v. Burton, 195 Mass. 277, 279, 81 N. E. 257, and cases there cited.

The name of the proposed purchaser, or of the firm by which the defendant was employed and which stood in the position of a purchaser, was highly material here, especially in view of the fact that the plaintiff's claim is that the reason for the purchaser's desire to keep this secret was, as the plaintiff was informed, an apprehension that if the name was made known a higher price might be demanded for the property. In this respect the case is unlike Veasey v. Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241. See Pratt v. Patterson, 112 Pa. 475, 479, 3 Atl. 858; Wilkinson v. McCullough, 196 Pa. 205, 46 Atl. 357, 79 Am. St. Rep. 702; Young v. Hughes, 32 N. J. Eq. 372. * * *

Judgment must be entered for the defendant on the verdict.[68]

[68] Contracts to induce an agent, attorney, or trustee to commit a breach of trust: Smith v. David B. Crockett Co., 85 Conn. 282, 82 Atl. 569, 39 L. R. A. (N. S.) 1148 (1912); Spinks v. Davis, 32 Miss. 152 (1856), an attorney agreed for a consideration to become administrator of an estate and then collect a debt due plaintiff from the deceased; Holcomb v. Weaver, 136 Mass. 265 (1884), a contractor promised an agent a commission for having recommended the former to his principal; Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 108 N. Y. Supp. 830 (1908), bribe to agent to induce him to enter into a contract on behalf of his principal; Haymond v. Hyer, 80 W. Va. 594, 92 S. E. 854, L. R. A. 1918B, 1 (1917), contract by an executor for secretly purchasing part of the estate; Greenberg v. Evening Post Ass'n, 91 Conn. 371, 99 Atl. 1037 (1917), bribe paid to cause corrupt award of a prize.

HOSFORD v. ENO.

(Supreme Court of South Dakota, 1918. 41 S. D. 65, 168 N. W. 764, L. R. A. 1918F, 831.)

Action by P. A. Hosford against D. G. Eno. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

McCoy, J. Plaintiff, as an attorney at law, instituted this action to recover from defendant the sum of $400 and interest, under a contract retaining him to act as attorney for defendant. Defendant answered, admitting the contract, but denied that plaintiff had ever rendered him any service as attorney by virtue thereof, and that there had been no consideration for said contract under which plaintiff seeks to recover. Defendant also alleged that said contract was illegal and void as being against public policy, by reason of facts hereafter appearing. There was verdict and judgment in favor of plaintiff, and defendant appeals.

The sole question to be determined in this case is whether the respondent, who was city attorney of Platte, charged with the duty of prosecuting appellant for a violation of the ordinances of said city, might legally accept employment from defendant to represent him in the circuit court, or out of court, on a criminal charge against appellant arising out of the same transaction, upon which was based the prosecution for the violation of the said city ordinances. It is the contention of appellant that it is against public policy and sound legal ethics to permit respondent to accept such services or enter into a contract to perform services for appellant under such circumstances, and that therefore the contract sued upon was void and of no effect. We are of the view, and so hold, that the contention of appellant is right. It appears from the record beyond all question that appellant had been arrested for violating certain ordinances of the city of Platte, and that the respondent then and there held the office of city attorney of that city, and was charged by law with the duty of prosecuting appellant for the violation of said ordinances, and that after the said arrest of appellant, the respondent entered into a contract whereby the respondent agreed, for the sum of $400, to represent and defend appellant, either in or out of the circuit court, against a criminal charge in relation to the same subject-matter and transaction upon which the charge for violating the city ordinances was based; in other words, the respondent by entering into said contract placed himself in the position of attempting to serve two masters at once whose interests were legally hostile to each other.

One of the professional services incident to the office of city attorney is the duty of prosecuting actions brought on behalf of the city for violation of its ordinances. The contract entered into by respondent with appellant was in direct conflict with his duties as city attorney. The rule is rigid, and designed not alone to prevent the

dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. Strong v. Building Association, 183 Ill. 97, 55 N. E. 675, 47 L. R. A. 792. An attorney cannot recover for legal services rendered by him both to plaintiff and defendant concerning the same transaction. A lawyer, under no circumstances, can recover for services rendered to parties having opposing interests growing out of the same circumstances. MacDonald v. Wagner, 5 Mo. App. 56.

Based upon statute, and every consideration of professional ethics, it is generally held by all courts that an attorney that has once been made the recipient of the confidence of a client concerning certain subject-matter is thereafter disqualified from acting for any other party adversely interested in the same subject-matter. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. In the case of In re Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545, a disbarment proceeding, where Cowdery was acting for the city and county of San Francisco, and was charged with the duty of handling certain litigation on the part of said city and county then pending, entered into a contract to defend in such cases after his term of office had expired, the court said: "Proper public policy dictates that one employed by the choice of the people for a stated period in the capacity of an attorney and counsel for the state, or any portion of it, should not be allowed to say that he had received no confidential communications in his official capacity, and therefore he was at liberty to be retained by the adversaries in the same case after his term of office had expired. It would be placing before gentlemen of the bar a temptation to neglect their duties when acting in such public employment which no principle of law justifies. A just public policy forbids it."

In the case at bar the contract was entered into to defend appellant while respondent was still acting as city attorney and before his term of office had expired. A contract of this character might have a tendency to cause the city attorney of Platte to be more lenient and to more readily disregard the legal duties he owed to said city. As city attorney he was presumed to have become acquainted with all the facts upon which the prosecution by the city was based. Hence we are of the view that the contract in question was wholly void as being against public policy.

While having no binding force as a judicial decision or legislative act, but as indicating the general view of members of the bar, we call attention to the following provisions of the "Canons of Ethics," adopted by the American Bar Association and the Bar Association of this state: "It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents

conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The judgment and order appealed from are reversed, and the cause remanded, for further procedure in harmony with this decision.[69]

PITTSBURGH DREDGING & CONSTRUCTION CO. v. MONONGAHELA & WESTERN DREDGING CO.

(Circuit Court of the United States, 1905. 139 Fed. 780.)

BUFFINGTON, District Judge. This is a motion to enter judgment on reserved points in a suit by the Pittsburgh Dredging & Construction Company against the Monongahela & Western Dredging Company, brought to recover one-half the profits earned by defendant on certain dredging done by it. The facts established by the verdict or uncontroverted in the proofs are these: In June, 1904, the Jones & Laughlin Steel Company were required by the United States engineer in charge of the Monongahela river to remove a large body of slag from the shore bed of that stream. In pursuance of this requirement the steel company requested bids from the plaintiff and defendant dredging companies. Thereupon these companies entered into an agreement, followed by a written contract, whereby defendant was to bid $1.60 and plaintiff $1.70 per cubic yard for the dredging required by the government, and, whichever party received the contract, each was to have one-half the work. Bids were made accordingly, the plaintiff's netting from $4,500 to $5,000 in excess of defendant's. The defendant alleged these bids were rejected, that the requirements of the government engineer were changed, and thereupon it bid $1.25 on the changed requirements. It contended this bid was for another and different requirement from that contemplated by the contract, and its bid was not covered by such contract. The finding of the jury, however, established the fact that the bid of the defendant and the work awarded were embraced by the contract referred to, and that the plaintiff tendered performance of one-half thereof. The proofs show the work was actually done by defendant at a cost of 9 cents per cubic yard. The Jones & Laughlin Company knew nothing of the contract between these parties until the work was finished. On the trial a verdict was rendered in favor of the plaintiff for $3,439.50, subject to the questions involved in the defendant's fifth and sixth points, which were, respectively: "That the agreement of June 16. 1904, constituted a conspiracy to defraud the Jones & Laughlin Steel Company, and was illegal and void, and no action can be main-

[69] Kearley v. Thompson, 24 Q. B. D. 742 (1890), attorney received a payment to induce him not to cross-examine a witness; Warner v. Flack, 278 Ill. 303, 116 N. E. 197, 2 A. L. R. 423 (1917), attorney paid to induce him to give his client certain advice.

tained thereon, and the verdict must be for the defendant;" and "that the agreement of June 16, 1904, constituted a combination in restraint of trade, and was illegal and void, and no action can be maintained thereon, and the verdict must be for the defendant." The defendant now moves for judgment thereon.

From the terms of the contract, the fact that it was not disclosed to the Jones & Laughlin Company, and the uncontradicted testimony proved on the part of the plaintiff by Smoot, one of the defendant's officers, who says, "Well, the defendant and the plaintiff —we had a meeting, and we decided we could fix this thing up and make some money out of it, and get a pretty good price, and we made prices on it," it is clear that the purpose of the contract was to mislead the steel company into the belief there was competitive bidding between the two companies, and by this collusive bidding secure the contract for their joint benefit. The plaintiff, then, being driven to the necessity of showing such a contract as the foundation of its right to recover, will the law lend its aid to enforce such an agreement? The answer to this turns on the question whether this is an illegal contract, for, as Lord Kenyon said, "It is a maxim in our law that a plaintiff must show he stands on fair ground when he calls a court of justice to administer relief to him," and to the same effect is the holding of the Supreme Court in McMullen v. Hoffman, 174 U. S. 654, 19 Sup. Ct. 845, 43 L. Ed. 1117, namely: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged right directly springing from such contract." It will be observed that when the law refuses to be used to enforce an unlawful contract it is not done to benefit or aid the party who has profited by the wrong, and who is in possession of the fruits of the fraud, but on the higher ground of public policy. This may result in a wrongdoer profiting by his own wrong, but to transfer the money to the other wrongdoer would equally enable that other to profit by his unlawful act. But assuredly the party who is thus left remediless cannot justly complain, for if, for the purposes of legal relief, the parties are without remedy, they have outlawed themselves, and the law wisely holds aloof, and leaves without its aid those whose deliberate purpose was to transgress its provisions. Nor is it necessary that the objectionable contract actually perpetrate a fraud, or that any wrong should have been done to any one. It is the nature and object of the contract, apart from the fact, whether wrong actually from it results, that bars its enforcement. "The law looks to the general tendency of such contracts. The vice is in the nature of the contract, and it is condemned as belonging to a class which the law will not

the same. Morton, J., rejected this evidence, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

BIGELOW, C. J. The right of the plaintiff to maintain his action on the second count, on proof of the facts therein set forth, was determined at the former hearing of this case. 1 Allen, 262. The only point now raised which was not then considered by the court arises on the evidence offered by the defendant to show that there was an agreement between him and the plaintiff, by which the former agreed to sign the composition deed and procure the release of the other creditors of Richard Frost on a promise by the latter to pay a portion of the debt due from said Richard to the defendant, in addition to the dividend which he might receive under the assignment, in common with the other creditors. That such an agreement would be a fraud on the other creditors, and that the defendant could maintain no action upon it against the plaintiff, is too clear to admit of any doubt. It was a secret and underhand contract by which the defendant secured to himself an advantage over other creditors of the insolvent, while at the same time he was holding out to the same creditors that he was to share in the assets equally with them, and thereby inducing them to sign the composition deed and release the debtor from their claims. Story, Eq. § 378; Cockshott v. Bennett, 2 Term R. 763, 766; Lewis v. Jones, 4 Barn. & C. 511; Case v. Gerrish, 15 Pick. 49. The question then presents itself, whether such a fraudulent agreement can be set up by the defendant, who was a party to it, as a defense to an action by the plaintiff to recover the same share or dividend of the assets of the debtor as has been paid to the other creditors by the defendant. This is in some respects a novel question; but it seems to us to come within principles recognized in the adjudged cases, by the application of which it can be readily solved.

Assuming that the defendant could establish all the facts contained in his offer of proof, it is clear that the plaintiff was a party to the fraudulent agreement by which the signatures of the other creditors to the release of the debtor were obtained. It was by his procurement, and on a promise by him to pay the defendant a portion of his debt beyond the amount which he would receive from the estate of the debtor, and the latter was induced to sign the release and to become the agent in procuring the signatures of the other creditors. It was through the procurement and instrumentality of the plaintiff, and by means of an agreement which operated as a fraud on the other creditors, to which he was a party, and for which he furnished the consideration, that the composition and release were obtained. He was therefore a participator in the fraud. Holding the relation of a creditor, and bound to act with good faith towards the other creditors, in entering into an agreement with them to compound with their debtor and to release him from their debts, he became a party to an agreement by which a secret advantage was attempted to be secured to the

defendant, by which he was induced to become a party to the assignment and release, and thereby to hold out false colors to the other creditors, and lead them to believe that all were acting on equal terms, and to grant a discharge to their debtor on the faith that all were to receive a like portion of their respective debts. To adopt the significant figure which has been used to describe the effect of a transaction of this nature, in Story, Eq. § 378, the plaintiff did not himself act as a decoy duck to mislead the other creditors, but he did that which was quite as effectual in accomplishing the fraud on them; he procured the duck, and placed him in a position in which he was enabled to practice a deception, and to draw the creditors into an arrangement with their debtor to which otherwise they might not have assented.

In this aspect of the case, we do not see that the plaintiff stands in any better situation, or is entitled to any greater favor in a court of law than the defendant. As participators in the fraud, they both stand on an equal footing. Neither can claim to recover anything in an action which can be maintained only by proof of a transaction into any part of which his fraud has entered as an essential element, affecting the rights of any parties interested therein. It is on this ground that it has been held that a creditor cannot recover his share or dividend under a composition deed to which he became a party, if he had previously taken a private agreement for the payment of the residue of the debt. His right to recover the amount to which the fraudulent agreement did not extend is forfeited by his participation in a fraud connected with another part of the same transaction. The whole is regarded as an entire agreement, which is vitiated by the fraudulent act of the party, as to him, so that he can claim no benefit under any of its provisions. Higgins v. Pitt, 4 Exch. 323; Knight v. Hunt, 5 Bing. 432; Howden v. Haigh, 11 Adol. & E. 1033; Fors. Comp. Cr. 152. It is quite immaterial, that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agreement. The fraud consists, not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors. Such an agreement vitiates the whole transaction, so that the party can claim no benefit under a composition into which he entered in consequence of such corrupt or fraudulent contract. It is quite clear, therefore, that the defendant, if he did not stand in the position of assignee having possession of the assets, and were compelled to bring an action for the share or dividend on his debt which might be coming to him in common with the other creditors, could not recover. The agreement into which he entered with the plaintiff would be a bar to his right to recover even that sum

to which the fraudulent agreement did not extend. For a like reason, the plaintiff in this suit ought not to be allowed to recover. The fraud in which he participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate.

It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defense the illegality of a transaction on which a cause of action is founded. Such defenses are allowed, not out of favor to defendants, or to protect them from the effects of their unlawful contracts, but on the ground of public policy, which does not permit courts of justice to be used to aid either party in enforcing contracts which are unlawful or tainted with fraud, but leaves them in the condition in which their illegal or immoral acts have placed them.

We are therefore of opinion that the evidence offered at the trial was competent, and that it should have been admitted and submitted to the jury, with instructions in conformity to the principles above stated.

Exceptions sustained.[71]

[71] All agree that a secret agreement for a preference of one creditor over others, where the debtor is making a composition and the creditors expect to share alike, is a fraud upon the others and is illegal. Mallalieu v. Hodgson, 16 Q. B. 689 (1851); White v. Kuntz, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886 (1887); Cheveront v. Textor, 53 Md. 295 (1879); Brown v. Nealley, 161 Mass. 1, 36 N. E. 464 (1894); Crossley v. Moore, 40 N. J. Law, 27 (1878); Tinker v. Hurst, 70 Mich. 159, 38 N. W. 16, 14 Am. St. Rep. 482 (1888). This is true, even though the secret payment is made by a third person and not out of the debtor's funds. Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150 (1891); Brigham v. La Banque Jacques-Cartier, 30 Can. S. C. 429, 2 B. R. C. 449 (1900).

Hanover Nat. Bank of City of New York v. Blake, 142 N. Y. 404, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607 (1894), differs from Frost v. Gage in holding that the preferred creditor can enforce the composition agreement (although, of course, not the secret preference agreement) against the debtor, the fraud merely causing the composition to be avoidable at the option of the other creditors.

SECTION 9.—CONDUCTING BUSINESS WITHOUT A LICENSE

GRIFFITH v. WELLS.

(Supreme Court of New York, 1846. 3 Denio, 226.)

Griffith sued Wells before a justice of the peace in December, 1843, and declared in assumpsit for two half gallons of whiskey and two glasses of beer, sold and delivered to the defendant, of the value of three shillings and six pence. The plaintiff, who was a grocer, proved his declaration. The defence was, that the plaintiff sold the liquor without having a license to sell spirituous liquors. The justice gave judgment for the plaintiff for 44 cents damages, besides costs. On certiorari, the C. P. reversed the judgment, on the ground that the plaintiff did not show a license to sell spirituous liquors. The plaintiff brings error.

BRONSON, C. J. Our excise law does not in terms, prohibit the sale of strong or spirituous liquors without a license, nor declare the act illegal; but only inflicts a penalty upon the offender. 1 Rev. St. 680, §§ 15, 16. From this it is argued, that although the seller without a license incurs a penalty, the contract of sale is valid, and may be enforced by action. But it was laid down long ago, that "where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful; for it cannot be intended that a statute would inflict a penalty for a lawful act." Bartlett v. Viner, Skin. 322. In the report of the same case in Carthew (page 252), Holt, C. J., said: "A penalty implies a prohibition, though there are no prohibitory words in the statute." Although this was but a dictum, the doctrine has been fully approved. De Begnis v. Armistead, 10 Bing. 107; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Cope v. Rowlands, 2 Mees. & W. 149; Mitchell v. Smith, 1 Bin. 110, 4 Dall. 269, 1 L. Ed. 828; Seidenbender v. Charles, 4 Serg. & R. (Pa.) 159, 8 Am. Dec. 682, per Tilghman, C. J.; Bank v. Merrick, 14 Mass. 322.

When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. Johnson v. Hudson, 11 East, 180; Brown v. Duncan, 10 Barn. & C. 93; Chit. Cont. (Ed. 1842) 419, 697. But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported: Law v. Hodgson, 2 Camp. 147; Brown v. Duncan, 10 Barn. & C. 93; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Adol. 887; Little

v. Poole, 9 Barn. & C. 192; Tyson v. Thomas, McClel. & Y. 119; Wheeler v. Russell, 17 Mass. 258; Bensley v. Bignold, 5 Barn. & Ald. 335; Drury v. Defontaine, 1 Taunt. 136, per. Mansfield, C. J.; Cope v. Rowlands, 2 Mees. & W. 149; Houston v. Mills, 1 Moody & R. 325.

Now I think it quite clear, that in the enactment of our excise law the legislature looked beyond the mere question of revenue, and intended to prevent some of the evils which are so likely to flow from the traffic in spirituous liquors. If revenue alone had been the object, licenses would have been allowed indiscriminately to all. But the statute forbids a license to any one, whether tavern-keeper or grocer, who is not of good moral character; and he must moreover give bond, with sureties, that his house or grocery shall not become disorderly. Sections 6, 7, 13. These regulations were evidently intended to protect the public, in some degree, against the consequences which might be expected to follow from allowing all persons, at their pleasure, to deal in strong liquors. And although the statute only inflicts a penalty for selling withut a license the contract is illegal, and no action will lie to enforce it. The justice was wrong; and his judgment has been properly reversed by the common pleas.

Judgment affirmed.[72]

[72] In the following cases the requirement of a license was held to be for the protection of the public and not for purposes of revenue only, and that contracts made without fulfilling the requirement were illegal and void: In re Reidy's Estate, 164 Mich. 167, 129 N. W. 196 (1910), unlicensed clerk in drug store cannot maintain suit for wages: Bowdoin v. Alabama Chemical Co., 201 Ala. 582, 79 South. 4 (1918). license to sell fertilizers; Zimmerman v. Brown, 30 Idaho, 640, 166 Pac. 924 (1917), sale of unlicensed stallion; Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880 (1889), physician; Tedrick v. Hiner, 61 Ill. 189 (1871), lawyer; Hittson v. Browne, 3 Colo. 304 (1877), lawyer cf. Harland v. Lilienthal, 53 N. Y. 438 [1873], and Brooks v. Volunteer Harbor No. 4 American Ass'n of Masters, Mates & Pilots, 233 Mass. 168, 123 N. E. 511, 4 A. L. R. 1086, and note (1919); Buckley v. Humason, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 42, 36 Am. St. Rep. 637 (1893), broker; Richardson v. Brix, 94 Iowa, 626, 63 N. W. 325 (1895), broker; Goldsmith v. Manufacturers' Liability Ins. Co. of New Jersey, 132 Md. 283, 103 Atl. 627 (1918), insurance broker; Wells v. People ex rel. Daniels, 71 Ill. 532 (1874), public school teacher; Bisbee v. McAllen, 39 Minn. 143, 39 N. W. 299 (1888), goods sold without using weights and measures inspected and approved as required; Cope v. Rowlands, 2 M. & W. 149 (1836), where Baron Parke said: "The question for us now to determine is whether the enactment of the statute is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty, if he does not pay it, or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers? On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is."

In Hunter v. Big Four Auto Co., 162 Ky. 778, 173 S. W. 120, L. R. A. 1915D, 987 (1915), a statute prohibited carrying on business under an assumed name without first recording a statement of the facts; this was held to make void a contract for the sale of goods by one not complying with the statute. Contra: Sagal v. Fylar, 89 Conn. 293, 93 Atl. 1027, L. R. A. 1915E, 747 (1915).

WOOD v. KREPPS et al.

(Supreme Court of California, 1914. 168 Cal. 382, 143 Pac. 691, L. R. A. 1915B, 851.)

Action by Luther B. Wood against J. E. Krepps and another. From a judgment for plaintiff, defendants appeal. Affirmed.

LORIGAN, J. This action was brought to foreclose a chattel mortgage given as security for the payment of a promissory note for $1,000 principal, with interest at 4 per cent. per month, executed by defendants in favor of the plaintiff. The note and mortgage were executed March 7, 1910, and the mortgage was recorded the day following its execution.

The answer of the defendants set up that at the time of the execution of the note and mortgage the plaintiff was engaged in the city of Los Angeles in carrying on the business of pawnbroking and the business of loaning money for himself and others on personal security and on personal property other than carrying on the business of banking, and, as special defenses against the right of plaintiff to recover, alleged: First, that plaintiff did not at the time of the execution of the note and mortgage—March 7, 1910—nor until October, 1911, give to the defendants the memoranda or notice provided for by section 5 of an act of the Legislature defining personal property brokers and regulating their charges and business (Stats. 1909, p. 969); and, second, that plaintiff had not, at the time of the execution of said note and mortgage, procured a license, as required by an ordinance of the city of Los Angeles to authorize him to carry on the business of pawnbroking or the business of loaning money for himself and others upon personal security and upon personal property in which he was engaged. Plaintiff moved to strike out from the answer these special defenses referred to, on the ground that they were immaterial and redundant. The court granted the motion and entered a decree of foreclosure in favor of the plaintiff. Defendants appeal from this decree, insisting that the court erred in striking out the defenses set up in their answer. This is the only point made.

The theory of the defendants in alleging that plaintiff had failed to give them the memorandum or notice of the contents of the note and mortgage and other matters provided for by section 5 of the said act of 1909, at the time the note and mortgage were executed, is that such failure precluded any recovery by plaintiff. But this theory is erroneous. While the section relied on provides that when a loan such as here is made a memorandum or notice of the contents of the note and mortgage and other matters shall be given the mortgagors, it is not made by the statute essential to the validity of the transaction that this shall be done. It is a statutory duty, imposed upon the personal property broker, to be performed by him when the loan is made, but after the instrument taken as security is executed. It is a matter which does not at all enter into the contract between the parties, but is collateral to it. The statute itself provides that as a penalty for failure

to give the memorandum or notice the broker shall be subjected to a fine not exceeding the specified amount. This is the only penalty which the statute imposes. No further penalty is declared, and the contract itself is not in any manner affected by the failure to comply with this provision of the section.

Now as to the ordinance pleaded in the answer. This ordinance, alleged to have been in force on and prior to the making of the note and mortgage, was a general license ordinance of the city of Los Angeles, which declared that it shall be unlawful for any person to commence or carry on any trade, profession, or occupation set forth in the ordinance without having first procured a license to do so; declared that the amount of such license imposed on any occupation mentioned in the ordinance shall be deemed a debt to the city, to be collected by civil action; provided that "every person, firm or corporation engaged in doing or carrying on the business of pawnbroking or the business of loaning money for himself or any other person upon personal security, upon evidences of indebtedness, assignments of salary, salary warrants or demands, or any personal property other than those carrying on the business of banking" shall pay a license of $50 per annum; and further provided that a violation of any of the provisions of the ordinance shall constitute a misdemeanor punishable by fine or imprisonment, or both.

The theory of the appellants upon this branch of the defense pleaded is that, the note and mortgage having been executed at a time when respondent was engaged in the business of a personal property broker as distinguished from that of a pawnbroker without having procured the license required by the ordinance to do so, the note and mortgage given to him were executed in violation of the law, and are void.

It is to be observed in considering this claim of appellants that while they allege in their special defenses that respondent was engaged in the business of pawnbroking and also in the business of loaning money upon personal property as a personal property broker (and the section of the ordinance just quoted fixing a license tax mentions them both). still they are there treated as separate and distinct businesses, and the transaction here involved pertains solely to the business of loaning money on personal property—the personal property brokerage business. In their answer, though not heretofore referred to, appellants set up, in connection with their pleading based on the ordinance, various regulations prescribed by it for the conduct of the business of pawnbroking and the failure of the respondent to conform to them. as well as a failure to have procured a license for carrying on the business of a personal property broker, and cite cases—notably that of Levinson v. Boas, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661—where it is held that the business of pawnbroking is subject to police regulations for the benefit of the public; that it may be suppressed or licensed as a municipality sees fit; that when licensed it may be required to be conducted under rules, regulations, and restrictions; and that if conducted without a license or

without conforming to the regulations imposed, contracts of pledge made in the transaction of such business are rendered void. But here we are not concerned with the business of pawnbroking or the validity of contracts made in disregard of regulations imposed by ordinance for the valid conduct of such business because the contract involved here has no relation to that business. It is one alleged to have been entered into with plaintiff while conducting the business of a personal property broker—loaning money on chattel mortgage—without a license, a legitimate business which neither called for nor was subjected to any regulation under the ordinance.

But considered even with respect to such latter business appellants insist that as the note and mortgage were executed to plaintiff while he was engaged in such business and as part of it in violation of the ordinance which forbade, under penalty, that particular business from being carried on without a license, the note and mortgage are therefore void. The position of counsel for appellants is that where a penalty is fixed in an ordinance for doing business without a license, it amounts to a prohibition against doing such business, and a contract executed in violation of such prohibition cannot be enforced. There are some authorities which sustain this position to the extreme extent which appellants claim, but it is not of general application. Whether the imposition of a penalty under a statute or ordinance is intended to be prohibitory or not is to be determined from a consideration of its nature and terms, and in determining this, certain rules have been established which are generally recognized. The general doctrine now well settled by the authorities is that when the object of the statute or ordinance in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business, or is for the purpose of regulating it for the protection of the public or in the interest of public morals, health, or police, the imposition of the penalty amounts to a prohibition against doing the business without a license, and a contract made by an unlicensed person in violation of the statute or ordinance is void. This was the rule applied in Levinson v. Boas to the pawnbroking contract there involved, and that case fairly illustrates its application. On the other hand, it is equally well settled, though it must be admitted that there are some few authorities to the contrary, that when the object of the statute or ordinance in imposing a license to conduct a harmless and legitimate business is solely for the purpose of yielding a public revenue, and not for the purpose of protection, contracts made in the course of such business are valid, notwithstanding a penalty is imposed for a failure to obtain a license to conduct it. This was the purpose—municipal revenue solely—which the municipality had in view by requiring a license for carrying on the business of loaning money on personal property or the personal property brokerage business in which plaintiff was engaged, and out of which the note and

mortgage here involved arose. There is no law in this state making the business of loaning money on personal property illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. The business itself, however, is not affected. It is neither malum in se nor malum prohibitum. The ordinance does not pretend to prescribe or prohibit the business. Any one may carry it on, the only condition attached to doing so being that the person engaged in it must obtain a license. The only penalty imposed is that if he does not do so, he will not only be subject to a civil action at the instance of the city, but likewise to a penalty in a criminal proceeding for doing business without having obtained it. The carrying on of the business itself is not prohibited; it is only the carrying on of it without a license. The prohibition runs against the person engaged in it without a license, not against the business itself. The ordinance does not declare that a contract, made by any one in the conduct of the various businesses for which licenses are provided to be procured under the ordinances, shall, if a license is not obtained, be invalid; nor is there any provision therein indicating in the slightest that this failure was intended to affect in any degree the right of contract. The primary purpose of the ordinance is to secure revenue by the imposition of license taxes on the several occupations mentioned in it, and not to suppress or to prohibit their being carried on, and while a penalty is, as usual, imposed for failure to obtain the license, this, in the absence of any declaration of a further penalty, is the only one to which the party conducting the business without a license was intended to be subjected. The question of license is essentially one between the city and the person engaging in business within the limits of the municipality. It is not a matter in which third parties are interested. Whatever penalties are imposed upon business delinquencies are in aid of enforcing the rights of the city, and are not intended to operate further so as to defeat contracts between those engaged in business without a license and third parties, or to afford the latter an opportunity of repudiating their indebtedness or acquiring property without paying for it.[73] * * *

Affirmed.[74]

[73] The court here cited, with quotation, Vermont Loan & Trust Co. v. Hoffman et al, 5 Idaho, 376, 49 Pac. 314, 37 L. R. A. 509, 95 Am. St. Rep. 186 (1897); Walker v. Baldwin & Frick et al., 103 Md. 352, 63 Atl. 362 (1906); Ruckman v. Bergholz, 37 N. J. Law, 347 (1875); Toocker v. Duckworth, 107 Mo. App. 231, 80 S. W. 963 (1904); Sunflower Lumber Co. v. Turner Supply Co., 158 Ala. 191, 48 South. 510, 132 Am. St. Rep. 20 (1909); Mandelbaum v. Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433 (1882); Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346 (1871); Lindsey v. Rutherford, 56 Ky. (17 B. Mon.) 245 (1856); Fairly v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215 (1894); Harris v. Runnels, 53 U. S. (12 How.) 79, 13 L. Ed. 901 (1851); Niemeyer et al. v. Wright, 75 Va. 239, 40 Am. Rep. 720 (1881); Aiken v. Blaisdell, 41 Vt. 655 (1869); Elliott on Contracts, vol. 1, § 267; Sutherland, Stat. Const. § 336.

[74] Statutes affixing penalties were similarly construed in Pangborn v. Westlake, 36 Iowa, 546 (1873), penalty for selling city lots without recording

SECTION 10.—CONTRACTS IN AID OR WITH KNOWLEDGE OF ILLEGAL PURPOSE

WAYMELL v. REED et al.

(In the King's Bench, 1794. 5 Term R. 599.)

In assumpsit for goods sold and delivered, the defence was, that the contract was a smuggling transaction. It appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England; and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. A verdict was taken for the plaintiff, subject to be set aside, and a nonsuit entered, if this Court should be of opinion that the plaintiff was not entitled to recover under these circumstances. A rule having been obtained for that purpose,

Erskine and Best shewed cause.

Bower and Garrow, contrâ, were stopped by the Court.

Lord KENYON, C. J.[75] It is not necessary to enquire now, whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in Holman v. Johnson, Cowp. 344, to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord Mansfield, at the end of Holman v. Johnson, comes up to the present case.

Rule absolute.[76]

a plan of the city addition; Harris v. Runnels, 12 How. 79, 13 L. Ed. 901 (1851); Wheeler v. Hawkins, 116 Ind. 515, 520, 19 N. E. 470 (1889); Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188 (1878); Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720 (1881); Ritchie v. Boynton, 114 Mass. 431 (1874); Wood v. Erie Ry. Co., 72 N. Y. 196, 28 Am. Rep. 125 (1878); Gay v. Seibold, 97 N. Y. 472, 49 Am. Rep. 533 (1884); Smith v. Mawhood, 14 M. & W. 452 (1845), license to sell tobacco.

75 Buller and Grose, JJ., concurred.

76 A seller can maintain action for the price, even though he had knowledge that the buyer intended to smuggle the goods into the buyer's country. "There is nothing illegal in merely knowing that the goods he sells are to be

PAUL JONES & CO. v. WILKINS.

(Supreme Court of Tennessee, 1916. 135 Tenn. 146, 185 S. W. 1074, Ann. Cas. 1918B, 977.)

Suit by Paul Jones & Co. against T. B. Wilkins. To review judgment for defendant, plaintiff petitions for certiorari. Writ denied.

WILLIAMS, J. This suit was commenced by Paul Jones & Co., a wholesale liquor concern of Louisville, Ky., to recover the sale price of 35 cases of whisky sold to Wilkins and shipped to Memphis. The defense was based on the ground that the liquor was sold to Wilkins to be by him retailed in Shelby county, in violation of the prohibition laws of this state in force in that city. The trial judge and the Court of Civil Appeals have concurred in a denial of a remedy to plaintiff in the suit; and the cause is before us for review on a petition for certiorari.

The fundamental principles that must govern the controversy are those announced in the case of Bank v. Burke, 135 Tenn. 19, 185 S. W. 704, Ann. Cas. 1918C, 439, at this term of court. That case involved the legality of a contract of lease, but the opinion also discussed contracts of sale.

The general rule is that in case of the sale of intoxicating liquors mere knowledge on the part of the seller that the purchaser intends illegally to resell such liquors will not render the contract void so as to bar the seller's action for the purchase price. Tracy v. Talmage, 14 N. Y. 173, 67 Am. Dec. 132; Anheuser-Busch Brewing Asso. v. Mason, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; Washington Liquors Co. v. Shaw, 38 Wash. 398, 80 Pac. 536, 3 Ann. Cas. 153; Frankel v. Hillier, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265; 9 Cyc. 571.

However, if the seller participates or contributes to the intention of the purchaser to sell in violation of law, or does any act, however slight, to facilitate or in furtherance of the design to transgress, or has an interest therein, the right to recover for the price is lost. The participation in the illegal purpose or act must be in some manner other than the mere act of making the sale. Authorities, supra.

We are of opinion that the facts in this case show such a participation on the part of the plaintiff vendor as to bar him of any remedy. The plaintiff knew through its local solicitor in Memphis that Wilkins was running a "wide-open" retail liquor saloon; the solicitor had bought drinks for himself and others over the bar. The shipment represented by the account in suit was not made to Wilkins as consignee, but to the Lewis Transfer Company for delivery—so agreed in order that the public would not know to whom it was to be delivered. The

disposed of in contravention of the fiscal laws of another country. * * * The distinction is, where he takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels." Pellecat v. Angell, 2 C., M. & R. 311 (1835), following Holman v. Johnson, Cowp. 344 (1775).

cases were not marked with the name of T. B. Wilkins, but with the initials, "T. B. W."

The manager of the vendor company testifies that the shipment to the transfer company as consignee was for the purpose of insuring delivery to Wilkins. We fail to see how that end could have been more safely attained by the marking of the outside of the cases with mere initials, rather than with the name and street address of the purchaser, even though it was desirable thus to use the transfer company.

Where it appeared that the plaintiff, a wholesale liquor dealer, supplied a retailer in another state with intoxicating liquors, and aided the latter by shipping to a fictitious consignee part of the liquors, and by packing other portions so as to conceal their true character, it was held that his account could not be recovered. Kohn v. Melcher (C. C.) 43 Fed. 641, 10 L. R. A. 439; Feineman v. Sachs, 33 Kan. 621, 7 Pac. 222, 52 Am. Rep. 547; Corbin v. Houlehan, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568.

In Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154, it was held that an action by the seller could not be maintained when, at the defendant's request, the plaintiff marked the packages in a peculiar way, omitting the defendant's name so as to enable the defendant with greater facility to save them from seizure.

Particular pertinency is given to these authorities by the fact that we have in this state a statute (Act Extra Session 1913, c. 1) that requires common carriers to cause all consignees of liquors to sign, before delivery of goods, an affidavit setting out his name, address, the fact of consignment to affiant, the use to be made of the liquors, etc. It is manifest that the manipulation resorted to by the plaintiff was to circumvent the object sought to be attained by the Legislature in the passage of this act.

A correct result has been reached in this case. Writ denied.[77]

STANDARD FURNITURE CO v. VAN ALSTINE.

(Supreme Court of Washington, 1900. 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.)

Action by the Standard Furniture Company against Con Van Alstine. From a judgment for defendant, plaintiff appeals. Affirmed.

FULLERTON, J. This is an action brought by the appellant, a domestic corporation, for the recovery of certain furniture and house-furnishing goods. The complaint was, in form, that commonly used in this state for the recovery of personal property in specie. The respondent, who was defendant below, after denying the allegations of

[77] In accord: Johnstown Land Co. v. Brainerd Brewing Co., 142 Minn. 291, 172 N. W. 211 (1919); Hull v. Ruggles, 56 N. Y. 424 (1874).

ownership and right of possession of the property in appellant contained in the complaint, pleaded affirmatively that the appellant claimed title to the property by virtue of a certain agreement in writing by which two certain women purchased the property and agreed to pay appellant therefor, but without further description as to the character of the agreement. He then pleaded the recovery of a judgment by himself against the purchasers named in the agreement, the issuance of an execution thereon, the seizure and sale of the property under the writ of execution, and his purchase of the property and its delivery to him at the execution sale. He pleaded further that the vendees were, at the time of the execution of the written agreement and the delivery of the property by the appellant to them, the keepers of a house of ill fame in the city of Seattle; that the appellant had knowledge at the time the agreement was entered into, and at the time the goods were delivered, that the vendees were the keepers of a house of ill fame, "and that the said goods so delivered, and said written agreement aforesaid, were to aid and enable the said" vendees "to carry on and conduct a house of prostitution; * * * and that any sum remaining unpaid on account of said goods, if any did remain, was to be paid by said" vendees to the appellant "out of the earnings of said house of prostitution."

The appellant, in reply, admitted the judgment, levy, and sale, and that it claimed title by virtue of a conditional contract of sale, but denied the other allegations of the affirmative answer. It then pleaded affirmatively the conditions of the contract under which the sale of the property was made, showing it to be a conditional sale, with "title, ownership, and possession of the property" reserved in itself until the purchase price should be paid, and with the right, also, to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before maturity" of the deferred payments; that the purchase price was to be paid in monthly installments of $150 each, and that title should pass to the vendees when the last installment should be paid. It alleged a breach on the part of the vendees of the conditions of the contract, and that the respondent had refused to perform the same, and its election to declare the contract forfeited. It then alleged, by way of estoppel, that the notice given of the execution sale at which the respondent purchased expressly recited that the property was to be sold subject to the contract of sale between the appellant and its vendees, that the officer conducting the sale orally proclaimed that fact at the time he offered the property for sale, and that the sale was actually so made. At the trial, after the appellant had introduced its evidence and rested its case, the respondent called the president of the appellant, and proceeded to examine him touching the affirmative matter alleged in his answer not admitted by the reply. Before the examination of the witness was concluded, the court announced that the evidence was sufficient to warrant the court in holding that the contract was void as against public policy. He thereupon

refused to permit the appellant to offer proofs on the matter alleged in the reply as an estoppel, took the case from the jury, and entered judgment in favor of the respondent.

It is urged on behalf of the appellant that the evidence before the trial court upon which it based its judgment showed, at most, nothing more than that the appellant, at the time it entered into the contract of conditional sale and delivered the property to the vendees named therein, had knowledge that the vendees intended to put the property to an unlawful use; and that this fact is not sufficient to justify the trial court in its holding that the contract was void as against public policy. It is true that it is held in many well-considered cases, and it is perhaps the weight of authority, that mere knowledge on the part of a vendor of goods that the vendee designs to and will put them to an immoral or illegal use is not of itself sufficient to bar an action brought to recover the purchase price of the goods sold. But in all of the cases announcing this rule which have been brought to our attention the transaction was one in which the owner of the goods at the time of their delivery to the vendee parted with his title and right of possession, so that thereafter the relation between the vendor and vendee was that of debtor and creditor merely, or that of debtor and creditor with a mortgage over to secure the deferred payments of the purchase price. The sale and delivery of the property were complete, and no element of participation or aid in the immoral or illegal design of the vendee could be imputed to the vendor.

On the other hand, it is held by all of the cases—even those which announce the rule contended for by the appellant—that if the vendor has knowledge of the immoral or illegal design of the vendee, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it, the vendor cannot recover. Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Aiken v. Blaisdell, 41 Vt. 665; Schankel v. Moffatt, 53 Ill. App. 382; Ralston v. Boady, 20 Ga. 449; Webster v. Munger, 8 Gray (Mass.) 584; Adams v. Coulliard, 102 Mass. 167; Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, and note to this case in 32 Am. St. Rep. 450; Beach, Mod. Cont. § 457. And there are cases which hold that knowledge on the part of the vendor that the purchaser intends to devote the property purchased to an illegal use will bar a recovery of the purchase price, even though he does no other act than deliver the property to the vendee. It was so held by the supreme court of the United States in Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439, though the court seems to admit that there might be a distinction between the cases where the use to which the property is to be devoted is only malum prohibitum, or of inferior criminality, and the cases where it is to be used in aid of the perpetration of a heinous crime,

such as treason, as was the fact in that case. See, also, Tatum v. Kelley, supra; Milner v. Patton, 49 Ala. 423; Lewis v. Latham, 74 N. C. 283; Bickel v. Sheets, 24 Ind. 1; Steele v. Curle, 4 Dana (Ky.) 381.

Where the sale is absolute, though on credit, the vendee becomes the owner of the property purchased, and has all the rights therein that any owner has over his own property, and he may make such use of it as to him seems fit, without let or hindrance from his vendor. Under an ordinary contract of conditional sale, the law is different. The vendee thereunder, the title being reserved in the vendor, is a mere bailee of the property. If the use of the property be not prescribed in the contract of sale, the purchaser must nevertheless use it for a lawful and proper purpose, and in the way its nature contemplates it should be used, or else suffer a forfeiture of its contract. It is clear that the relation between the parties to the contract in the present case was something more than that of debtor and creditor merely, and it would seem it was something more than an ordinary contract of conditional sale. The appellant not only reserved "title, ownership, and possession of the property," but reserved the right to "take possession of the aforesaid personal property whenever it may deem itself insecure, even before the maturity" of the deferred payments. This practically left the control of the use of the property with the appellant, and, as the evidence shows that it had knowledge of the immoral and illegal use to which the vendees intended to and did put the property, it is hard to conceive why it did not aid and participate in that immoral and illegal use.

The distinction between knowing that a buyer is intending to put the property to some unlawful use, and participating in that unlawful intent, is, to say the least, somewhat refined; and where a vendor, for the mere sake of gain, makes a contract, the effect of which is to put his own property in the hands of persons who will use it to conduct a house of prostitution, knowing it will be so used, the courts ought not to be astute to find nice distinctions which will enable him to avoid the consequences of his acts. It must be borne in mind that at common law it was an indictable offense to keep a house of ill fame, or to let a house knowing it was to be used for the purpose of prostitution (Whart. Cr. Law, § 1459); that in this state these acts are made misdemeanors by statute (Ballinger's Ann. Codes & St. §§ 7239, 7261); and that "any contract auxiliary to the keeping of a bawdy house, or otherwise encouraging prostitution, is void" (Bish. Cont. § 506; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63; Beach, Mod. Cont. § 1443).

We are aware that the appellant, though it admits that it had knowledge at the time it entered into the contract that its vendees were prostitutes, and that the house where they lived and where the goods were

delivered was in a section of the city known as the "Tenderloin District," contends that the evidence fails to show that it had knowledge that the house was kept as a house of ill fame. A perusal of the entire record, however, does not leave this question in doubt. Nor was there such a substantial conflict in the evidence thereon as to compel the trial court to submit the question to the jury.

It is further contended that the trial court erred in refusing to permit the appellant to offer proofs of the matter alleged in the reply by way of estoppel, but in this we find no error. No principle of law is better settled than that a contract prohibited by law or morality is void as against public policy. It is because of the public interest, and not the desire to aid the defendant, that the courts refuse to enforce such a contract, and hence the doctrine of estoppel has no application. Greenh. Pub. Pol. rule 126, and illustrations there given; Beach, Mod. Cont. § 1499; Turnbull v. Farnsworth, 1 Wash. T. 444; Ah Doon v. Smith, 25 Or. 89, 34 Pac. 1093.

The judgment is affirmed.[78]

[78] In Pearce v. Brooks, L. R. 1 Ex. 213, 14 L. T. 288 (1866), the plaintiff sold a brougham to the defendant, knowing that the defendant was a prostitute, who expected to use the brougham in her illegal trade, and that payment would be made out of her illegal gains. It was held that the contract was illegal and void.

In the United States, a contract that is in itself lawful is not made unenforceable by the fact that the plaintiff knew that the defendant had an unlawful purpose ulterior to the contract, if the plaintiff does not share the purpose and aid its execution. Bryson v. Haley, 68 N. H. 337, 38 Atl. 1006 (1895); Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301 (1887); Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446 (1892); s. c., 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355 (1901); Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132 (1856); Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205 (1870). But see Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439 (1870), "heinous crime."

Directly contra to Pearce v. Brooks are: Loose v. Larsen, 40 Nev. 157, 161 Pac. 514, L. R. A. 1917B, 1166 (1916), sale of liquor to house of prostitution; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580 (1890), same; Fineman v. Faulkner, 174 N. C. 13, 93 S. E. 384, L. R. A. 1918A, 337 (1917), sale of Edison machine to prostitute; Luderbach Plumbing Co. v. Stein, 113 Miss. 475, 74 South. 327 (1917), installing electrical fixtures in house of prostitution.

A contract involving future illicit cohabitation is void. Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797 (1892); Boigneres v. Boulon, 54 Cal. 146 (1880); Brown v. Tuttle, 80 Me. 162, 13 Atl. 583 (1888); Ayerst v. Jenkins, 16 Eq. 275 (1872).

An agreement between a married man and a woman to marry as soon as the former shall secure a divorce from his existing wife is illegal. Olson v. Saxton, 86 Or. 670, 169 Pac. 119 (1917); Wilson v. Carnley, [1908] 1 K. B. 729; Noice v. Brown, 38 N. J. Law, 228, 20 Am. Rep. 388 (1876).

ROYS v. JOHNSON et al.

(Supreme Judicial Court of Massachusetts. 1856. 7 Gray, 162.)

METCALF, J. It is agreed by the parties that the plaintiff performed for the defendants the services for which he now seeks to recover payment and that they have not paid him. It is for them, therefore, to show that he is not entitled to recover. This, in our opinion, is not shown by the statement of facts submitted to us. It appears, indeed, from that statement, that the defendants, without a license, set up theatrical exhibitions, in which they employed the plaintiff as an actor; and it follows, of course, that they thereby violated the law, and subjected themselves to punishment. But it does not appear that the plaintiff knew that they had no license. Unless he knew that fact, he is in no legal fault; and where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong, to defeat the rights of a plaintiff who is innocent.

In the cases cited by the defendants' counsel, where defences were sustained because the claims were void for illegality, the parties suing knew, or were bound to know, that they or the parties sued were violating or undertaking to violate the law. And this distinguishes all those cases, as well in law as in common justice, from the case at bar; as was held in Bloxsome v. Williams, 3 Barn. & C. 232. In that case, a suit was brought to recover damages for breach of a warranty of a horse sold to the plaintiff on Sunday. The defence was, that the contract was void within St. 29 Car. II, which prohibits worldly labor, business or work, in the exercise of one's ordinary calling. It appeared that the defendant's ordinary calling was that of a dealer in horses, and therefore, that he had violated the statute by selling and warranting the horse; but that dealing in horses was not the plaintiff's ordinary calling, and therefore, that he had not violated the statute by purchasing the horse and taking a warranty. But, as the case states, there was no evidence that the plaintiff knew that the defendant was by trade a horsedealer at the time the bargain was entered into. The court held that the defendant was answerable for the breach of his contract. Bayley, J., said. "The defendant was the person offending, within the meaning of the statute, by exercising his ordinary calling on the Sunday. He might be thereby deprived of any right to sue upon a contract so illegally made; and upon the same principle any other person knowingly aiding him in a breach of the law, by becoming a party to such a contract, with the knowledge that it was illegal, could not sue upon it. But in this case, the fact that the defendant was a dealer in horses was not known to the plaintiff. He, therefore, has not knowingly concurred in aiding the defendant to offend the law; and that being so, it is not competent to the defendant to set up his own breach of the law as an answer to this action." See report of the same case in 5 Dowl. & R. 82, and a recognition of

the doctrine of that case in Fennell v. Ridler, 8 Dowl. & R. 207, 208, and 5 Barn. & C. 409, and also in Begbie v. Levy, 1 Tyrw. 131, and 1 Cromp. & J. 183.

It is to be noticed that in the case of Bloxsome v. Williams, it was said that it was not known to the plaintiff that the defendant was a dealer in horses, because there was no evidence that he knew it. In the present case, we treat the plaintiff as not knowing that the defendant had no license, because the statement of facts does not show that he knew it.

It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license and were doing unlawful acts.

Judgment for the plaintiff.[79]

[79] In accord: Rosenbaum v. United States Credit System Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449 (1900); Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347 (1880); Emery v. Kempton, 2 Gray (Mass.) 257 (1854); Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Chamberlain v. Beller, 18 N. Y. 115 (1858); Burkholder v. Beetem's Adm'r, 65 Pa. 496 (1870). So where one party to a sale for future delivery intends it as a gambling transaction, but the other party does not, the latter can enforce the contract. Pixley v. Boynton, 79 Ill. 351 (1875); Flowers v. Bush & Witherspoon Co., 254 Fed. 519, 166 C. C. A. 77 (1918). Also where a married man contracts to marry a woman who does not know that he is married, she can maintain suit for breach of promise. Millward v. Littlewood, 5 Ex. 775 (1850).

The innocent party has rights under the contract; but he is also privileged not to perform, and may repudiate on learning of the illegal action or purpose of the other. Church v. Proctor, 66 Fed. 240, 13 C. C. A. 426 (1895); Cowan v. Milbourn, L. R. 2 Ex. 230 (1867).

The Statute may Mark the Criminal.—If the statute is intended for the protection of one class of persons against another, the courts frequently enforce a contract in favor of the former and against the latter, or else create a quasi contractual duty of reimbursement in order to carry out the real purpose of the statute. See Bowditch v. New England Mutual Life Ins. Co., 141 Mass. 292, 4 N. E. 798, 55 Am. St. Rep. 474 (1886); Savings Bank of San Diego County v. Burns, 104 Cal. 473, 38 Pac. 102 (1894); Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132 (1856); Scotten v. State ex rel. Simonton, 51 Ind. 52 (1875); Gray v. Roberts, 2 A. K. Marsh (Ky.) 208, 12 Am. Dec. 383 (1820), suit against a lottery keeper; White v. President, etc., of Franklin Bank, 22 Pick. (Mass.) 181 (1839); Smart v. White, 73 Me. 332, 40 Am. Rep. 356 (1882); McDuffee v. Hayden-Coeur D'Alene Irr. Co., 25 Idaho, 370, 138 Pac. 503 (1913).

Ignorance of the law is no excuse; but if a contract can be performed in a lawful manner it will be enforced, in spite of the fact that the parties expected to perform it in an alternative manner, which, unknown to them, was illegal. Waugh v. Morris, L. R. 8 Q. B. 202 (1873); Favor v. Philbrick, 7 N. H. 326 (1834); Hogston v. Bell, 185 Ind. 536, 112 N. E. 883 (1916).

SECTION 11.—CONTRACTS ILLEGAL IN PART

SULLIVAN v. HORGAN.

(Supreme Court of Rhode Island, 1890. 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110.)

MATTESON, J. This is an action of assumpsit to recover moneys claimed to be due to the plaintiff from the defendant under a contract of hiring. It appears from the evidence reported that the plaintiff was employed by the defendant in his business of a dealer in groceries and liquors, as bar-tender and clerk, from November 27, 1886, until April 19, 1888, and was to receive as wages $18 per month until May 1, 1887, and $25 per month thereafter. At the trial the defendant set up as a defense the illegality of the contract, the sale of liquors being prohibited by law when the contract of hiring was made, and during the period of the plaintiff's employment. The jury returned a verdict for the plaintiff for $187.84. The defendant moves for a new trial, on the ground that the verdict is against the law and the evidence.

The principle that if a contract or promise be founded on a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal, and rejected, the illegality of part vitiates the whole, so that no action can be maintained upon it as a contract, is conceded; but it is suggested that, inasmuch as the contract is illegal and void, and is therefore, as it is contended, a nullity, the plaintiff is entitled to recover for that portion of his services performed as clerk in the grocery part of the business, upon a quantum meruit, what such services were reasonably worth, and therefore that the verdict may be supported. We do not, however, agree with the suggestion. Although a contract thus infected with illegality is regarded in law as a nullity, in so far that the law will not lend its aid to enforce it, it is nevertheless not treated as if it had no existence in fact. The illegality extends to every part of the transaction, and it cannot, therefore, be made the foundation of an assumpsit. Both parties are in pari delicto, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. It may sometimes happen, in consequence, that a defendant may gain a pecuniary benefit by reason of his wrong-doing, or of that in which he has equally participated; but it is not for the sake of the defendant that his objection to his own illegal contract is sustained. In Holman v. Johnson, Cowp. 341, 343, Lord Mansfield remarks: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of

public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or from the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, potior est conditio defendentis."

Bixby v. Moor, 51 N. H. 402, is a case strongly in point. In that case it appears that the defendant kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendant to work generally in and about the saloon. There was no special agreement that he should or should not sell liquor, or what particular duty he should do. But he was accustomed to work generally in and about the saloon, taking care of the room, building fires, taking care of the billiard tables, tending bar, and waiting upon customers, and, in the absence of the defendant, he had the whole charge of the business. In assumpsit, upon a quantum meruit, it was held that he could not recover compensation for any portion of his services. The court say: "In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff at the defendant's request should perform all the services which he did in fact perform, and that the defendant, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services. This entire promise (and the performance thereof) formed an entire consideration for the defendant's promise to pay, and a part of this indivisible consideration was illegal."

In the present case the sums which the defendant promised to pay formed one entire consideration for all the services to be rendered by the plaintiff, both those in tending the bar, which were illegal, and those as clerk in the grocery store, which were legal. Had one price been agreed upon for the services as bar-keeper, and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for the services which were legal; but, as it is, the defendant's promise being entire, and the consideration for it being partly legal and partly illegal and indivisible, both parties are to be regarded as equally in fault, and the law will lend its aid to neither.

Petition granted.[80]

[80] Sometimes a contract is so constructed that it is held to be divisible, the lawful part being enforced. Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837

CHAPTER X

THE STATUTE OF FRAUDS

ST. 29 CAR. II, c. 3 (1677). AN ACT FOR PREVENTION OF FRAUDS AND PERJURIES

Sec. 4. And be it further enacted that from and after the said 24th day of June no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.[1]

(1881), sale of stock in trade and good will for $3,221, including liquors illegally sold, separately valued at $218; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689 (1918), separation agreement for division of property, care of children, and not to contest divorce action; Fishell v. Gray, 60 N. J. Law, 5, 37 Atl. 606 (1897); United States v. Bradley, 10 Pet. 343, 360, 364, 9 L. Ed. 448 (1836); Gelpcke v. Dubuque, 1 Wall. 221, 17 L. Ed. 530 (1863); McCullough v. Virginia, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382 (1898); Osgood v. Bauder, 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655 (1888); Dean v. Emerson, 102 Mass. 480 (1869); Peltz v. Eichele, 62 Mo. 171 (1876); Smith's Appeal, 113 Pa. 579, 6 Atl. 251 (1886); Osgood v. Cent. Vt. R., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930 (1905).

The contract was held indivisible and void as a whole in Johnson v. McMillion, 178 Ky. 707, 199 S. W. 1070, L. R. A. 1918C, 244 (1918), money loaned in part to spirit away a witness; Bixby v. Moor, 51 N. H. 402 (1871); Bishop v. Palmer, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339 (1888); Handy v. St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695 (1889); Ramsey's Estate v. Whitbeck, 183 Ill. 550, 56 N. E. 322 (1900); Saratoga County Bank v. King, 44 N. Y. 87 (1870); Foley v. Speir, 100 N. Y. 552, 3 N. E. 477 (1885); Owens v. Wilkinson, 20 App. D. C. 51 (1902); Sedgwick County v. State, 66 Kan. 634, 72 Pac. 284 (1903); Baines v. Geary, 35 Ch. D. 154 (1887); Baker v. Hedgecock, 39 Ch. D. 520 (1888); Bromley v. Smith, [1909] 2 K. B. 235.

Even though the consideration given by the plaintiff is entire and indivisible, if it is in every respect lawful, the plaintiff can enforce such promises of the defendant as are lawful, even though he made another independent unlawful promise. Erie Ry. Co. v. Union Locomotive & Express Co., 35 N. J. Law, 240 (1871); W. T. Rawleigh Medical Co. v. Walker, 16 Ala. App. 232, 77 South. 70 (1917), one of defendant's promises was in illegal restraint of trade; State ex rel. Laskey v. Board of Education of Perrysburg Tp., 35 Ohio St. 519 (1880).

[1] This section has been re-enacted, with few substantial changes, by the Legislatures of all the states in this country.

Sec. 17. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.[2]

SECTION 1.—CONTRACTS OF GUARANTY

THOMAS v. WELLES.

(Superior Court of Connecticut, 1773. 1 Root, 57.)

Error. Welles was a constable of the town of Hartford, had a rate warrant and a rate against Jacob Brown for which he levied upon Brown's body and was about to commit him to gaol. Thomas, in consideration that Welles would suspend any further proceedings

[2] This section has been re-enacted with some variations in all the American jurisdictions except Alabama, Arizona, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia.

The price is fixed at $30 in Arkansas, Maine, Missouri, and New Jersey; at $33 in New Hampshire; at $40 in Vermont; at $200 in California, Idaho, Montana, and Utah; at any price, however small, in Florida and Iowa; and at $50 in the other jurisdictions in which this section is in force.

The Commissioners on Uniform State Laws have recommended a uniform Sale of Goods Act for the American states. This has been adopted in Arizona, Connecticut, Massachusetts, New Jersey, New York, Ohio, Rhode Island, and some other states. The provisions in this act that correspond to section 17 of the original Statute of Frauds, as adopted in New York (Laws 1911, c. 571 [Consol. Laws, c. 41] § 85), are as follows:

"1. A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

"3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

against Brown that night, assumed and promised that he would see him forthcoming to said officer the next morning, or he would pay the debt. Upon this Welles released said Brown, and Thomas did not see him forthcoming, nor has he paid the debt, &c.

Plea in bar—The statute against frauds and perjuries; demurrer. Judgment—That the plea is insufficient, and for plaintiff to recover.

Error assigned is—That the plea was sufficient. Judgment—Manifest error; for this is clearly a promise for the debt and duty of another.

KANTER v. M. HOFHEIMER & CO., INC.

(Supreme Court of Appeals of Virginia, 1916. 118 Va. 625, 88 S. E. 60.)

Action by M. Hofheimer & Co., Incorporated, against Israel Kanter. There was judgment for plaintiff, and defendant brings error. Affirmed.

WHITTLE, J. From the point of view of a demurrer to the evidence, the essential facts of this case are these: Plaintiff in error, Kanter (who was defendant below), for several years prior to 1912 had been engaged in the retail liquor business in the city of Norfolk, where for some violation of the statute his license was revoked. Thereupon Kanter, in association with his brother-in-law, Kesser, and one Rice, organized and had incorporated the South Norfolk Liquor Company, and through the agency of Rice the corporation obtained from the circuit court of Norfolk county a license to keep an ordinary in South Norfolk, a suburb of the city of Norfolk. Kanter practically owned the entire stock and conducted the business of the corporation as the general manager. While in business in the city of Norfolk he was a customer of the defendant in error, and bought his stock of liquors from that concern. As soon as the corporation was organized and licensed, Kanter approached the secretary and treasurer of M. Hofheimer & Co., Incorporated, for the purpose of establishing trade relations between them and his corporation, and to purchase the opening stock; but the offer was declined, and the secretary and treasurer absolutely refused to do business with the corporation or to sell it goods, but agreed to sell the stock to Kanter as an individual and deliver the goods to the South Norfolk Liquor Company. That proposition was accepted, and the goods (for the price of which the judgment under review against Kanter was recovered) were sold in pursuance of that agreement.

The plaintiff in error seeks to escape liability on two grounds:

1. That the sale was made to the South Norfolk Liquor Company, Incorporated, and that Kanter was not liable therefor under the statute of frauds, because his promise to pay was not in writing.

That issue of fact was submitted to the jury upon correct instruction, and, upon conflicting evidence, having been resolved in favor of

the plaintiff, the finding of the jury is conclusive. Kanter's liability being positive and personal, not contingent and collateral, the transaction was not within the statute of frauds. 2 Va. Law Reg. 465; Hopkins v. Richardson, 9 Grat. (50 Va.) 485; Noyes' Ex'x v. Humphreys, 11 Grat. (52 Va.) 636; Wright v. Smith, 81 Va. 777; Skinker v. Armstrong, 86 Va. 1015, 11 S. E. 977.

2. That if the sale was made to Kanter, with knowledge that the liquor was to be resold by him in violation of the statute, plaintiff could not recover.

That issue was likewise submitted to the jury upon an extremely favorable instruction as to the defendant's contention, and the jury again adopted the theory of the plaintiff that Kanter purchased the goods upon his individual credit for a corporation in which he was a controlling stockholder, and which, under its license, had the lawful right to sell the liquors.

The jury having so found, upon proper instructions and sufficient evidence, and their verdict having been sustained by the trial court, on familiar principles, it cannot be disturbed in this court.

We are of opinion that the judgment should be affirmed.[3]

GRIFFIN v. CUNNINGHAM.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 505, 67 N. E. 660.)

Action by one Griffin against one Cunningham. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Contract to recover for lumber furnished by the plaintiff to one Griffiths, a contractor, for the purpose of making alterations on a house owned by the defendant. Griffin proposed to bring a suit against

[3] Where the sole credit is given to the defendant, his promise is not within the statute of frauds; there is no other debtor for whose default he is promising to answer, and this is true, even though the consideration for the defendant's promise is the delivery of goods to a third person or the rendering of service to him. Lakeman v. Mountstephen, L. R. 7 H. L. 17 (1874); Janvrin v. Powers, 79 N. H. 44, 104 Atl. 252 (1918); Weil v. Centerfit, 201 Ala. 531, 78 South. 885 (1918), doctor cared for defendant's servant; Mackey v. Nickoll, 60 Okl. 12, 158 Pac. 593 (1916); Banfield v. Davidson (Tex. Civ. App.) 201 S. W. 442 (1918); Powell Lumber Co. v. Dalton (Mo. App.) 185 S. W. 530 (1916); Cordray v. James, 19 Ga. App. 156, 91 S. E. 239 (1917); Larson v. Jensen, 53 Mich. 427, 19 N. W. 130 (1884).

If for any reason no other person is bound, the defendant's promise is not within the statute. Mease v. Wagner, 1 McCord (S. C.) 395 (1821), promise to pay for funeral supplies; Fox & Weeks v. Laney, 107 S. C. 318, 92 S. E. 1044 (1917), same; Harlan v. Harlan, 102 Iowa, 701, 72 N. W. 286 (1897). But a promise to guaranty a minor's debt is within the statute. Dexter v. Blanchard, 11 Allen (Mass.) 365 (1865); Scott v. Bryan, 73 N. C. 582 (1875).

Joint Contracts.—No writing is required to bind A., where A. and B. promise jointly to pay for goods delivered to B. (This seems to be due to a fiction of unity as to the two promisors.) Gibbs v. Blanchard, 15 Mich. 292 (1867); Bryant v. Panter, 91 Or. 686, 178 Pac. 989 (1919); Galamba v. Harrisonville Pump & Foundry Co. (Mo. App.) 191 S. W. 1084 (1917).

Griffiths, and the three parties entered into an agreement by which Cunningham promised to pay Griffin the amount of his bill against Griffiths, if Griffiths approved the bill, payments to be made direct to Griffin.

BRALEY, J. If the promise made to the plaintiff by the defendant was nothing more than an oral agreement on his part to pay any balance due Griffiths that remained after a settlement of liens for labor, the undertaking was collateral, as the original debt owed by Griffiths to the plaintiff was not extinguished. And as it is not claimed that the defendant derived any benefit from the arrangement, the statute of frauds on which the defendant relies would be a full defense. Curtis v. Brown, 5 Cush. 488; Manley v. Geagan, 105 Mass. 445; O'Connell v. Mount Holyoke College, 174 Mass. 511, 514, 55 N. E. 460. But there was something more. What the parties agreed to was in dispute. And as the case is before us on a refusal to rule that upon all the evidence the plaintiff could not recover, it becomes necessary to determine whether there was any evidence to sustain the verdict.

The plaintiff puts his case on a substitution of debtors, and his evidence in substance tended to prove that Griffiths, who was owing him a large amount for lumber that had been used in reconstructing a house belonging to the defendant with whom Griffiths had a contract to furnish materials and do the work, agreed that the balance coming to him under the contract should be paid by the defendant to the plaintiff in settlement of his bill for the lumber, and that the defendant, at whose suggestion the arrangement was made, assented to the substitution, and promised to pay the plaintiff the balance remaining due under the contract after the settlement of any liens for labor. Relying on this agreement, and in consequence of it, the plaintiff released Griffiths, his original debtor, and looked to the defendant solely for the payment of his bill. The question is, what was the intention of the parties? and, in order to determine the character of the transaction, all the circumstances are to be considered.

The substitution sought to be accomplished was a change of debtors to the extent of the plaintiff's claim against Griffiths, and it was not necessary that the whole indebtedness of the defendant to Griffiths, if it exceeded the amount of the plaintiff's bill, should have been discharged. But the arrangement between the parties was enough under the evidence in this case to fully discharge the defendant from any liability under the building contract, as there was no contention that the amount due the plaintiff from Griffiths was more than the sum finally paid to him by the defendant in the settlement made between them. There was also evidence from which the jury might find that the original debt of Griffiths to the plaintiff had been discharged, though this follows if mutual consent to the substitution is proved. Walker v. Sherman, 11 Metc. 170. If the claim of the plaintiff against him had been converted into a claim of the plaintiff against the defendant, it is not necessary to consider the transaction as a possible assignment of a

part of, the claim of Griffiths against Cunningham, and that in such a case the plaintiff could have relief only in equity. See James v. Newton, 142 Mass. 366, 374, 8 N. E. 122, 56 Am. Rep. 692; Holbrook v. Payne, 151 Mass. 383, 384, 24 N. E. 210, 21 Am. St. Rep. 456. Under the plaintiff's evidence, the defendant, by accepting the order of Griffiths, who signed it with the understanding that the bill of the plaintiff was to be paid by the defendant, contracted not only to pay the debt. but also, as a part of the transaction, undertook that the debt should be paid to the plaintiff, while the plaintiff at the same time agreed to accept the defendant as his debtor in place of Griffiths. It would not be enough that the defendant accepted the order; he must go further and promise to pay the plaintiff. The consideration for the promise is that the plaintiff, as a part of the completed arrangement, became bound to look solely to the defendant for the money owed him, instead of to Griffiths. If the original debtor did not remain liable, the defendant's promise was not to answer for the debt of another, and it was not within the statute. Furbish v. Goodnow, 98 Mass. 296; Richardson v. Robbins, 124 Mass. 105. For these reasons, the case does not fall within Curtis v. Brown, ubi supra, as argued by the defendant, but is to be governed by Caswell v. Fellows, 110 Mass. 52, 54; Eden v. Chaffee, 160 Mass. 225, 35 N. E. 675; Trudeau v. Poutre, 165 Mass. 81, 42 N. E. 508; and Plummer v. Greenwood, 169 Mass. 584, 48 N. E. 782; and is to be distinguished from the line of decisions in which this court has held that a stranger to a simple contract, and from whom no consideration moves, cannot sue on it, or enforce a promise made to another for his benefit. Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1; Borden v. Boardman, 157 Mass. 410, 32 N. E. 469, and cases cited; Aldrich v. Carpenter, 160 Mass. 166, 35 N. E. 456.

In the case at bar the plaintiff was the promisee, and the contract between him and the defendant gave all the contractual rights provided for his benefit, and had an ample consideration to support it by the release of the original debtor. If there had been no conflict of testimony, and the terms of the alleged substitution of debtors was not in dispute, whether enough had been made out to establish the claimed novation would have been a matter of law for the court. But there were two possible conclusions on the evidence: If the defendant was believed, the plaintiff could not prevail; while if the plaintiff's testimony was accepted as true, a complete substitution had taken place, and the defendant was liable. Obviously it could not be ruled as matter of law that the plaintiff was not entitled to recover; and, as the case was submitted to the jury under instructions not excepted to, the presumption is that they were full and accurate, and the order must be

Exceptions overruled.[4]

[4] In accord: Booth v. Eighmie, 60 N. Y. 238, 19 Am. Rep. 171 (1875); La Duke v. John T. Barbee & Co., 198 Ala. 234, 73 South. 472 (1916); Milovsky v. Shapiro (Sup.) 172 N. Y. Supp. 346 (1918); Meriden Britannia Co. v.

EASTWOOD v. KENYON.

(In the Court of Queen's Bench, 1840. 11 Adol. & E. 438.)

Lord DENMAN, C. J.[5] The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with the case of Buttemere v. Hayes, 5 M. & W. 456, that this defence might be set up under the plea of non assumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.[6] * * *

GUILD & CO. v. CONRAD.

(Court of Appeal. [1894] 2 Q. B. 885.)

LINDLEY, L. J.[7] This case is one of considerable difficulty and very near the line. The question is, what is the nature of the promise which the defendant made to the plaintiff. It appears that the real

Zingsen, 48 N. Y. 247, 8 Am. Rep. 549 (1872); Whitaker v. Greene (R. I.) 103 Atl. 779 (1918); Williams v. Garrison, 21 Ga. App. 44, 93 S. E. 510 (1917); Goodman v. Chase, 1 B. & Ald. 297 (1818).

[5] The statement of facts is omitted and only a part of the opinion is here printed. That part dealing with the validity of past consideration is printed ante, p. 393.

[6] In accord: Landow & Co. v. Gurian, 93 Conn. 576, 107 Atl. 517; Bryant v. Jones, 183 Ky. 298, 209 S. W. 30 (1919); McEwen v. Vollentine (Okl.) 170 Pac. 490 (1918); Dodds v. Spring, 174 Cal. 412, 163 Pac. 351 (1917), assumption of mortgage debt by grantee of mortgagor; McAndrew v. Sowell, 100 Kan. 47, 163 Pac. 658 (1917), same; Moore v. Kirkland, 112 Miss. 55, 72 South. 855 (1916); Meyer v. Hartman, 72 Ill. 442 (1874); Clay Lumber Co. v. Hart's Branch Coal Co., 174 Mich. 613, 140 N. W. 912 (1913); Smart v. Smart, 97 N. Y. 559 (1885); Pike v. Brown, 7 Cush. (Mass.) 133 (1851).

[7] The statement of facts and the concurring opinions of Lopes and Davey, L. JJ., are omitted.

plaintiff, Mr. Binney, is a merchant who was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant; and by a letter of June, 1888, the defendant agreed that, if the plaintiff would give credit to the Demerara firm to the extent of £5000, the defendant would indemnify the plaintiff to that extent. There is no question that that was a guarantee in the proper sense of the term; that is to say, it was an undertaking by the defendant to be responsible for the Demerara firm for £5000. This was in writing; but by a verbal guarantee the amount was enlarged afterwards, in March, 1891, to £6000. The plaintiff claimed that enlarged amount under this verbal guarantee; but the learned judge below has decided this claim in favor of the defendant, and no appeal has been brought in respect of that decision. As time went on, the Demerara firm got overdrawn; and at last, in December, 1891, the plaintiff was so reluctant to accept their bills that he eventually declined to do so; and an interview then took place between the plaintiff and defendant and Wakefield, a member of the Demerara firm. This interview took place on December 31, 1891, when bills of that firm for £5950. were about to become due, but which the plaintiff would not accept; and in the following January a second interview took place in consequence on some further bills to the amount of £5280. One of the difficult points in this case is to find out what took place at those interviews. The promises said to have been made were verbal only. Wakefield, one of the parties present at the interviews, is dead. The testimony of the plaintiff and the defendant upon the subject differ entirely. The plaintiff's version is to the effect that the defendant undertook to indemnify him against those bills if he, the plaintiff, would accept them. The defendant's version is that he did not give any such undertaking; and that was the controversy which was before the jury. The jury has decided that controversy in favour of the plaintiff. They have found, after hearing the evidence, that the defendant is wrong; that he did in fact make a promise to find the funds for both batches of bills, and to indemnify the plaintiff against them. I do not now consider the question of the form of the promise—whether it imposed a primary or a secondary liability. I pass that by for the moment. But the struggle on the main point resulted in favour of the plaintiff. The jury were then discharged, and it was arranged that any other questions which might arise in the case should be left to the judge. The judge then addressed his mind to the question whether the promise found by the jury to have been made by the defendant was in such a shape that the Statute of Frauds rendered it nugatory unless it was in writing, or whether it was such that the Statute of Frauds did not apply to it. The question whether that was brought before the jury seems a little uncertain. The learned judge, having seen the witnesses and read the correspondence, came to the conclusion

BAILEY v. MARSHALL.

(Supreme Court of Pennsylvania, 1896. 174 Pa. 602, 34 Atl. 326.)

DEAN, J. Whether the debt in controversy be that of him who has assumed to pay it, or of another, is in most cases a question of fact. There can be no precise legal definition of liability under the act of 26th of April, 1855 (P. L. 308), which will determine in all cases—perhaps in but very few—the answerability of him who promises to pay. The act says: "No action shall be brought whereby to charge * * * the defendant upon any special promise to answer for the debt or default of another unless the agreement * * * shall be in writing." This is clearly meant to relieve an alleged guarantor or surety. It was never intended to relieve him who had a personal, beneficial interest in the assumption. There cannot be a better construction of this statute than in Nugent v. Wolfe, 111 Pa. St. 480, 4 Atl. 15, where we held (the present chief justice rendering the opinion) that: "It is difficult, if not impossible, to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

Applying these principles to the facts in the case before us, to what conclusion do they impel us? In September, 1892, Mary E. Bailey held a note against Davis Pennock, in the sum of $1,000, with power of attorney to confess judgment. At this time Marshall, the defendant, entered a judgment against Pennock for $5,000, issued execution, and levied on all the real and personal property of Pennock. The amount actually due and payable on his $5,000 judgment did not exceed, as appeared afterwards, from his own statement, $200. The plaintiff was standing there with her judgment ready for entry on which she could immediately issue execution, seize and bid upon the property. Just at this juncture, Marshall, knowing her rights, sent for her, and said, "I will stand by thee, and see thee is paid every cent, if thee says nothing and does nothing." She accepted his proposition,—neither entered

Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000 (1895); Fidelity & Casualty Co. of New York v. Lawler, 64 Minn. 144, 66 N. W. 143 (1896); Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216 (1895); contra: May v. Williams, 61 Miss. 125, 48 Am. Rep. 80 (1883); Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291 (1886); Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823 (1897); Kelsey v. Hibbs, 13 Ohio St. 340 (1862); Posten v. Clem, 201 Ala. 529, 78 South. 883, 1 A. L. R. 381, 383 (1918) (fully annotated).

her judgment, nor took any steps to collect it. The sheriff's sale went on, and Marshall bought the larger part of the real and personal property, and was credited on his purchase with the amount of his own judgment.

We notice by the testimony that Marshall denies the statement of Mrs. Bailey. We express no opinion as to the credibility of the witnesses. The question is, if the jury believed Mrs. Bailey's testimony, would the court have been warranted in granting the compulsory nonsuit on the ground that the promise was to answer for the debt or default of another? What was the leading object of Marshall in making the promise by which he lured her to inaction? Clearly, it was not to pay Pennock's debt, nor Mrs. Bailey's claim. His sole purpose was to silence her as an antagonistic bidder at the sheriff's sale. This was no benefit to Pennock, the debtor. It was an advantage to Marshall, and he reaped the full fruits of it. She was silenced by his promise, and he got the property at his own figure. His leading object was to subserve his own interest. In fact, he had no other object. Having accomplished it, he is now called upon to answer not for Pennock's debt, but for his own; and, if Mrs. Bailey be believed, he ought to pay.

The decree of the court below, entering compulsory nonsuit, is reversed, and procedendo awarded.

WALTHER v. MERRELL.

(St. Louis Court of Appeals, Missouri, 1878. 6 Mo. App. 370.)

BAKEWELL, J. The petition of plaintiff alleged that in March, 1877, and for a long time prior thereto, and after that date, defendant was president of a banking corporation called the Bank of St. Louis, doing a general banking business in St. Louis; that on July 12, 1877, plaintiff had $4,200 on deposit in said bank, which had been received and deposited by him as receiver in a cause then pending; that "on July 14, 1877, having fears as to the solvency of said bank and the safety of the moneys so deposited, he went to said bank for the purpose of withdrawing said funds from the same, as he had a lawful right to do, and as he could and would have done but that said defendant, who was then the president of said bank, and otherwise largely interested in the same as director, stockholder, and depositor, induced plaintiff not to withdraw the same, and promised and agreed with him that if he would not withdraw the same, that he (defendant) would pay plaintiff the total amount of his deposit if said bank should close.

"Plaintiff states that he knew or believed that defendant was solvent, and that he was abundantly able to pay plaintiff said money should said bank close up; and relying on the promise of said defendant as aforesaid, and to accommodate him and comply with his request, he did not withdraw said funds from said bank as he had intend-

ed to do, and but for said promise should have done, but permitted the same to remain in said bank in consequence of the promises.

"Plaintiff further states that thereafter, on the 16th day of July, A. D. 1877, said bank did close up, and has ever since remained closed; that on or about the 20th day of July, A. D. 1877, plaintiff demanded the amount of said deposits from defendant, who then and there promised to pay the same, but failed, and has ever since failed to pay the same to plaintiff.

"Plaintiff states that he has received on account of said deposit from said bank the sum of $2,072.75, and no more; that he has been compelled to and has used his own funds to make good said deposit, and is now discharged as receiver, and said funds and moneys now belong to him; that defendant is therefore indebted to plaintiff in the sum of $2,072.75, with interest from July 20, 1877; for which, with interest, he asks judgment."

The answer of defendant was a general denial. He further answered that the promise set out is within the Statute of Frauds, and that it was not in writing. Plaintiff demurred to the new matter; the demurrer was overruled, and final judgment was entered for defendant, from which plaintiff appeals.

The promise in this case was to pay the debt of another, that existed when the promise was made, and continued to exist after the promise. The statute says that such a promise, unless it be in writing, is void. It by no means follows, however, that this promise, though not in writing, is void; because it is determined by a unanimous course of decisions upon the statute that an oral promise to pay another's debt may in some cases be binding upon the promisor though the debt still exists in full force against the original debtor and in favor of the original creditor. Attempts have been made at various times, by men of great learning and ability, to classify the cases, and to arrange under some general heads those decisions in which it has been held that though there was a promise to pay the debt of another the statute does not apply. The third class of Chancellor Kent in Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317, is "where the promise to pay the debt of another arises out of some new consideration of benefit or harm moving between the newly contracting parties." This class of cases, he says, is not within the statute. Cases where the promise is collateral to the principal contract, but made at the same time, and an essential ground of the original credit, and cases in which the collateral undertaking is subsequent to the creation of the debt, and not the inducement to it, though the subsisting liability is the ground of the promise, are the first and second classes, to which, he says, the statute applies. Chancellor Kent does not expressly say that the consideration in the third class of cases must move to the promisor; but if this be added, then, where the main object of the promisor is not to guarantee the debt, but to benefit himself, such cases have been held,

in a long line of well-considered cases, not to fall within the statute. On the other hand, the great name of Kent, and the general language of his exception, have bred a class of cases that fly in the face of the letter and the spirit of the statute and leave it nothing on which to operate, by holding, as they do, that, if the new promise was supported by any legal consideration, it was not within the law.

The question is not at all whether there was a consideration for defendant's promise. There must always be a consideration to support a promise. That the consideration is coexisting with the promise, and that it moves to the promisor, does not take the case out of the statute; for in all cases where credit is given on the strength of the promise of another to see the debt paid, though this promise forms the consideration for the credit, the contract, if not in writing, is void. Two things are required—a consideration good at common law, and a promise in writing—or the case is within the statute. Consideration alone will not give vitality to a contract to pay another's debt, or the statute has made no change in the law.

The question as to what oral promises are now within the statute has been complicated by a vast number of decisions, which cannot all be reconciled. It has been discussed in this country again and again, by men who have brought to its consideration every quality which can dignify and adorn the bench. The opinion of Chief Justice Shaw, in Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; of Judge Comstock, in Mallory v. Gillett, 21 N. Y. 412; of Judge Sill, in Kingsley v. Balcome, 4 Barb. (N. Y.) 132; of Judge Gray, in Furbish v. Goodnow, 98 Mass. 297; of Chief Justice Poland, in Fullam v. Adams, 37 Vt. 391, together with the essay of Judge Redfield, appended to that opinion, in 4 Am. L. Reg. (N. S.) 473, leave little to be desired by one who wishes to see what has been done to reduce to system the cases on this section of the Statute of Frauds, and to draw from them a rule that may be a guide to future decisions. In some reported cases, the question as to whether or not the oral argument is within the statute is disposed of by saying that the promise is collateral or original, as the case may be, without stating the grounds upon which this conclusion is based; though the question in the case seems to be, what is a collateral and what an original contract. Every contract is original in a certain sense.

A stringent rule is that approved in Kingsley v. Balcome, 4 Barb. (N. Y.) 131, and Fullam v. Adams, 37 Vt. 391; that the undertaking must be considered collateral, and not original, wherever the actual indebtedness is not extinguished, or at least assumed by the new promisor, so that he stands to the creditor as bound to pay the debt as his own; the new promisor holding the original debtor as a surety to him, and the understanding being in no sense collateral to the original debt of another, which must have ceased to exist as an indebted-

ness due to the original creditor, or the case will be within the statute. The opinion of Judge Sill in this case is cited with approval in Bissig v. Britton, 59 Mo. 211, 21 Am. Rep. 379. Not that the rule as above set forth is expressly adopted in that case. Indeed there seem to be cases of exception to the statute to which this rule could hardly be made to apply.

The rule laid down in the Massachusetts cases seems to be this: That where the main object of the promise is a benefit accruing directly to the promisor, and which he did not before enjoy, and the promise to pay the debt of another is a mere incident, then the accidental or incidental fact that the promise includes the answering for the debt of another will not bring it within the statute; but where the main object is to obtain the release of the person or property of the debtor, or other forbearance or other benefit to him, then it is within the statute, though a new consideration moves directly to the promisor. Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Furbish v. Goodnow, 98 Mass. 297. This rule has also been approved in New York, in the case of Mallory v. Gillett, 21 N. Y. 412, in which the cases are carefully examined. If we go beyond such peculiar cases, and except from the statute instances in which the debtor alone is interested, and where the debt still subsists, on the ground that there is a consideration to support the contract, we virtually repeal the statute, and leave the law as it was before the act was passed.

We have turned to the cases in our own Reports cited by counsel. and we are satisfied that none of these cases sanction, and that no Missouri case sanctions, any greater relaxation of the statute than the rule which we have extracted from the Massachusetts Reports and from the New York case just cited. In Hursh v. Byers, 29 Mo. 469, defendant had promised plaintiff, a tavern-keeper, that if he would let Mrs. Acors remove her baggage, he would pay her tavern-bill. The landlord, on the faith of this promise, let the baggage go. The defence was that the promise was within the statute, and void. The Supreme Court does not pass upon the question. It decides in favor of the defendant, on the ground that the tavern-keeper had no lien. But it does not say that if he had had a lien the promise would have been good. According to the English cases, and the best-considered American cases, it would have been within the statute. According to the dissenting opinion in Mallory v. Gillett, the oral promise would have been good. But we think that the cases in which it has been held that the statute does not apply where a creditor holds security for his debt, and surrenders it to the debtor upon the promise of a third person to be answerable for the debt, arose upon the misapprehension of the facts of the case, and of the language of Lord Mansfield in Williams v. Leper, 3 Burr. 1886, which was a case in which the security was surrendered really to the party making the promise as trustee for certain creditors. Where the promisor gets the security into his hands, in

a case of this kind, the case is universally held not to be within the statute. And in Vermont it is said, in Fullam v. Adams, quoted above, that no case is sound where it has been held that an oral promise to pay the debt of another is binding, unless the promisor held in his hands property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon the obligation or duty growing out of the receipt of such fund.

In Besshears v. Rowe, 46 Mo. 502, Rowe had sold real estate to one Brown, subject to a judgment in favor of Besshears, and it was agreed between the three men, before the sale, that plaintiff's judgment should be released; that Brown should pay the purchase-money, less the judgment, and should pay the judgment directly to plaintiff. The agreement was held not to be within the statute, because the debt became by the agreement the debt of Rowe. It also ceased to be the debt of Brown. This case was not only within the Massachusetts rule, but within the more stringent one approved in Kingsley v. Balcome.

In Barker v. Scudder, 56 Mo. 272, Barker sold to Scudder, and in part payment took notes of Able, who was insolvent when his note matured. The purchaser guaranteed the notes. It was held that his promise, though oral, was not within the statute. The principle involved here runs through a great number of cases. It has always been held that they are not within the intent of the law. The new and distinct consideration, independent of the debt of the maker, moving directly to the promisor, and being itself the main transaction, takes them out of the statute, within the meaning of Chancellor Kent's exception as interpreted in Mallory v. Gillett and the Massachusetts cases cited above. In these cases the promise to pay the debt existing to the promisor, and transferred to the promisee at the time the promise is made. The promise is not made to the party to whom the debt is owing (Eastwood v. Kenyon, 11 Ad. & E. 438), and the consideration originates in a new and independent dealing between the promisor and the creditor, the undertaking to answer the debt of another being a mere incident of the transaction. As the note is transferred, the indebtedness to the original creditor is gone, and he can look to the debtor merely as a surety for himself in case he has to take up the note when due. The case comes within a well-known class of cases excepted from the operation of the statute, and noted in the third class of exceptions in Mallory v. Gillett. The real substance of the promise here is to pay an obligation of the party making it, though its payment results in the payment of the debt of another. "The rule," says Judge Wagner (46 Mo. 503), "rests on solid ground, that when one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute."

In Glenn v. Lehnen, 54 Mo. 45, the court says that if plaintiff delivered the goods on the faith of defendant's promise to be responsible as a surety for the purchaser, the promise is void unless in writing. And in Holt v. Dollarhide, 61 Mo. 433, Rice executed a note to McCloud, which McCloud assigned to plaintiff. Rice then sold a lot to Dollarhide, and directed him to pay the purchase-money to plaintiff, which Dollarhide agreed to do. The court says that defendant did not by this assume to answer for the debt of another, but undertook to pay his own debt. This is also clearly within the meaning of Chancellor Kent's exception as interpreted both in Massachusetts and in Mallory v. Gillett, and is one of a well-known class of cases held to be outside of the statute; though it has been strenuously contended that both such cases and that of which Barker v. Scudder, is an example, and which are both manifestly promises to pay the debt of another in a merely formal sense, ought to be brought within the statute as being within the scope and meaning of the law.

In the case at bar, the promise was to pay the debt of another. Merrell was certainly not the bank. The promise was clearly collateral. Merrell was to pay the deposit to plaintiff if the bank should close; the indebtedness of the bank existed when the promise was made, and still subsisted. Here was no distinctly new consideration moving directly to the promisor, and substantial, so as to be a clearly sufficient motive for the transaction. The main object was forbearance to the bank and any benefit to the promisor was merely incidental. It is true, defendant was an officer and shareholder of the bank, and might be benefited by the action of plaintiff in leaving the deposit; but that is not enough. A good illustration of the consideration which takes the case out of the statute, as making the new contract the main thing and the promise to pay the debt of another a mere incident, is one of the earlier English cases, Tomlinson v. Gill, Amb. 330, cited in Mallory v. Gillett. There, Gill promised the widow that if she would allow him to administer he would pay all debts of the estate. Here it was held that this was a promise to make the estate produce the debts, in consideration of being allowed to administer. It was a purchase of that privilege, and the debts of the estate became the debt of Gill. Or the case of a factor who gets an increased commission to insure collections or guarantee the sales. There, the factor gets possession of the goods. His object in making the agreement is not the interest of the debtor at all. He makes an independent agreement, solely for his own benefit, that if the goods are delivered to him he will be answerable for the price.

The case made by the petition, on the other hand, seems to be just one of those which the statute was mainly designed to meet, where words of recommendation or of encouragement to forbearance may be exaggerated or misunderstood, and represented as positive contracts, against the intention of the alleged guarantor, and where the law re-

quires the most satisfactory evidence as to the precise language of the promise.

The judgment of the Circuit Court is affirmed. All the judges concur.[9]

[9] In accord: Harburg India Rubber Co. v. Martin, [1902] 1 K. B. 778; Trustees of Free Schools in Andover v. Flint, 13 Metc. (Mass.) 539 (1847); Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912B, 218 (1910); Carleton v. Floyd, Rounds & Co., 192 Mass. 204, 78 N. E. 126 (1906); First Nat. Bank v. Gaddis, 31 Wash. 596, 72 Pac. 460 (1903); Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618 (1909); Richardson Press v. Albright, 224 N. Y. 497, 121 N. E. 362, 8 A. L. R. 1198, and note (1918).

A promise to pay the debt of a third person to the promisee is not within the statute, if the payment is to be out of funds of property of the third person in the promisor's hands. Dock v. Boyd, 93 Pa. 92 (1880); Belknap v. Bender, 75 N. Y. 446, 31 Am. Rep. 476 (1878); Fairbanks Morse & Co. v. Tafel, 159 Ky. 602, 167 S. W. 887 (1914); Cincinnati Traction Co. v. Cole, 258 Fed. 169 (1919); Armstrong v. First Nat. Bank (Mo. App.) 196 S. W. 562 (1919); First Nat Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895). See Ames' Cases on Suretyship, 42.

Where the promisor receives a consideration of positive benefit to himself, this constituting the actual moving cause of his promise, as well as the conventional equivalent therefor, his promise is not within the statute, even though performance thereof will also incidentally discharge the debt of another. To determine "the actual moving cause" is no easier in the law of contracts than in the law of torts. In the following cases the promise was held to create an independent duty, and not to be within the statute: Prime v. Koehler, 77 N. Y. 91 (1879), grantee of mortgaged premises promises to pay the mortgage if mortgagee will forbear to foreclose it; Johnson v. Huffaker, 99 Kan. 466, 162 Pac. 1150, L. R. A. 1917D, 872 (1917), same; Manning v. Anthony, 208 Mass. 399, 94 N. E. 466, 32 L. R. A. (N. S.) 1179 (1911), same; Raabe v. Squier, 148 N. Y. 81, 42 N. E. 516 (1895), owner of building promises to pay subcontractor if he will continue to furnish material to contractor —but see contra Rand v. Mather, 11 Cush. (Mass.) 1, 59 Am. Dec. 131 (1853); Clifford v. Luhring, 69 Ill. 401 (1873), same; Cincinnati Traction Co. v. Cole, 258 Fed. 169, 169 C. C. A. 237 (1919), same; Bennington Lumber Co. v. Attaway, 58 Okl. 229, 158 Pac. 566 (1916), same; Wells & Morris v. Brown, 67 Wash. 351, 121 Pac. 828, Ann. Cas. 1913D, 317 (1912), same; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826 (1891), promise to pay for past services rendered for another as part compensation for future service to the promisor; Cuttill v. Harrington, 185 Iowa, 537, 170 N. W. 778 (1919), same

A promise of a del credere agent to make good any loss arising to the principal from sales or other contracts, is not within the statute. Wolff v. Koppel, 5 Hill (N. Y.) 458 (1843); Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282 (1828); Davys v. Buswell, [1913] 2 K. B. 47; Couturier v. Hastie, 8 Ex. 40 (1852).

A contract to insure an employer against loss from the dishonesty of employees is not taken out of the statute by the fact that a premium is paid. Commonwealth v. Hinson, 143 Ky. 428, 136 S. W. 912, L. R. A. 1917B, 139, Ann. Cas. 1912D, 291 (1911). Contra: Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co., 142 Minn. 428, 172 N. W. 693 (1919).

SMITH v. MOTT.

(Supreme Court of California, 1888. 76 Cal. 171, 18 Pac. 260.)

Replevin by George G. Smith to recover a piano pledged by his wife for a loan to her of $200 from defendant, J. H. Mott. Judgment for defendant, and plaintiff appeals.

HAYNE, C. Replevin for a piano. The plaintiff was the owner of the piano. His wife pledged it without his knowledge or consent, to secure a loan to her from the defendant. When the plaintiff learned of the whereabouts of the piano, he went to the defendant, and, after being informed of the position of affairs, made a parol promise to pay the interest and storage within a few days and the principal in three or four months, if the defendant would wait that time, which the defendant agreed to do and did do. The court below sustained the validity of the pledge on the theory that there was a ratification. It is probably not technically correct to speak of a "ratification" where the transaction was by one who neither was nor assumed to be an agent, but who acted on her own account. And it may be conceded that the parol promise of the plaintiff to pay the debt was within the statute of frauds, and void, so far as his personal liability to pay was concerned. See Crooks v. Tully, 50 Cal. 255. But we think that what occurred amounted to an agreement between the parties that the property should remain in pledge for the wife's debt. This agreement was collateral to, and distinct from, the contract to pay, and was not required to be in writing. Jones, Pledges, § 5; Civil Code, § 2986. The property being already in possession of the defendant, no redelivery to him was necessary. Jones, Pledges, § 36. And the agreement for forbearance of the wife's debt was sufficient consideration. 1 Pars. Cont. *443. We therefore advise that the order denying the motion for new trial be affirmed.

We concur. BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed.[10]

[10] In Thompson v. Hazelwood Savings & Trust Co., 234 Pa. 452, 83 Atl. 284 (1912), the plaintiff deposited $10,000 with the defendant and agreed in consideration of the defendant's renewing the note of a third person not to withdraw the deposit until the note should be paid. This was held to be a pledge of the money as collateral, executed by the actual deposit, and not within the statute of frauds. Contra: Jones v. Citizens' State Bank, 103 Kan. 297, 173 Pac. 977 (1918).

RIBOCK v. CANNER et al.

(Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 5, 105 N. E. 462.)

Action by Israel Ribock against Carl Canner and another. There was a verdict for plaintiff, and defendants excepted. Exceptions sustained, and judgment entered for defendants.

SHELDON, J. The plaintiff had begun to do work upon three houses which Hoffman and Pottick (hereinafter called the builders) were erecting in Chelsea; and for this work the builders by a written contract had promised to pay the plaintiff the sum of $5,150. The defendants had taken from the builders a construction mortgage upon the property for more than $13,000, which sum they were to advance to the builders in installments as the work progressed. When only a small part of his work had been done, the plaintiff became suspicious of the financial responsibility of the builders, and refused to go on unless they would give him a written order upon the defendants to pay him for his work out of the advances to be made by the defendants on the mortgage. The builders gave him such an order, and he presented it to the defendant Canner for acceptance. Canner refused to accept the order, but in substance, according to the testimony of the plaintiff, which must have been followed by the jury, told the plaintiff "to go ahead with the job" and he would pay him the money; that the plaintiff should have "nothing to do with them builders," but that, whenever the plaintiff was "ready by his paper" to come up with a notice, and he would give the plaintiff a check. This plainly meant that when money became due to the plaintiff by his contract with the builders, Canner would pay him whatever was so due. There was not by any fair construction of the language used a new and independent agreement between Canner and the plaintiff that the plaintiff should go on and do the work upon Canner's credit and that Canner should pay for it, as in Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, and other cases relied on by the plaintiff. On the contrary, the contract between the plaintiff and the builders remained in full force; the amounts to become due to the plaintiff were fixed by that contract; and the liability of the builders to the plaintiff was wholly unaffected. Canner's promise was merely a verbal promise to pay to the plaintiff what should become due to him from the builders, and as such came within the statute of frauds. R. L., c. 74, § 1, cl. 2. That defense was set up in the answer. It was a bar to any action upon the promise, even though it could be found that there was a valuable consideration therefor. Tileston v. Nettleton, 6 Pick. 509; Loomis v. Newhall, 15 Pick. 159, 169; Ames v. Foster, 106 Mass. 400, 8 Am. Rep. 343; O'Connell v. Mt. Holyoke College, 174 Mass. 511, 513, 55 N. E. 460; Miles v. Driscoll, 201 Mass. 318, 87 N. E. 579.

The payments made afterwards from time to time by Canner to the

plaintiff in part performance of his verbal promise have no bearing upon this question.

As Canner's promise will not support any action, we need not consider whether the other defendant in any event could have been held thereon.

The case appears to have been fully tried. It comes within the terms of St. 1909, c. 236. The defendants' exceptions must be sustained, and judgment must be entered in their favor.

So ordered.

SECTION 2.—CONTRACTS IN CONSIDERATION OF MARRIAGE

DIENST v. DIENST.

(Supreme Court of Michigan, 1913. 175 Mich. 724, 141 N. W. 591.)

Action by Anna Emily Josephine Jannasch Shortt Dienst against Andrew Dienst. From an order and decree sustaining a demurrer to defendant's cross-bill, he appeals. Affirmed.

McAlvay, J.[11] Complainant filed her bill of complaint against defendant, praying for divorce on the ground of extreme cruelty. Defendant appeared and filed an answer to said bill of complaint, coupled with a cross-bill, wherein he set up a verbal antenuptial contract, by which it is claimed that she agreed to make provision for him after the marriage by executing a will of all her property in his favor in case he survived her. The relief prayed for in said cross-bill is that complainant produce and file such will, which is claimed to have been made soon after the marriage, and that it be declared binding as a settlement of the property rights of the parties; that in case the will has been destroyed by her she be required to make and execute a duplicate thereof; that in case she refuses so to do within the period of five days after decree, the decree stand in the place and stead of said will and be final; that the rights and interest of defendant in said property be declared fixed, binding, and vested; that complainant be enjoined from disposing of any of her property except in accordance with the agreement claimed, and for general relief. He does not pray for a decree of divorce. Issue was joined by a replication to the answer.

A general demurrer was interposed by complainant to the cross-bill of defendant on the ground of want of equity for several reasons, the chief of which was that the claimed antenuptial contract was within the statute of frauds. This provision of the statute reads: "Every

[11] Part of the opinion is omitted.

agreement, promise or undertaking, made upon consideration of marriage, except the mutual promises to marry, shall be void unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, signed by the party to be charged therewith." Section 9515, subd. 3, C. L. 1897. * * *

A very brief statement of the circumstances which brought about the marriage between these parties will be made. It appears that in November, 1908, a correspondence between them was begun, the initial letter having been written by complainant. Both were subscribers to the publication of a marriage brokerage called "The Correspondent," in which complainant discovered an attractive description of defendant. Complainant was of the age of 62 years and defendant 66 years. Both had been previously married, and each had been widowed by death. She was possessed of an estate, real and personal, in her own right, of between sixty and seventy thousand dollars. Defendant was penniless. A lurid correspondence, thus begun between the parties, of which we are furnished only that of complainant, appears as exhibits to his cross-bill (he modestly withholding his contributions to the same), and within a few months culminated in their engagement, which was speedily followed by a marriage, growing out of which this litigation, to sever the marital relations between them, naturally followed.

Counsel for defendant apparently appreciates and admits that if the agreement sought to be enforced was made and entered into upon consideration of marriage, not having been reduced to writing, it is void under the statute of frauds. However, he contends that the agreement relied upon by him was "not made upon consideration of marriage"; that the agreement was that if defendant would give up his home and employment and abandon prospective political preferment, come to Kalamazoo, marry, and reside with complainant and not return to Kansas, she would not only support him, but would make a will as already stated. It appears, however, that the only agreement which defendant charges in his cross-bill was entered into by complainant, and which he avers he relied upon, is the agreement set forth in the excerpt from his cross-bill above quoted, to the effect that she *"then and there, as a further consideration for the consummation of such engagement of marriage promised and agreed* that she would, immediately after their said marriage, make such provision that the said defendant would come into possession and ownership of all of her said property upon her death." That this was the inducement appears from his averment as follows: "And that thereupon immediately thereafter, relying upon such representations, promises, and agreements on the part of the said plaintiff, and in consideration thereof, he gave up and abandoned his employment, position, and prospects, * * * which he then and there had, and immediately proposed marriage to the said complainant," which pro-

posal complainant immediately accepted. It is clear to us that this claimed agreement and undertaking between these parties was made upon consideration of marriage, and was within the prohibition of the statute of frauds. It was therefore void and not enforceable.

The other questions discussed in the briefs of the parties do not require consideration.

The order and decree of the circuit court in sustaining the demurrer of complainant is affirmed, and the cross-bill is dismissed, with costs of both courts to complainant. The cause will be remanded, and will proceed in due course.[12]

MALLORY'S ADM'R v. MALLORY'S ADM'R et al.

(Court of Appeals of Kentucky, 1891. 92 Ky. 316, 17 S. W. 737.)

Action by C. L. Mallory's administrator against A. W. Mallory's administrator and others to recover personal property. Judgment for defendants. Plaintiff appeals. Reversed.

BENNETT, J.[13] A. W. Mallory, the appellee's intestate, was a widower with children, and C. L. Mallory, the appellant's intestate, was a widow with one child, a son. Both of these persons owned property, and married each other. The husband, the appellee's intestate, died, and in a few days thereafter, and before the personal property that the statute gives to the widow, and which is to be set apart to her, was set apart, C. L. Mallory, wife of A. W. Mallory, and the appellant's intestate, died. This suit was instituted by appellant's administrator to recover of the appellee, as administrator, the value of the said personal property, the same not having been set apart, and was, or some of it, on hand at the death of A. W. Mallory, but disposed of by the appellee. The contention of appellee is that, as there was an antenuptial contract between C. L. and A. W. Mallory, that entitled each to retain the title of his and her property, and dispose of the same as though no marriage had taken place, C. L. Mallory was not entitled to the property that the statute directs to be set

[12] In accord: Hunt v. Hunt, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306 (1902); White v. Bigelow, 154 Mass. 593, 28 N. E. 904 (1891); Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305 (1893); Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363 (1875); London v. G. L. Anderson Brass Works, 197 Ala. 16, 72 South. 359; Day v. Roby, 77 N. H. 144, 89 Atl. 305 (1913); Barlow v. Barlow, 233 Mass. 468, 124 N. E. 285 (1919).

An engagement to marry is not within the statute as a contract in consideration of marriage. Coggins v. Cannon, 112 S. C. 225, 99 S. E. 823 (1919); Short v. Stotts, 58 Ind. 29 (1877); Blackburn v. Mann, 85 Ill. 222 (1877); Harrison v. Cage, 1 Ld. Raym. 387 (1698). But if the promise to marry is by its terms not to be performed within one year it is unenforceable. Derby v. Phelps, 2 N. H. 515 (1822); Paris v. Strong, 51 Ind. 339 (1875); Barge v. Haslam, 63 Neb. 296, 88 N. W. 516 (1901); Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443 (1868). Contra: Brick v. Gunnar, 36 Hun (N. Y.) 52 (1885); Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385 (1900).

[13] Part of the opinion is omitted.

apart to the widow upon the death of her husband. It is not alleged that the antenuptial contract was in writing; and as (Gen. St. 1888) chapter 22, § 1, requires contracts in consideration of marriage to be in writing, if the contract relied upon comes within said provision, it was necessary to allege that the contract was in writing; and the answer, because of not alleging that fact, is not sufficient. Besides, the proof fails to show that the contract was in writing. Does the alleged contract come within said provision? It seems that the question has been settled and put beyond dispute by this court in the case of Potts v. Merrit, 14 B. Mon. 406. That case, like this, was a case of verbal and antenuptial contract, and the Revised Statutes, then in force, had the same provision, as to requiring the antenuptial contract to be in writing, as the General Statutes, supra; and this court held that the contract was not enforceable, in law or in equity, unless it was in writing. An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relation, and make a law in that regard to suit themselves; and consideration for the contract is the agreement to marry each other, which must be consummated, else the consideration fails. So the contract clearly comes within the provision, supra, requiring contracts in consideration of marriage to be in writing. If they are not in writing, no action can be maintained on them, and, in a case like this, such contract is no defense to an action by the widow or her representative to enforce her marital rights. * * *

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

SECTION 3.—CONTRACTS FOR THE SALE OF LAND

ESTABROOK v. WILCOX.

(Supreme Judicial Court of Massachusetts, 1917. 226 Mass. 156, 115 N. E. 233.)

Action by Francis S. Estabrook against William G. Wilcox. Judgment for plaintiff, and defendant brings exceptions. Exceptions sustained, and judgment directed to be entered for defendant.

LORING, J. This is an action by which the plaintiff seeks to recover damages for breach of an oral agreement to lay out and construct a street on the defendant's land for the use of the plaintiff as grantee in a deed executed by the defendant. The defense set up was the statute of frauds.

The plaintiff relies upon Cole v. Hadley, 162 Mass. 579, 39 N. E. 279, Drew v. Wiswall, 183 Mass. 554, 67 N. E. 666, and Durkin v.

Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436. But in those cases the right to have a street laid out over the defendant's land was created in writing. In those cases the deed to the plaintiff referred to a plan to show the land conveyed and on that plan a street was shown on which the premises conveyed abutted. That is to say: in those cases the right to have a street laid out over the defendant's land (that is to say the right to an easement over the defendant's land) was created by an instrument in writing. In the case at bar the only way in which the plaintiff undertook to make out that he had an easement over the defendant's land was by the oral contract. To this the fourth section of the statute of frauds (re-enacted in this commonwealth in R. L. c. 74, § 1, cl. 4) is a defense. Where the plaintiff makes out a right to a street over the defendant's land by deed or by any other writing and then relies on a contract on the defendant's part to do the physical work necessary to construct the street and make the paper street into a real street he has a right of action on that contract although that contract was made by word of mouth. That was the point decided in the three cases on which the plaintiff relies where the whole matter is fully explained.

It follows that the exceptions must be sustained. And we are of opinion that acting under St. 1909, c. 236, § 1, we should direct judgment to be entered for the defendant. It is

So ordered.[14]

HOUSTON v. FARLEY et al.

(Supreme Court of Georgia, 1917. 146 Ga. 822, 92 S. E. 635.)

Suit by W. R. Houston against L. F. Farley and others. Judgment for defendants dismissing the petition on demurrer, and plaintiff brings error. Affirmed.

W. R. Houston and L. F. Farley entered into a verbal contract that Farley was to attend an administrator's sale and purchase thereat a described lot of land if it should sell for less than $2,000, and, if the land was purchased, to take title to himself and execute to Houston a bond conditioned to make or cause to be made to him good and sufficient title to the property purchased upon his compliance with certain conditions, namely, the payment in cash of the sum of $100 and the giving of his notes to Farley for the balance due, as follows: $100 in 12 months, and the balance to become due two years from the date of the contract of purchase; the deferred payments bearing interest at the rate of 8 per cent. per annum. The property was purchased by Farley for $1,441, and the administrator made a deed to him. On the next day, Houston tendered to Farley $100 in cash, and offered to deliver

[14] Other easement cases are Heyman v. Biggs, 223 N. Y. 118, 119 N. E. 243 (1918); Popham v. Eggleston (Tex. Civ. App.) 193 S. W. 181 (1917); Callan v. Walters (Tex. Civ. App.) 190 S. W. 829 (1916).

his promissory notes in accordance with the stipulations of the contract, and demanded a bond for title in compliance with their contract. Farley refused to execute a bond for title, and thereafter sold the property to one Andrews, who was alleged to have purchased with the full knowledge of Houston's right. Upon these allegations, Houston prays specific performance of the parol contract with Farley against the defendants. The court dismissed the petition on demurrer.

Evans, P. J. (after stating the facts as above). A ground of the demurrer raises the point that the oral contract of which specific performance is sought is within the statute of frauds. The plaintiff contends that the statute does not apply to a case as alleged in the petition. He bases such contention on the dictum of the first headnote in the case of Chastain v. Smith, 30 Ga. 96, that: "Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the statute of frauds; resulting trusts being expressly excepted from the operation of the statute."

In discussing this ruling, Bleckley, C. J., said in Roughton v. Rawlings, 88 Ga. 819, 16 S. E. 89: "But the facts in Chastain v. Smith did not require the court to determine whether there was a resulting trust or not. * * * Strike this fact out of the case, and there would have been a very different question before the court from that on which the decision could be upheld with this fact in it. The case itself was decided correctly, but the reason suggested in the first headnote is not applicable to the facts as a whole, nor sustainable."

There is a clear distinction between cases where equity will enforce a trust at the instance of a principal against his agent who, being commissioned to buy a piece of property, does buy it and takes title in his own name, and cases where a trust results solely by operation of law. In the former case the agent will be compelled to transfer to the principal the benefit of his contract, upon repayment of the purchase money and necessary expenses. Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898 (6). A resulting trust which arises solely from the payment of the purchase price is not created unless the purchase money is paid either before or at the time of the purchase. Hall v. Edwards, 140 Ga. 765, 79 S. E. 852. When the person who sets up a resulting trust has in fact paid no part of the purchase money, he will not be allowed, under the statute of frauds, to show by parol that the purchase was made for his benefit. No resulting trust can arise from the payment of money after the purchase has been completed. The plaintiff is not contending that the defendant was to purchase the property in the plaintiff's name, but that the defendant, having purchased the land, would sell it to him on credit according to stipulated terms. Such a contract is within the statute of frauds, which requires every contract for the sale of lands or any interest in or con-

tered adverse criticism from high authority (Benj. Sales [Ed. 1892] § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day (Conn.) 476; Erskine v. Plummer, 7 Me. (7 Greenl.) 447, 22 Am. Dec. 216; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. (Ky.) 340; Byassee v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited, (Marshall v. Green, 1 C. P. Div. 35,) the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale.

These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, (Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373), holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 62 Am. Dec. 68; 1 Denio (N. Y.) 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Bowers v. Bowers, 95 Pa. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. 467; Knox v. Haralson, 2 Tenn. Ch. 232.

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs

of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

Judgment affirmed.[16]

WETKOPSKY v. NEW HAVEN GAS LIGHT CO.

(Supreme Court of Errors of Connecticut, 1914. 88 Conn. 1, 90 Atl. 30, Ann. Cas. 1916D, 968.)

Action by Sylvester Wetkopsky against the New Haven Gas Light Company. From a judgment as of nonsuit, plaintiff appeals. Judgment set aside, and new trial ordered.

The complaint alleges that the defendant on March 27, 1912, being the owner of a dwelling house situated at No. 44 Mill street, in New Haven, which it desired to dispose of and have removed, sold the same

[16] In accord: Green v. Armstrong, 1 Denio (N. Y.) 550 (1845); Carnahan v. Terrall Bros., 137 Ark. 407, 209 S. W. 64 (1919): La Plant v. Loveland, 142 Minn. 89, 170 N. W. 920 (1919); Johnson v. Broughton, 183 Ky. 628, 210 S. W. 455 (1919); Miller v. Smith, 202 Ala. 449, 80 South. 833; Baucom v. Pioneer Land Co., 148 Ga. 633, 97 S. E. 671 (1918); Davis v. Harris, 178 N. C. 24, 100 S. E. 111 (1919).

Marshall v. Green, 1 C. P. D. 35 (1875), holds that a contract for the sale of standing trees to be cut by the buyer and removed in a short period is not a contract for the sale of an interest in land. This seems to hold that the test is the intention of the parties and not the physical character of the thing sold or its status in the law of property. See Williston, Sales, §§ 61-67, Bennett, Sales of Standing Trees, 8 Harv. L. Rev. 367.

Crops planted annually are treated as personalty. Northern v. State ex rel. Lathrop, 1 Ind. 113 (1848); Whitmarsh v. Walker, 1 Metc. (Mass.) 313 (1840); Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591 (1874); Sainsbury v. Matthews, 4 M. & W. 343 (1838).

A sale of growing grass, to be cut and removed by the buyer, was held within section 4 of the statute in Carrington v. Roots, 2 M. & W. 248 (1837).

to the plaintiff (who then owned a lot on the opposite side of the street to which he intended to remove it), for a good and valuable consideration then paid; that the defendant had knowledge of the purpose for which the plaintiff purchased the house; and that the defendant afterwards refused to permit the plaintiff to remove or take possession of the house or to deliver the same to him. The answer denied the allegation that the defendant sold the house to the plaintiff or had knowledge that he intended to remove it across the street to his lot, admitted that the defendant owned the house and the land upon which it stood, and alleged that, being about to construct a tank upon the lot, and it being necessary to the progress of such work that the house should be removed from the lot not later than April 2d, the defendant agreed with the plaintiff on March 27th that for the sum of $40, which was then paid by the plaintiff, he might have the materials of which the house was constructed, if he would tear it down and entirely remove the materials from the premises on or before the night of April 2d and that on the following day the plaintiff repudiated this agreement and told the defendant that he did not intend to tear down the house and would not do so, but intended to remove it in its entirety, and that the defendant thereupon, after the plaintiff had again stated that he would not tear down the house, tendered him back the $40 and notified him that the agreement was rescinded, and the defendant afterwards tore down the house and removed the materials. The reply denied the allegations that there was an agreement to tear down the house.

Upon the trial the plaintiff introduced in evidence two writings which read as follows:

"March 27, 1912. Received of Sylvester Wetkopsky five dollars, deposit on house No. 44 Mill St. Balance of $35^{00}/_{100}$ to be paid on or before April 1, 1912. New Haven Gas Light Company, J. B. Byrne."

"3:30 p. m., March 27, 1912. Received of Sylvester Wetkopsky thirty-five dollars, balance on house No. 44 Mill St. $35^{00}/_{100}$. New Haven Gas Light Company, J. B. Byrne."

He also offered to prove by parol evidence the terms of the contract between the parties. This evidence, upon objection that the contract was within the statute of frauds, was excluded. The appeal assigns as error the action of the court in excluding this evidence, in holding that the above writings were not sufficient memoranda to satisfy the statute of frauds, and in holding that the contract alleged was within the statute.

THAYER, J. The only question which has been argued before us in this case is whether, under the allegations of the complaint, the plaintiff could prove a parol contract for the sale of the dwelling house therein described.

The defendant's counsel in their brief have suggested, without seriously urging the matter that the complaint treats the contract as

one of purchase and sale. We think that it may also be construed as alleging a contract to sell and a breach of the contract by the defendant; the subject-matter being a dwelling house. The complaint describes the dwelling house as "situated at No. 44 Mill street," and it appears from the finding that the plaintiff offered evidence tending to prove that it was a two-story, seven-room house "on a lot of the defendant" across the street from a lot belonging to the plaintiff. It does not appear, either in allegation or proof, that the house was permanently attached to the realty, or that it was not so detached from it as to be a mere chattel. But it appears from the finding that the trial court in making its rulings assumed that the house was attached to the soil, and in this court both parties have argued the case upon the same assumption. We shall assume, therefore, that it was, at the time of the alleged contract, attached to the real estate in the manner in which such dwelling houses are ordinarily affixed to the soil and belonged to the defendant as the owner of the soil.

The plaintiff claims that the sale of a house to be immediately removed from the land on which it stands, and to which it is affixed, is a sale of personal property, and not of an interest in real estate, and so is not within the section of the statute of frauds which prevents the maintenance of an action upon agreements for the sale of real estate, unless the same shall be in writing.

Browne, in his first edition, after reviewing the early cases relating to this section of the statute as bearing upon sales of fixtures, buildings, standing trees, growing crops, etc., attached to the soil, drew therefrom the general rule that: "If the contract when executed is to convey to the purchaser a mere chattel, though it may be in the interim a part of the realty, it is not affected by the statute." Browne, Statute of Frauds (1st Ed.) § 249. Benjamin, after quoting with approval the language of Lord Blackburn, from his work on Sales, lays down the rule: "that an agreement to transfer the property in anything attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is transferred to the purchaser, is an agreement for the sale of goods, an executory agreement." Benjamin on Sales, vol. 1, § 133. Williston says: "If the contract is to sell and deliver a house, even though the house is, at the time, affixed to the realty, it is a contract for the sale of goods, for the parties contract to buy and sell a house separated from the realty and moved from its foundations. On the other hand, if the parties attempt to make a present transfer of a building or materials fixed in a building, it is evident that they are attempting to make a sale of realty, even though it is also agreed that the subject-matter of the sale shall be severed in a short time." Williston on Sales, § 66.

The Supreme Court of Massachusetts, speaking in a case where the contract related to growing trees, said: "It may be difficult in many cases to determine, from the terms of the contract, whether the parties

intend to grant a present estate in the trees while growing or only a right, either definite or unlimited as to time, to enter and cut with title to the property when it becomes a chattel. If the former be the true construction, then it comes within the statute, and must be in writing; if the latter then, though wholly oral, it may be enforced." White v. Foster, 102 Mass. 375, 378. There is great conflict in the decisions, but this is the rule in England and in many of our sister states. Shaw v. Carbrey, 95 Mass. (13 Allen) 462; Douglass v. Shumway, 79 Mass. (13 Gray) 498, 502; Claflin v. Carpenter, 45 Mass. (4 Metc.) 580, 583, 38 Am. Dec. 381; Erskine v. Plummer, 7 Me. (7 Greenl.) 447, 451, 22 Am. Dec. 216; Davis v. Emery, 61 Me. 140, 142, 14 Am. Rep. 553; Banton v. Shorey, 77 Me. 48, 51; Fish v. Capwell, 18 R. I. 667, 670, 29 Atl. 840, 25 L. R. A. 159, 49 Am. St. Rep. 807; Sterling v. Baldwin, 42 Vt. 306, 311; Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749; Byassee v. Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; Long v. White, 42 Ohio St. 59, 60; Slocum v. Seymour, 36 N. J. Law, 139, 141, 13 Am. Rep. 432. This is the rule early adopted in this state. Bostwick v. Leach, 3 Day, 476, 484. We think notwithstanding the numerous opposing authorities, that this is the better rule.

Counsel for the defendant attempted to distinguish cases of contract to sell millstones or other fixtures attached to the realty and belonging to the owner thereof, as was the case in Bostwick v. Leach, or a case of contract to sell the boards and brick of which a building is composed, where the vendee is to remove the millstones in the one case and to tear down the building and remove the materials of which it is constructed in the other, from a contract to sell an entire building to be severed and removed by the vendee. We see no difference in principle between the cases. The brick and materials of which a building is composed are, before the destruction of the building, a part of the realty as much as the entire building is before its severance; indeed, they constitute the building. If a vendor contracts to sell a building entire or to sell the materials of which it is composed and to sever the building from the land or tear it down and deliver the materials, it will hardly be claimed that in either case a sale of land or any interest therein is contemplated, or that an action could not be maintained for a breach of the contract, because the intent of the parties in either case to contract with respect to a mere chattel is apparent.

Where the intent to sell a building as a chattel is thus apparent from the contract and circumstances attending it, the severance may be made by the vendee. Mashall v. Green, L. R. 1 C. P. Div. 35, 40. The fact that the vendee is to remove the building is important only as bearing upon the intent of the parties in determining whether the title to the building is to pass at once or only after severance from the realty. When the parties to the contract have in contemplation the sale of a building or a tree as a chattel, when it shall be detached from the land,

there is no good reason why a court should not give effect to the contract as the parties understood and intended it. In such a case neither party intends that any interest in the real estate shall pass. The very purpose of the contract may be to rid the land of such tree or building. Until detached from the land, the thing contracted to be sold would remain a part of the realty, and a conveyance of the realty to a third party would carry it to the purchaser.

The implied license to enter and sever the chattel, if this was to be done by the vendee, would be revoked by such conveyance of the land, and the vendee's remedy must be against the vendor for breach of the contract.

Growing crops, fructus industriales, are an exception to the rule, and may be sold and the title pass to the purchaser before severance from the soil.

In the case before us the complaint alleges that the defendant owned the dwelling house in question which it desired to have removed from its lot, and that the plaintiff purchased it with the purpose of removing it across the street to his own lot. The defendant denies this, and by the answer alleges that the contract was that for the $40 paid the plaintiff was to have the materials of which the house was constructed if he would tear down the house and entirely remove the materials. This is denied in the reply. As already intimated, we think that the allegations of the complaint are sufficient to permit proof of an executory contract for the sale of the house as well as a contract of bargain and sale. The parties were at issue as to what the contract was; the plaintiff claiming that it was for the sale of the house severed from the land, the defendant that it was for the sale of the materials of which the house was constructed if the plaintiff would tear it down and remove them.

The two receipts which were in evidence were not sufficient memoranda of any contract to satisfy the statute. They did not show any sale, present or prospective of the house, and would apply as well to money received on a lease as on a sale of the house. But the plaintiff was entitled to show that the contract was as he claimed for the sale of the house as a chattel after severance from the soil, and there was error in excluding the evidence offered for this purpose.

There is error; the judgment is set aside; and a new trial ordered. All concur.[17]

[17] In accord: Long v. White, 42 Ohio St. 59 (1884). Contra, if title is to pass before severance: Lavery v. Pursell, 39 Ch. D. 508 (1888). A sale of tenant's fixtures is regarded as a sale of a mere "right to sever," and not of an interest in land. Hallen v. Runder, 1 Cr., M. & R. 266 (1834); Lee v. Gaskell, 1 Q. B. D. 700 (1876). See Williston, Sales, § 65.

ZWICKER v. GARDNER.

(Supreme Judicial Court of Massachusetts, 1912. 213 Mass. 95, 99 N. E. 949, 42 L. R. A. [N. S.] 1160.)

Action by Sam Zwicker against Edwin S. Gardner, executor. Finding for plaintiff, and defendant brings exceptions. Exceptions overruled.

MORTON, J. The plaintiff mortgaged certain premises to the defendant. The defendant instituted foreclosure proceedings and the plaintiff alleges that the defendant agreed that if he, the plaintiff, would not bid at the foreclosure sale or procure other persons to bid, he, the defendant, would bid the premises in and sell them at private sale and pay over to the plaintiff any balance that remained after deducting the mortgage, interest and expenses. The plaintiff alleges that he refrained from bidding or procuring others to bid at the foreclosure sale, and the defendant bid the premises in and afterwards sold them at private sale for a sum in excess of the mortgage, interest and expenses. This is an action to recover such excess. The case was sent to an auditor, who found the facts to be as alleged by the plaintiff, and was heard by the court without a jury upon the auditor's report. The court ruled and found in favor of the plaintiff. The case is here on exceptions by the defendant to the refusal of the court to rule as requested by the defendant that the contract was within the statute of frauds and the plaintiff could not recover. It was agreed that the contract, if there was one, was not in writing, and that there was no note or memorandum thereof in writing signed by the defendant's testator, or by any one by him thereunto lawfully authorized.

We think that the ruling and finding of the court were right. This is not an action to enforce an oral contract for the sale of land or an interest in or concerning the same. The land has been sold and nothing remains to be done except for the defendant to account for and pay over the excess. That part of the contract is separable from the rest of the contract and the rest of the contract having been performed there is no reason why this part of it should not be enforced. And to that effect see the cases which we cite. Trowbridge v. Wetherbee, 11 Allen, 361; Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Page v. Monks, 5 Gray, 492. The case of Kennerson v. Nash, 208 Mass. 393, 94 N. E. 475, cited by the defendant, is entirely different from the case before us. It is not necessary to consider whether, if the contract did come within the statute of frauds, it would have been taken out of the statute by part performance.

Exceptions overruled.

MAGUIRE v. KIESEL.

(Supreme Court of Errors of Connecticut, 1913. 86 Conn. 453, 85 Atl. 689.)

Action by Charles F. Maguire against E. Kiesel to recover damages for breach of an oral contract respecting real estate. From a judgment for plaintiff assessing his damages at $1,100, defendant appeals. Affirmed.

The following facts are established by the finding of facts and the finding of the issues in favor of the plaintiff:

About January 1, 1911, the plaintiff and defendant entered into an oral agreement to share equally in the profits that should be made from the purchase of a lot of land, the building and rental of a house thereon, and the sale thereof, if an opportunity to sell should be had. No time limit was placed upon the continuation of the agreement, but it might have been fully performed within one year. It was a part of the agreement that the defendant should have the title of the land conveyed to himself and the plaintiff jointly. Each party undertook to do certain things to carry out the agreement and necessary to complete the transaction. The plaintiff agreed to pay one-half of the price of the lot, to wit, $1,200, render or cause to be rendered certain services in connection with the enterprise, and contribute $900 toward the cost of erection of the building which was to cost $7,800. The defendant was to contribute $600 in money toward the purchase of the lot, his services as builder or contractor, and also $900 toward the cost of the building, and, in addition, pay any excess in the cost of the building over $7,800. The plaintiff performed or caused to be performed at his expense the services which he undertook to render, and either did or offered to do, and was at all times able and willing to do all the other things required of him to be performed under the terms of the contract. The defendant purchased the lot, taking title in his own name, and paying the entire purchase price, although plaintiff stood ready and willing to contribute his share thereof. The same day he conveyed the property to his wife, in whose name it has stood ever since. Thereafter the defendant stated to the plaintiff that he had procured the money for the purchase of the lot from his wife, and that, when the building had proceeded, he would turn over the plaintiff's share to him upon the plaintiff paying his share of the money. This explanation satisfied the plaintiff. Thereafter, in pursuance of the partnership agreement between them, the plaintiff and defendant agreed to erect a six-family house upon said lot. The defendant subsequently refused to allow the plaintiff to contribute the $900 agreed upon, although he offered to do so, and repudiated the agreement, and then and ever since has refused to abide by it. A building was erected upon the land by defendant, pursuant to and in substantial accordance with the plans and specifications agreed to by the plaintiff, which was com-

pleted and ready for occupancy August 1, 1911. The rental profit of the building was estimated by the parties to be and in fact was at the rate of $800 per year. The value of the property at the time of the completion of the property was and remained $1,500 more than its cost. The allegation of the complaint was that "the plaintiff entered into an agreement by parol whereby they were to purchase real estate jointly and construct a building thereon and to share in the profits arising therefrom."

PRENTICE, J.[18] (after stating the facts as above). The plaintiff sues to recover for damages alleged to have been suffered by him from the breach of an agreement between himself and the defendant for the conduct of a joint enterprise, and for services claimed to have been rendered and expenses incurred by him in compliance with the terms of the agreement and in aid of the joint undertaking, the benefit of which has been appropriated by the defendant as a consequence of his wrongful conduct in the breach of the agreement. The agreement which is thus made the basis of recovery was an oral one, and is found to have been one "to share equally in the profits that should be made from the purchase of a lot of land, the building of a house thereon and the sale thereof, if an opportunity to sell should be had." Four of the reasons of appeal charge the trial court with error in the rendition of its judgment upon the ground that the agreement was not actionable by reason of two provisions of the statute of frauds. In the brief and argument the only provision of the statute relied upon is that which makes nonactionable any agreement not in writing "for the sale of real estate or any interest in or concerning it." General Statutes, § 1089. * * *

The agreement was not within the operation of the statute. The statute "contemplates only a transfer of lands or some interest therein." Bostwick v. Leach, 3 Day, 476, 484; Hall v. Solomon, 61 Conn. 476, 483, 23 Atl. 876, 29 Am. St. Rep. 218. The subject-matter of the agreement was not land or any interest therein. It was a fund of money representing profits from a joint enterprise in the nature of a partnership. Bunnel v. Taintor, 4 Conn. 568, 573. This enterprise, to be sure, was one which contemplated and involved a real estate transaction, and the fund to be divided was to be derived from that source. But that touching which the agreement was made, and in which by reason of the agreement the plaintiff claims an interest, was the fund. Bunnel v. Taintor, supra, presented a situation strikingly similar in its details to the present, and having the same essential features, and we there held that the contract was not within the statute, 4 Conn. 568, 573. The overwhelming weight of authority in other jurisdictions is to the same effect, that an agreement for a joint enterprise in the nature of a copartnership which has for its purpose the purchase, im-

[18] Parts of the opinion are omitted.

provement, and sale of real estate for the profit arising therefrom to be divided among the joint undertakers as among partners, and which does not undertake to operate upon the ownership of or title to the realty, or anything annexed thereto as a part or parcel of it and transferable alone by deed, is not within the statute. Dale v. Hamilton, 5 Hare, 382; Chester v. Dickerson, 54 N. Y. 1, 8, 13 Am. Rep. 550; Bates v. Babcock, 95 Cal. 479, 484, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; Eaton v. Graham, 104 Ill. App. 296; Bruce v. Hastings, 41 Vt. 380, 98 Am. Dec. 592; Richards v. Grinnell, 63 Iowa, 44, 54, 18 N. W. 668, 50 Am. Rep. 727; Fountain v. Menard, 53 Minn. 443, 445, 55 N. W. 601, 39 Am. St. Rep. 617; Jones v. Davies, 60 Kan. 309, 314, 56 Pac. 484, 72 Am. St. Rep. 354; Dudley v. Littlefield, 21 Me. 418, 422; Howell v. Kelly, 149 Pa. 473, 475, 24 Atl. 224. * * * [19]

LECOMTE et al. v. TOUDOUZE et al.

(Supreme Court of Texas, 1891. 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870.)

FISHER, J. (Section B).[20] This is an action of trespass to try title and for damages brought by appellants against appellees to recover a strip of land lying between the farms of the parties; and for rents and profits, and damages for timber destroyed, in the sum of $650; and praying for an injunction to stay waste, etc. * * *

This brings us to the consideration of the facts with reference to the agreed boundary. Witness Locke, county surveyor of Bexar county, testifies that about March 21, 1884, Leon Lecomte, one of the plaintiffs, requested him to run a division line between him and Toudouze. He at first declined to do so, because, as he told Lecomte, there had been a row between Lecomte and Toudouze, and they had refused to let his deputy run the line. Whereupon Lecomte replied that they had agreed among themselves, and they simply wanted Locke to go down and run the line, and handed to witness a note to this effect from Toudouze. Locke went out in a few days to run the line, and found Lecomte and Toudouze at the house of the latter. They stated to the witness that they had settled all their differences, and had agreed on how he should run the line. They went out to run the line, and he started to begin at a point lower down the river than a certain pecan tree, whereupon Lecomte showed him a certain

[19] In accord: Fitch v. King, 279 Ill. 62, 116 N. E. 624 (1917); Bird v. Wilcox, 104 Kan. 709, 180 Pac. 774 (1919); Hammel v. Feigh, 143 Minn. 115, 173 N. W. 570 (1919); Thompson v. Hurson, 201 Mich. 685, 167 N. W. 926 (1918); Thompson v. McKee, 43 Okl. 243, 142 Pac. 755, L. R. A. 1915A, 521, note (1914); Bates v. Babcock, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. 133 (1892).

[20] Part of the opinion is omitted.

tree to commence from, and he ran from that tree parallel with the main line of the De Luna survey to where it intersected the Corpus Christi road. To continue on this line would have taken some of Lecomte's improvements. The parties then told him that they had agreed to run around the improvements, and he ran the line so as to leave Lecomte his improvements. They all appeared to be perfectly satisfied, and when he set the last peg at the end of the line he asked both Lecomte and Toudouze if they were satisfied with the line as run, and they replied, "Yes." When the witness was surveying the line the parties showed him where they agreed to put the line, and he ran it as directed.

Witnesses De Heimel and Neilly and defendant Gustave Toudouze testified the same, in substance, as witness Locke as to the agreed line. Toudouze further testified that, a few days before Locke made the survey, Octavia Lecomte, plaintiff, came to his house, and requested him to go with her to her house, and have an agreement with her husband and herself, settling all differences between them about the boundary line. He agreed to go, and, as they walked along to her house, they passed across the land in dispute, and she said: "Father, we have determined to give you back your land, but you see we have made improvements on some across the Corpus Christi road, and it will be hard on us to lose them." "I told her we would run the line from the river until it reached the road, and then we would turn the line along the road so as to leave them their improvements. She said this was perfectly satisfactory, and thanked me for the concession. When we arrived at the house we had a talk with Leon Lecomte, and there agreed upon how the line should be run, without however, at that time going over the line, and agreed that we would at once send for Locke to come out and survey and mark it out. I proposed to send my son for him, and Lecomte said no, he would go, but that I had also better send a note, so Locke would be sure to come. Lecomte wrote the note for me, and carried it to Locke. In a few days Locke came out and ran the line as testified to by him, so as to leave the Lecomtes their improvements [as he and witness had agreed] with them. Lecomte was along when the line was being run, and agreed to it; and they both expressed themselves as satisfied. In a few days Lecomte moved his fence back from the land in dispute, and put it along the Corpus Christi road on the line as surveyed by Locke, to where the survey stopped." Witness at once built his fence along the line agreed upon from the river to the Corpus Christi road. While he was building the fence the plaintiffs were both at home, and knew what was going on, and made no objection.

This agreement was made in March, 1884, and the fences remained as they were put by the parties immediately after the agreement, and it seems from the evidence, the land remained in possession of each party, respectively, up to the fence. The suit was brought about 18 months after the agreement.

Appellants contend that this evidence is not sufficient to establish an agreed boundary between the parties, because the land in controversy is the separate property of Mrs. Lecomte, and that the husband, Leon Lecomte, had no legal authority to make any agreement with reference to the boundary that would conclude her, unless it is shown that she acquiesced in the line agreed upon; and contend that the facts do not show an acquiescence upon her part in the line agreed upon. Appellants also asked a charge to this effect, which was refused.

In our opinion, this presents the important question in the case. It cannot be contended that the facts do not show an agreed boundary. Because the facts in the record tending to establish such agreement are more conclusive and certain in their force and effect than are usually found in cases of this character, where the courts in passing upon the question have repeatedly held the facts sufficient to prove the agreed line. An oral agreement between adjoining owners establishing a dividing line between their lands and a parol partition of lands are held not to be prohibited by the statute of frauds, nor are they within the meaning of the provisions of the law that regulate the manner of conveying real estate. Aycock v. Kimbrough, 71 Tex. 333, 12 S. W. 71, 10 Am. St. Rep. 745; Wardlow v. Miller, 69 Tex. 398, 6 S. W. 292; Cooper v. Austin, 58 Tex. 496; Stuart v. Baker, 17 Tex. 420; George v. Thomas, 16 Tex. 89, 67 Am. Dec. 612; Houston v. Sneed, 15 Tex. 309. The reason of this rule evidently is based upon the idea that the parties do not undertake to acquire and pass the title to real estate, as must be done by written contract or conveyance, but they simply by agreement fix and determine the situation and location of the thing that they already own; the purpose being simply by something agreed upon to identify their several holdings, and make certain that which they regarded as uncertain.

In ascertaining the effect of these parol agreements establishing boundary lines, we do not understand that it is necessary, in order to give the agreement vitality, that it should be supported by acquiescence or acts from which an estoppel may spring. For, if the agreement is made under circumstances free of facts that would authorize a court of equity to set it aside, it must stand, although the parties may have been mistaken in their belief that the line agreed upon approximates the line of the survey where it is really found to exist. Cooper v. Austin, 58 Tex. 496.

It is unnecessary for us in this case to express an opinion concerning the validity and effect of a parol agreement made by the husband alone, without the consent of the wife, as affecting her separate property. Some of the cases previously cited seem to recognize his power in this respect to so bind her. The evidence in this case satisfies us that the plaintiff Mrs. Lecomte was a party to the agreed boundary, and fully understood its location, and expressed her consent to its

establishment. The evidence of her father, Toudouze, connecting her with the agreement, is not denied by her.

We report the case for affirmance.

Affirmed.[21]

SECTION 4.—CONTRACTS NOT TO BE PERFORMED WITHIN ONE YEAR

PETER v. COMPTON.

(In the Court of King's Bench, 1694. Skin. 353, 90 Eng. Rep. 157.)

The question upon a trial before Holt, Chief Justice, at Nisi Prius, in an action upon the case, upon an agreement, in which the defendant promised for one guinea, to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing, for the marriage did not happen within a year: the Chief Justice advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was e contra) where the agreement is to be performed upon a contingent, and it does not appear within the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year: but where it appears by the whole tenour of the agreement, that it is to be performed after the year, there a note is necessary; otherwise not.

PETERS v. INHABITANTS OF WESTBOROUGH.

(Supreme Judicial Court of Massachusetts, 1837. 19 Pick. 364, 31 Am. Dec. 142.)

Assumpsit for expenses incurred &c. in the support of Catharine Ladds, from March 2d, 1835, until her death.

At the trial in the Common Pleas, before Strong, J., it appeared, that

[21] In accord: Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. 931 (1891); Grawunder v. Gotoskey (Tex. Civ. App.) 204 S. W. 705 (1918); Rose v. Fletcher, 83 Wash. 623, 145 Pac. 989 (1915); Wood v. Bapp, 41 S. D. 195, 169 N. W. 518 (1918); Garvin v. Threlkeld, 173 Ky. 262, 190 S. W. 1092 (1917); Bordes v. Leece, 183 Ky. 146, 208 S. W. 780 (1919), prior to actual occupation and acquiescence therein the oral contract may be repudiated.

If there is no actual doubt as to the boundary, and the conscious purpose is to convey a strip of land, the oral contract is invalid. Myrick v. Peet, 56 Mont. 13, 180 Pac. 574 (1919); Grawunder v. Gotowsky, supra; Standifer v. Combs, 184 Ky. 708, 212 S. W. 921 (1919).

Oral partitions of land by tenants in common are validated by acquiescence and actual occupation thereafter. McKnight v. Bell, 135 Pa. 358, 19 Atl. 1036 (1890).

the plaintiff was an inhabitant of Westborough; that Catharine Ladds was the daughter of John Ladds, who resided in a neighbouring town; that she came into the family of the plaintiff in March, 1834, when she was eleven or twelve years of age, and remained there until her death, which took place on the 31st of May, 1835, after a sickness of four or five months; that, on the 2d of March, 1835, the plaintiff gave notice of her illness to one of the overseers of the poor of Westborough, and requested that she might be supported by the town; but that no action was taken by them on the subject.

The counsel of the defendants then proposed to show by parol evidence, that a short time before Catharine went into the plaintiff's family, it was agreed between him and her father, that the plaintiff should take her into his family and employment, for one month, on trial, and if, at the end of the month, he was not satisfied with her, he might return her to her father, but that, otherwise, he should support her until she was eighteen years of age, and should not return her for any cause but bad conduct on her part; that, in pursuance of this agreement, she went into the family of the plaintiff, and that at the end of the month the plaintiff expressed himself to be satisfied with her, and never offered to return her to her father.

The plaintiff objected to the introduction of this evidence, on the ground that the contract, not being in writing, was void by the statute of frauds.

The judge ruled, that, as this contract was by parol, it was competent for the plaintiff to put an end to it at any time, and that, after the notice given to the overseer on the 2d of March, 1835, the plaintiff ceased to be liable for the support of the pauper; and the evidence was accordingly rejected.

The jury returned a verdict for the plaintiff. The defendants excepted to the ruling of the judge.

WILDE, J. This case depends on the question, whether the plaintiff was not, by his contract, as it was offered to be proved by the defendants, bound to support the pauper, for the expenses of whose support the defendants are charged; and we are of opinion that he was so bound by his contract with the pauper's father. This was clearly a valid contract, unless, being by parol, it was void by the statute of frauds, as an agreement not to be performed within the space of one year from the making thereof. St. 1788, c. 16, § 1. But this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period. 1 Com. on Contr. 86. On this construction of the statute it was decided, in an anonymous case in 1 Salk. 280, that a parol promise to pay so much money upon the return of a certain ship, was not within the statute, although the ship happened not to return within two years after the promise was made;

for that, by possibility, the ship might have returned within a year. So, in the case of Peter v. Compton, Skin. 353, it was decided that a promise to pay money to the plaintiff on the day of his marriage, was not within the statute, though the marriage did not happen within a year. And it was held by a majority of the judges, that where an agreement is to be performed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year.

This construction of the statute is fully confirmed by the case of Fenton v. Emblers, 3 Burr. 1278. In that case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of £6 per annum, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his house-keeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not with the statute. Mr. Justice Dennison declaring his opinion to be, (in which opinion the other judges coincided,) that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed, that a contingency was not within it, nor any case that depended on a contingency, and that it did not extend to cases where the thing might be performed within the year.

But if it appears clearly, that an agreement is not to be performed within a year, and that such is the understanding of the parties, it is within the statute of frauds, although it might be partly performed within that period. Such was the decision in Boydell v. Drummond, 11 East, 142. But the performance of the agreement in that case did not depend on the life of either party, or any other contingency. The defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakspeare's plays. The whole were to be published in numbers; and one number, at least, was to be published annually after the delivery of the first. The whole scope of the undertaking shows, as Lord Ellenborough remarks, that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year.

From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this we think is the clear meaning of the statute.

In the present case, the performance of the plaintiff's agreement with the child's father, depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year.

Judgment of the Court of Common Pleas reversed, and a new trial granted.[22]

DOYLE v. DIXON.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 208, 93 Am. Dec. 80.)

Action by John Doyle against John Dixon for breach of a contract by which the defendant, on selling his stock of groceries and good will to the plaintiff, agreed not to go into the grocery business in Chicopee for a period of five years. The defendant contended that the agreement was within the statute of frauds as an agreement not to be performed within a year, and that, as it was not in writing, the plaintiff could not recover; but the judge ruled the contrary. There was a verdict for the plaintiff, and the defendant excepted.

GRAY, J.[23] It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in Peters v. Westborough, 19 Pick. 364, 31 Am. Dec. 142, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or

[22] In accord: Myers v. Saltry, 163 Ky. 481, 173 S. W. 1138, Ann. Cas. 1916E, 1134, note (1915); Okin v. Sclidor, 78 N. J. Law, 54, 78 Atl. 770, 138 Am. St. Rep. 588, note (1909); Warner v. Texas & P. R. Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495 (1896), contract to maintain a switch as long as needed held valid in an action for a breach 13 years later; Cline v. Southern R. Co., 110 S. C. 534, 96 S. E. 532 (1918), to employ as long as work is satisfactory; Harper v. Harper, 57 Ind. 547 (1877); Carr v. McCarthy, 70 Mich. 258, 38 N. W. 241 (1888); Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502 (1875), contract to be performed at death; Riddle v. Backus, 38 Iowa, 81 (1874), same.

[23] The statement of facts is rewritten and part of the opinion is omitted.

rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in Hill v. Hooper, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. Lyon v. King, 11 Metc. 411, 45 Am. Dec. 219; Worthy v. Jones, 11 Gray, 168, 71 Am. Dec. 696. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds. * * *

Exceptions overruled.

MRS. K. EDWARDS & SONS v. FARVE.

(Supreme Court of Mississippi, 1916. 110 Miss. 864, 71 South. 12.)

Action by Cameron Farve against Mrs. K. Edwards & Sons. From verdict for the plaintiff, the defendants appeal. Reversed and remanded.

SMITH, C. J. Appellee instituted this suit in the court below to recover of appellants damages alleged to have been sustained by him because of the breach by appellants of a parol contract, by which, according to his evidence, he agreed to deliver to appellants' mill all of the logs which could be obtained from the timber on certain described land, appellants agreeing to pay him therefor 35 cents per log, 200 logs, neither more nor less, to be delivered each day, excluding Sundays,

till the entire number thereof which could be obtained from the land had been delivered. One of appellants' defenses is that the contract was void under the statute of frauds, because it was "not to be performed within the space of one year from the making thereof." In support thereof, evidence was introduced by them to the effect that there were between 90,000 and 100,000 logs on the land. The evidence for appellee was to the effect that the number of logs on the land was between 40,000 and 50,000.

One of the instructions requested by appellants and refused by the court was as follows: "The court instructs the jury for the defendant that a suit cannot be maintained on any oral contract which is not to be performed within the space of one year from the making thereof, and that therefore if the jury believed from the evidence that the number of logs to be handled could not be handled under the contract at the rate of 200 per day within one year from the beginning of said work they shall find for the defendant."

If the number of logs to be delivered under this contract amounted to 90,000, the contract could not have been performed within one year from the making thereof, for, since appellee could not be required to deliver nor appellants to receive more than 200 logs per day, it would have required 450 days to deliver them.

But it is said by counsel for appellee "that this contract, being personal, could and would terminate with the death of either individual," which death might have occurred within the year, and therefore the contract is not within the statute. Conceding for the sake of the argument that the death of either party to this contract would have terminated it, it would certainly not thereby have been fully performed, and the rule is that: "If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute (Mallett v. Lewis, 61 Miss. 105); but if his death would leave the agreement completely performed and its purpose fully carried out, it is not." Jackson v. Railroad Company, 76 Miss. 607, 24 South. 874; Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80.[24]

If the number of logs to be delivered amounted to 90,000, the contract sued on is within the statute of frauds and the instruction hereinbefore set out should have been given, for "the clause of the statute in regard to agreements 'not to be performed within the space of one year from the making thereof' means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making." 2 Elliott on Contracts, §§ 1277 and 1287.

Reversed and remanded.

[24] In accord: Hill v. Hooper, 1 Gray (Mass.) 131 (1854), personal service; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623 (1889), partnership.

HANAU v. EHRLICH.

(Court of Appeal. [1911] 2 K. B. 1056.)

FLETCHER MOULTON, L. J.[25] When the Legislature passes a statute, it is the duty of the Courts to interpret that statute and to enforce it. But in the case of statutes which were passed long ago there may gradually accumulate a succession of decisions as to their interpretation which may, and sometimes do, so bind later Courts that they cannot treat the question as res integra but must accept the construction already judicially determined, whether they approve of it or not. There is no better example than this very provision of section 4 of the Statute of Frauds which requires a written memorandum of contracts which are not to be performed within a year. In my opinion little is left of the statute. The Courts are bound by decisions which they may well think to be out of harmony both with the spirit and the letter of the enactment. For instance, in very early decisions the Courts, influenced by the fear that the statute would otherwise work injustice, decided that a contract was to be performed within a year if one of the contracting parties could perform his part within a year. The result is that a contract which obviously cannot be completely performed within twenty years must be treated as a contract to be performed within a year, if on one side it can be so performed.

A further question as to the meaning of a contract which is not to be performed within a year arose soon after the passing of the statute. There are two possible lines of interpretation: the one that in order to be outside the statute a contract must be such that it necessarily must be performed within a year; the other, that it was sufficient if it might be, or was capable of being, performed within that time. The Courts have held that the latter view is the correct one. In McGregor v. McGregor, 21 Q. B. D. 424, the Court of Appeal gave what is in my judgment an authoritative interpretation of this provision of the statute. In that case Lindley and Bowen, L. JJ. (and Lord Esher, M. R., does not differ from them), laid down clearly their interpretation of the provision. A husband had there agreed to allow his wife a weekly sum for maintenance; obviously the idea was that it would continue for her life. The Court had to consider whether a contract running with the life of the wife was one which might be wholly performed within a year, and Lindley, L. J., said: "The effect

[25] The concurring opinions of Vaughan Williams and Buckley, L. JJ., are omitted. Buckley, L. J., said: "It is now two centuries too late to ascertain the meaning of section 4 by applying one's own mind independently to the interpretation of its language. Our task is a much more humble one; it is to see how that section has been expounded in decisions and how the decisions apply to the present case."

The decision was affirmed in the House of Lords, [1912] A. C. 39. In accord: Wagniere v. Dunnell, 29 R. I. 580, 73 Atl. 309, 17 Ann. Cas. 205 (1909); Dobson v. Collis, 1 H. & N. 81 (1856). Contra: Blake v. Voight, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622 (1892).

of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply"; while Bowen, L. J., after saying that he approved of the decision in Peter v. Compton, Skin. 353, proceeds thus: "It was held that 'an agreement that is not to be performed within the space of one year from the making thereof' means in the Statute of Frauds an agreement which appears from its terms to be incapable of performance within the year." The seal of the Court of Appeal was thereby finally put on the interpretation that, if a contract might under any possible circumstances be performed within the year, it was not within the Statute of Frauds. We are bound by this decision, although it takes all contracts of personal service out of the Act, whatever be the term of service and even though the consideration is such that it cannot be performed within the year.

Turning to the agreement in the present case, I find it to be an agreement for two years, subject to a six months' notice on either side which may be given at any time, and I ask myself whether it is incapable of performance within the year, or whether, in the words of Lindley, L. J., it can by possibility be performed within the year. If I were free to answer that question, I should say that beyond all question it might possibly be performed within the year. The period of two years has no higher contractual sanction than the effect of the six months' notice, and such six months' notice may be given at any time. It is impossible to predicate that the period of the performance of this contract is more than a year. Moreover, supposing the notice to be given, then six months after that date the contract is wholly performed. There is no ghostly survival of the contract for the remainder of the two years; the contract is wholly performed when the notice has expired. I have, therefore, no hesitation in saying that, if I were free to use my own intellect and must be guided by the authoritative utterance of the Court of Appeal in McGregor v. McGregor, 21 Q. B. D. 424, I should certainly allow this appeal; but I am obliged to remember that, side by side with the decisions which have led up to McGregor v. McGregor, 21 Q. B. D. 424, there has been a parallel series of decisions which have dealt with one special class of contract, one where a fixed period longer than a year has been named in the contract not as a fixed period of the contract, but only as the period during which the contract lasts in one alternative. The only cases dealing with this point to which I need refer are Dobson v. Collis, 1 H. & N. 81, Ex parte Acraman, 31 L. J. (Ch.) 741, and Lavalette v. Riches, 24 Times L. R. 336. In those decisions it is laid down that where a contract specifies a fixed time for its performance which is longer than a year, and contains what is called a defeasance stipulation which might terminate the contract within the year, it is within the Statute of Frauds; that is to say, a contract like the present one, which is for two years, subject to a power on either side to give the six months' notice which terminates the period of the

contract and limits the obligations of parties on either side, is nevertheless within the statute. I cannot reconcile those decisions with McGregor v. McGregor, 21 Q. B. D. 424, but I can apply both sets of decisions, for I can say that in the smaller and more specific class to which Dobson v. Collis, 1 H. & N. 81, applies there are decisions which forbid me to apply the general test laid down in McGregor v. McGregor, 21 Q. B. D. 424. I must obey both sets of decisions as far as I can, and when I find a general rule laid down in the one which is contrary to the specific rule laid down for the specific class in the other, I am obliged to regard such decisions as that in Lavalette v. Riches, 24 Times L. R. 336, as establishing an exception to the general rule laid down in McGregor v. McGregor, 21 Q. B. D. 424, which exception, although not noticed in the last-named case, must have been intended to be included, because there are co-ordinate decisions which lay it down distinctly. I come to this conclusion with regret. I cannot see why the fact that you mention a maximum term to a contract, which only runs for that term if certain contractual powers are not exercised by the parties, should be held to override the contract to such an extent that, although it can be performed within the year, it is my duty to say that it cannot. But I am bound by the authorities, and agree that this appeal must be dismissed.

BROADWELL v. GETMAN.

(Supreme Court of New York, 1846. 2 Denio, 87.)

Error to the Oneida common pleas. Getman sued Broadwell before a justice of the peace, and upon a trial by jury recovered $25 besides costs, and this judgment was affirmed by the C. P. upon certiorari. The plaintiff's claim was principally for damages for the non-performance of a contract respecting the clearing of land. This contract was entered into on the first day of January, 1841, and was reduced to writing at the request of the parties and agreed to by them, but was not signed. By its terms the defendant agreed to clear off a piece of wood land belonging to the plaintiff, and make a fence two logs high on one end of it, which fence the plaintiff was to complete. The job was to be done by the spring of 1842, in season to put in a spring crop that year; and the defendant was to have for his compensation all the wood and timber growing on the premises, except what should be necessary for the fence, and also the first crop, which he was to put in in the spring of 1842. Both parties gave evidence upon the question whether the defendant had fully cleared off the land and as to the amount necessary to complete it. Before the cause was submitted to the jury, the defendant's counsel requested the justice to charge, that if a longer time was given by the contract to complete the work than one year from the time of making thereof, it was void; but he refused so to charge.

By the Court, BEARDSLEY, J. The special agreement between these parties was to endure for nearly two years. It was made on the first of January, 1841, and although the clearing was to be done by a year from the next spring, the defendant was to have the use of the land for a crop to be put in by him at that time.

By the statute every agreement which by its terms is not to be performed within one year from the making thereof, is declared to be void, unless in writing and subscribed by the party to be charged therewith. 2 R. S. 135, § 2, subd. 1. Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be carried into full and complete execution until after the expiration of that period of time. Fenton v. Emblers, 3 Burr. 1278; Boydell v. Drummond, 11 East, 142; Bracegirdle v. Heald, 1 Barn. & Ald. 723; Chit. on Cont. 67; 1 Smith's Leading Cases and Notes (Phil. Ed.) 143; Lockwood v. Barnes, 3 Hill, 128, 38 Am. Dec. 620; Russell v. Slade, 12 Conn. 455.

The word "agreement," as used in this section, signifies "a mutual contract on consideration between two or more persons," and ex vi termini, includes the several parties to the contract and their respective stipulation: every thing, indeed, which is to be done on both sides. Wain v. Warlters, 5 East, 10; Sears v. Brink, 3 John. 210, 3 Am. Dec. 475; Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Champion v. Plummer, 1 New R. 252; 2 Stark. Ev. 482 (Phil. Ed. of 1842). In this case there were mutual stipulations between the parties: the defendant was to clear the land and in part make a fence at one end of the lot. This fence was to be completed by the plaintiff; and he stipulated that the defendant should have all the timber cut on the land except what might be required for the fence, and also the use of the land for a summer crop in 1842. As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed, was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute. An agreement is an entire thing, and where that cannot be completely executed, on both sides, until more than a year has elapsed, the case falls within the express words of the enactment. It is also within its spirit, for "the mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it." Bailey, J., 11 East, 159; 1 Ld. Raym. 316.

The general principle is firmly settled that although the agreement requires a part performance within a year, and is so far faithfully executed, still it is void, unless reduced to writing, if other stipulations remain to be executed after the close of the year. Lockwood v. Barnes, supra. But notwithstanding the apparent universality and soundness of this position, it is laid down by some elementary writers

that the statute does not extend to contracts, "where all that is to be done by one of the parties is to be done within a year." 2 Leigh's N. P. 1045; Chit. on Cont. 69; Long on Sales, 56. This distinction had been suggested in Boydell v. Drummond and Bracegirdle v. Heald, supra, and was finally acted upon in the case of Donellan v. Read, 3 Barn. & Adol. 899, which was decided in 1832. In the last case, Littledale, J., who delivered the opinion of the court said, "as to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part." See also Holbrook v. Armstrong, 10 Me. 31. The principle affirmed in these cases has no application to the present case; for here the party seeking to enforce the contract was not to perform all its stipulations, on his part, within the year: he was to permit the defendant to occupy and use the land through the season of 1842, which time did not commence until more than a year after the contract had been entered into. But I would not be understood as yielding my assent to the principle stated. It seems to me in plain violation of the statute. Every verbal contract which is not to be performed within a year from the making thereof, is declared to be void. Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully, on both sides, within the year, I think it is void. What difference does it make that one party can, while the other cannot, complete the contract within a year? Such an agreement is not, in terms, excepted from the statute, and the reason for the enactment applies to it with full force. But it is unnecessary to pursue this subject; and I dismiss it with the remark that although where one party has fully performed on his part within the year, the agreement may notwithstanding be void, still he is not remediless, for he may maintain a general indebitatus assumpsit against the party who refuses to proceed further under the contract, and thus recover a compensation for what has been advanced and received upon it. Lockwood v. Barnes, Holbrook v. Armstrong, supra. See also Smith's Leading Cases, as referred to above; Mavor v. Pyne, 2 Car. & Payne, 91, and 3 Bing. 285.

The contract was void and the plaintiff should not have recovered, as he did, for its violation.

Judgment reversed.[26]

[26] In accord that a contract is within the statute if it is not to be performed by one party within one year, even though the duties of the other

PROKOP v. BEDFORD WAIST & DRESS CO.

(Supreme Court of New York, Appellate Term, 1919. 105 Misc. Rep. 573, 173 N. Y. Supp. 792.)

Action by Prokop J. Prokop against the Bedford Waist & Dress Company. Verdict and judgment for plaintiff, and defendant appeals. Judgment affirmed, with leave to appeal to the Appellate Division.

BIJUR, J.[27] The facts which the jury was warranted in finding are that the plaintiff was employed as a pattern maker by the defendant on Monday, September 10, 1917, on trial for one week. On the following Saturday, the 15th, the defendant said to plaintiff, "You will have to give me another week's time," to which plaintiff assented. On the succeeding Saturday, the 22d of September, before noon, the defendant said to plaintiff: "'I want a man for the whole year. You will have the whole year a job with me; you go ahead;' and so I did."

Plaintiff continued his work on the Saturday morning of the conversation last recited, and returned after 12 o'clock noon, at which time work had been suspended in the factory, and did some work. He continued in defendant's employ until he was discharged in March, 1918, and thereupon brought this action for breach of contract of employment.

Appellant's reliance on this appeal is upon an exception to the refusal of the court below to charge that: "If the jury believe the plaintiff's version, that an agreement was made on September 22d, but that plaintiff was to commence in the performance of that work on the following Monday, that they must find for the defendant under the statute of frauds." Appellant cites as authority for his position Jonap v. Preger, 59 Misc. Rep. 187, 110 N. Y. Supp. 483.

First, it must be pointed out that the request was inaccurate in its statement of the terms of the new contract as proved. I do not find in the record any evidence that plaintiff was not to commence work under the new contract until the following Monday; on the contrary, there is testimony by the plaintiff that he was "to commence work under that new arrangement right the same afternoon." But, even apart from that consideration, the mere fact that physical work is not begun or required to be performed under a contract of service until a particular day subsequent does not necessarily imply that the performance of the contract, within the language of subdivision 1 of sec-

party may be performed within that period: Dietrich v. Hoefelmeir, 128 Mich. 145, 87 N. W. 111 (1901); Marcy v. Marcy, 9 Allen (Mass.) 8 (1864). Contra: Donellan v. Read, 3 B. & Ad. 899 (1832); Cherry v. Heming, 4 Ex. 631 (1849); Fraser v. Gates, 118 Ill. 99, 1 N. E. 817 (1885); Piper v. Fosher, 121 Ind. 407, 23 N. E. 269 (1889); Smalley v. Greene, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267 (1879); Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938 (1895); Grace v. Lynch, 80 Wis. 166, 49 N. W. 751 (1891).

[27] Part of the opinion is omitted.

tion 31 of the Personal Property Law (Consol. Laws, c. 41), the statute of frauds, has not begun at an earlier date. The statute reads, so far as applicable: "Every agreement * * * is void" unless it be in writing "if such agreement: * * * 1. By its terms is not to be performed within one year from the making thereof."

It was held in McAleer v. Corning, 50 N. Y. Super. Ct. 63, 65: "If a contract of hiring is made for one year, to begin in præsenti, no services to be done by the employé until a future day, the contract is operative from the day of its making, and the year ends with the ending of one year from that day. It might be a natural mistake for a layman to think that, as a year of actual affirmative service could not begin until some service was done, that the contract for services was not operative until the day when something was to be done by him." See, also, Sprague v. Foster, 48 Ill. App. 140.

In other words the contract becomes operative and its performance is begun when the one contractor becomes a servant and the other an employer; i. e., when the former comes under the obligation which that relation implies.

Assuming, now, that the decision in Jonap v. Preger, supra, is supported by authority in holding that an oral contract of employment for the term of one year, to commence on the following day, is void, the question is whether the instant case presents such a contract. In Jonap v. Preger the plaintiff employé was admittedly working for the defendant under a yearly agreement which expired on March 23, 1907. On that day, according to plaintiff's testimony, the defendant said to him, "I will renew your contract from to-day for another year." The court said, in commenting upon this testimony: "In order to hold that the new year began on the 23d, it would be necessary to hold that the new contract rescinded the old contract, so far as the unexpired * * * period covered by it, was concerned, and that the new contract took effect before the termination of the old one and superseded it. There is nothing in the language testified to that would warrant such a construction."

But I do not see why it is necessary to hold that the preceding contract would be "rescinded so far as the unexpired portion of the period covered by it was concerned." All that would be implied through holding the new contract to be operative forthwith would be that the employer had disregarded the fact that he was paying the employé doubly for a negligible fraction of the old term.

If the Jonap Case was correctly interpreted, the statute to the effect that an agreement "to be performed within one year from the making thereof" means an agreement the term of which begins at the very instant of the making of the contract, then it seems to me that by the same token like import should be accorded to the words of the contracting parties when they employ substantially the language of the statute. If the strict interpretation is appropriate to the language of the statute, the same standard should be applied to the language of

the contractor. Therefore, where a party agrees to enter the employ of another for one year, the year should be held to begin eo instante. See Russell v. Slade, 12 Conn. 455. But in my opinion that is not the correct construction of the statute. A year, like a day, a week, and a month, is a common division of time of universal application. A contract for a year means a contract for 365 days. Now it would be, to say the least, unusual for parties during the course of a business day to contract for a year, intending to include within the term of the contract the whole of the day upon which the contract is made. That would imply that they were making a contract for a year, part of which had already elapsed. It would also be equally unlikely, except under peculiar circumstances, that a contract should, during the course of a business day, be entered into with the expectation that its term begin at the moment it is made. As a practical matter, such a course would ordinarily, for a number of obvious reasons, be so inconvenient as to render it exceptional. The natural and usual assumption, I think, in the absence of a particular provision to the contrary, would be that the parties intended performance to begin on the next day.

This rational view of the significance of the statute accords also with the established canon of statutory construction that fractions of a day, will not be considered, except where that course is necessary to prevent injustice, as, for example, in ascertaining the priorities of creditors. One of the purposes of the rule is to accord to the parties entitled thereto the whole of the period specified, and since by the very premise they do not enjoy the whole of the first day, that day is excluded from the computation. Cowles, J., in Phelan v. Douglass, 11 How. Prac. 193, 195, 196; Judd v. Fulton, 4 How. Prac. 298; Haden v. Buddensick, 49 How. Prac. 241, 246—all cited in Marvin v. Marvin, 75 N. Y. 240, 243. See, also, People v. N. Y. C. R. R. Co., 28 Barb. 284, 286, and People v. Sheriff of Broome, 19 Wend. 87.

It seems fair to assume that the framers of the statute of frauds had these practical considerations in mind; otherwise, the provision of section 4, which we are considering, would have been tantamount to the inhibition of most oral contracts for a year—a result that was manifestly not intended.

I am of the opinion, therefore, that an oral contract for a year, to commence on the day following its making, is not within the inhibition of the statute. I say this with all deference to the learned judges who have written in the three cases in this state which hold the contrary, and because I am convinced that their opinions were based upon a misapprehension of the authorities which they have cited, and upon an unexplained failure to consider the rule just discussed, which formed the basis of the decisions in Dickson v. Frisbee, 52 Ala. 165, 23 Am. Rep. 565 (1875), and Smith v. Gold Coast & Ashanti Explorers, Ltd., [1903] 1 K. B. 195.

The first case in the books in which this precise point is even mentioned was Cawthorne v. Cordrey, decided in England in 1863, and re-

ported in 13 C. B. (N. S.) 406. Although the headnote in that case reads: "A contract of hiring made on the 24th of March for a year's service to commence on the 25th is not void by the fourth section of the statute of frauds for want of a memorandum"—that statement is manifestly erroneous, for the case actually decided that: "There clearly was evidence upon which the jury were at liberty to find that there was a contract on Monday, the 24th, for a year's service; and it is no objection that the receipt which the plaintiff gave for the £20 advanced described the contract as being for services from Lady Day (Sunday) to Lady Day."

In other words, the actual decision was that the evidence warranted a finding by the jury that the contract was made on Monday, the 24th, for a year's service, and not on the preceding Sunday for a year's service to begin the following Monday. In the course of the argument, however, there were a number of colloquies between judges and counsel, as is so common in English courts. Wills, J., said: "If a builder undertakes to build a house within a year, that means a year from the next day." Byles, J., remarked: "If you adopt the reasonable rule, which excludes fractions of a day, taking the receipt to define the duration of the contract, there would be only 365 days."

These two statements were indeed mere dicta, but they express the view ultimately adopted by the Supreme Court of Alabama and the courts of England. There are no decisions in point in any state of the Union outside of New York. As I interpret the remark of Wills, J., it was intended to indicate (what I have discussed above) that the framers of the statute, when they prescribed that a contract to be performed within one year from the making thereof need not be in writing, had in mind the practical fact that a contract for a year's service, and other agreements covering a year, are usually made in the course of the day preceding the beginning of performance. The comment of Byles, J., plainly suggests that this accords with the accepted rule of construction, which excludes fractions of a day.

The next time that this precise question arose was in Dickson v. Frisbee, 52 Ala. 165, 23 Am. Rep. 565 (1875). Although the court there was evidently misled by the headnote in the Cawthorne Case to the extent of citing it as authority for the proposition that "a contract made on one day for a year's service to commence on the next was not within the statute of frauds," the reference to the Cawthorne Case followed a discussion of the law, concluding that: "This construction is in accordance with the ordinary rule for the computation of time which excludes fractions of a day."

It will thus be seen that the court placed its decision upon the very point indicated by Byles, J., in his dictum in the Cawthorne Case. The Dickson Case was followed in Smith v. Pritchett, 98 Ala. 649, 13 South. 569. * * *

Meanwhile the point had arisen for decision in England in Dollar v. Parkington (K. B. Div. 1901), reported in 84 L. T. 470, in which

Darling, J., decided that an oral contract for the hiring of horses for a year, to commence on the day following, is within the statute, on the authority of Lord Ellenborough's general comment in Bracegirdle v. Heald. He declined to follow the dicta in Cawthorne v. Cordrey, and refers to the opinion of Brett, J., in Brittain v. Rossiter (1879) L. R. 11 Q. B. Div. 123, to the effect that those dicta have never been converted into a decision. He also remarks upon the curious fact that the precise question had never been decided by the courts of England, although the statute of frauds had been the subject of more litigation than any other statute of the realm.

The English bar, however, did not have to wait long for an authoritative expression on this question by an appellate court. In Smith v. Gold Coast & Ashanti Explorers, Ltd., [1903] 1 K. B. 285, Lord Alverstone, C. J., with the concurrence of Wells and Channell, JJ., expressly approved the dicta in the Cawthorne Case, and the favorable comment thereon by Brett, J., in the Brittain Case, and added that the question there suggested had now arisen for decision. The court then held: "That a contract for a year's service, to commence on the day next after the date on which the contract was made, is not an agreement which is not to be performed within the space of one year from the making thereof, within the meaning of section 4 of the statute of frauds."

It is significant that this decision is founded expressly on the rule that the law does not regard fractions of a day, which formed the basis, as I have shown, of the similar decision in Dickson v. Frisbee, 52 Ala., supra. Evidently the attention of the Appellate Term in Jonap v. Preger was not called to the decision in the Smith Case. My conclusion, therefore, is that the oral contract in the instant case—whether interpreted as one to begin on the same day or the day after it was made—is not rendered invalid by the statute of frauds.

Judgment affirmed, with $25 costs, and with leave to appeal to the Appellate Division. All concur.[28]

[28] The court's discussion of some of the authorities is omitted. Contra, and expressly disapproved, are Levison v. Stix, 10 Daly (N. Y.) 229 (1881); Billington v. Cahill, 51 Hun, 132, 4 N. Y. Supp. 660 (1889). In accord, and cited above, are Dickson v. Frisbee, 52 Ala. 165, 23 Am. Rep. 565 (1875); Smith v. Pritchett, 98 Ala. 649, 13 South. 569 (1893); Smith v. Gold Coast, etc., Ltd., [1903] 1 K. B. 285.

SECTION 5.—CONTRACTS FOR THE SALE OF GOODS

LEE v. GRIFFIN.

(In the Court of Queen's Bench, 1861. 1 Best & S. 272.)

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labour done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea. That the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the Sittings for Middlesex after Michaelmas Term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:

"My Dear Sir.—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days.—Yours &c. Frances P."

Shortly after writing the above letter, Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29 Car. II, c. 3, and the learned Judge was of that opinion. The plaintiff's counsel then contended that, on the authority of Clay v. Yates, 1 H. & N. 73, the plaintiff could recover in the action on the count for work and labour done and materials provided. The learned Judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

In Hilary Term following, a rule nisi having been obtained accordingly,

Patchett now shewed cause.

CROMPTON, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document, which contains such particulars, parol evidence is admissible for the

purpose of shewing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labour, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine: but, where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labour done, and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labour. Clay v. Yates, 1 H. & N. 73, turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labour, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labour or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

Hill, J. I am of the same opinion. I think that the decision in Clay v. Yates, 1 H. & N. 73, is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labour. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labour. Atkinson v. Bell, 8 B. & C. 277, is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J., in Grafton v. Armitage, 2 C. B. 339, where he says: "In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the plaintiff." And Tindal, C. J., in his judgment in the same case, p. 340, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of Atkinson v. Bell, 8 B. & C. 277, is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted: no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labour. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour: but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In Atkinson v. Bell, 8 B. & C. 277, the contract, if carried out, would have resulted in the sale of a chattel. In Grafton v. Armitage, 2 C. B. 340, Tindal, C. J., lays down this very principle. He draws a distinction between the cases of Atkinson v. Bell, 8 B. & C. 277, and that before him. The reason he gives is that, in the former case, "the substance of the contract was goods to be sold and delivered by the one party to the other:" in the latter "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of Clay v. Yates, 1 H. & N. 73, is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Rule absolute.[29]

[29] In accord: Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656 (1891).

GODDARD v. BINNEY.

(Supreme Judicial Court of Massachusetts, 1874. 115 Mass. 450, 15 Am. Rep. 112.)

Contract to recover the price of a buggy built by plaintiff for defendant. Plaintiff agreed to build a buggy for defendant, and to deliver it at a certain time: Defendant gave special directions as to style and finish. The buggy was built according to directions. Before it was finished, defendant called to see it, and in answer to plaintiff, who asked him if he would sell it, said no; that he would keep it. When the buggy was finished, plaintiff sent a bill for it, which defendant retained, promising to see plaintiff in regard to it. The buggy was afterwards burned in plaintiff's possession. The case was reported to the supreme judicial court.[80]

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank v. Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 189; Sewall v. Fitch, 8 Cow. (N. Y.) 215; Robertson v. Vaughn, 7 N. Y. Super. Ct. 1; Downs v. Ross, 23 Wend. 270; Eichelberger v. M'Cauley, 5 Har. & J. (Md.) 213, 9 Am. Dec. 514. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee v. Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley v. Sheppard, 10 Bing. 99; Howe v. Palmer, 3 B. & Ald. 321; Baldey v. Parker, 2 B. & C. 37; Atkinson v. Bell, 8 B. & C. 277.

In this commonwealth, a rule avoiding both of these extremes was established in Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on

[80] The statement of facts is rewritten.

the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer v. Cone, 1 Metc. 283. "The distinction," says Chief Justice Shaw, in Lamb v. Crafts, 12 Metc. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner v. Joy, 9 Metc. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman v. Meigs, 4 Cush. 497, and Clark v. Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. St. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than Mixer v. Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon v. Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually

delivered to him, and where nothing remains to be done except that the buyer could pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. Noy's Maxims, 89; 2 Kent. Com. (12th Ed.) 492; Bloxam v. Sanders, 4 B. & C. 941; Tarling v. Baxter, 6 B. & C. 360; Hinde v. Whitehouse, 7 East, 571; Macomber v. Parker, 13 Pick. 175, 183; Morse v. Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation the verdict must be set aside, and judgment entered for the plaintiff.[31]

BALDWIN v. WILLIAMS.

(Supreme Judicial Court of Massachusetts, 1841. 3 Metc. 365.)

This case was tried before Wilde, J., who made the following report of it:

This was an action of assumpsit, and the declaration set forth an agreement of the plaintiff that he would bargain, sell, assign, transfer, and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24th, 1835, for the payment of $1,500; the other dated May 5th, 1836, for the payment of $500; and both payable to the plaintiff or order on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff $1,000

[31] The rule in this case is substantially the same as that contained in Uniform Sales Act, § 4. It was previously followed by most of the courts in the United States. See Williston on Sales, § 55. The New York rule had previously excluded from the statute all contracts for the sale of goods not in existence at the date of the contract. See Parsons v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517 (1871); Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619 (1875). For the present New York statute, see ante, p. 1375.

in cash, and to give the plaintiff a post note, made by the Lafayette Bank, for $1,000, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams for $1,000.

The plaintiff at the trial proved an oral agreement with the defendant as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff without recourse to him in any event, and a demand upon the defendant to fulfil his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that any thing passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing nor proved by any note or memorandum in writing signed by the defendant or his agent, and nothing was received by the purchaser, nor given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand if in the opinion of the whole court the agreement set forth in the declaration falls within the statute of frauds (Rev. St. c. 74, § 4); otherwise, the nonsuit to be taken off, and a new trial granted.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

The plaintiff's counsel contends in the first place that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and in the second place that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends that an agreement to exchange notes is a mutual contract of sale. But it is not necessary to decide this question, for the agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes $2,000 in cash, in addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." "Merx est quicquid vendi potest."

In Tisdale v. Harris, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in Humble v. Mitchell, 3 Perry & D 141,

11 Adol. & E. 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of Tisdale v. Harris is very cogent and satisfactory; and it is supported by several other cases. In Mills v. Gore, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. St. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in Clapp v. Shephard, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. St. c. 81, § 8, say that the words " 'goods or chattels' are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned."

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are moveable goods, and so far as these words may relate to the question under consideration they seem to have the same meaning. But however this may be, we think the present case cannot be distinguished in principle from Tisdale v. Harris; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.[32]

[32] The English Sale of Goods Act (56 & 57 Vict. c. 71) defines goods as "chattels personal other than things in action and money." The American Uniform Sales Act, § 4, expressly includes choses in action. See the New York statute, ante, p. 1375. This act merely codifies the already existing general rule. See Greenwood v. Law, 55 N. J. Law, 168, 26 Atl. 134, 19 L. R. A. 688 (1892); Sprague v. Hosie, 155 Mich. 30, 118 N. W. 497, 19 L. R. A. (N. S.) 874, 130 Am. St. Rep. 558 (1908); Hewson v. Peterman Mfg. Co., 76 Wash. 600, 136 Pac. 1158, 51 L. R. A. (N. S.) 398, and note Ann. Cas. 1915D, 346 (1913), all dealing with shares of corporate stock; Williston on Sales, § 67.

A contract between two persons for the joint purchase of goods from a third to be divided between them, partly in specie and partly in the proceeds when resold, is not within the statute; the contracting parties not being buyer and seller. Stack v. Roth Bros. Co., 162 Wis. 281, 156 N. W. 148, Ann. Cas. 1918C, 741, note (1916).

YOUNG v. INGALSBE.

(Court of Appeals of New York, 1913. 208 N. Y. 503, 102 N. E. 590.)

Action by William E. Young against Grenville M. Ingalsbe, as executor of Lyman H. Northup, deceased. From a judgment of the Appellate Division (151 App. Div. 375, 135 N. Y. Supp. 939) modifying and affirming a judgment for defendant entered upon the report of a referee to hear and determine the action, plaintiff appeals. Affirmed.

COLLIN, J. The plaintiff claimed, as a creditor, a sum from the estate of Lyman H. Northup, deceased. The statute of limitations barred his recovery (except as to one item allowed by the judgment of the Appellate Division), unless a transaction between the plaintiff and the deceased constituted a sale by the latter to the former of his interest in certain books and the crediting by the former of the price upon the indebtedness, and prevented its application. The question for our determination is: Did the transaction effect that result?

The transaction as found by the referee was: The plaintiff and the deceased owned, with equal interests, a law library. The deceased was indebted to plaintiff and they, at a stated time, entered into an agreement, wholly unwritten, whereby the plaintiff purchased the interest of the deceased, the purchase price to be applied by the plaintiff upon the indebtedness. Immediately after the time when the agreement was made, the plaintiff accepted of the interest and caused to be pasted upon the backs of the books leather labels with his name printed thereon, took possession, and assumed and still assumes ownership of the books, and gave the deceased credit for the sum of $77 on account of and pro rata on the several items of the indebtedness.

The part of the statute of frauds relevant to the transaction is: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: * * * (6) Is a contract for the sale of any goods, chattels or things in action for the price of fifty dollars or more, and the buyer does not accept and receive part of such goods, or the evidences, or some of them, of such things in action; nor at the time, pay any part of the purchase money." Personal Property Law (Consol. Laws 1909, c. 41) § 31.

The statute made void the verbal agreement in the present case unless there was, subsequent to and in pursuance of it, either the acceptance and receipt by the plaintiff of Northup's interest or the payment by him, at the time the agreement was made, of the purchase price or a part thereof. The rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the thing sold delivered to the purchaser

(Olyphant v. Baker, 5 Denio, 379; Bissell v. Balcom, 39 N. Y. 275), is devitalized by the statute in the cases within its provisions. In those cases the statute renders essential to the proof of a valid contract of sale, not only evidence of the verbal contract, but also evidence of a receipt and acceptance by the vendee of a part of the goods or of a payment at the time the oral agreement was made. The contract must be authenticated by a prescribed act of the parties in pursuance and part performance of it. The act may originate with the vendor or vendee; with the vendor if a delivery of part of the goods and their acceptance by the vendee is the ground for validating the contract; with the vendee if part payment is relied upon. In either case the participation and assent of both parties to it is necessary. The receipt of the goods by the vendee implies a delivery by the vendor. Delivery and receipt of the goods without acceptance is insufficient, and payment implies a receipt and acceptance of the consideration by the party to whom it is made. Hawley v. Keeler, 53 N. Y. 114; Pitney v. Glens Falls Ins. Co., 65 N. Y. 6, 26. While the statute does not interdict the establishment of the verbal contract by parol testimony, it guards against the misunderstanding, misconception, or perjury of the parties by requiring proof of the mutual confirmatory act evidencing intelligence and finality concerning it on the part of each. A writing, of course, evidences the contract as to both parties. Where it is omitted, but the vendee has paid part of the price or the vendor has delivered and the buyer has accepted a part of the goods upon the strength of the agreement, those acts furnish unequivocal evidence of the existence of a contract of some sort between them, although its terms and the performance of the attesting act must after all depend upon the recollection of witnesses. The design of the statute requires that neither party can create the evidence which shall prove the unwritten contract as against the other. Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316; Rodgers v. Phillips, 40 N. Y. 519; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337.

The facts found by the referee in this case do not establish the contract. Upon the part of the deceased there was merely the naked, verbal agreement. He did not by any act or participation in any act subsequent to it assent to or recognize or confirm it. Each act of the plaintiff was individual and independent. His possession of the books, if had at the time of the agreement, was not on the strength of or pursuant to it but under another and prior arrangement and, if acquired subsequent to the contract, was without a delivery and through his sole and exclusive act. Under either hypothesis the title of the deceased to the books did not pass to the plaintiff by virtue of a receipt and acceptance because he did no act by which he relinquished his dominion or recognized and confirmed that of the plaintiff over them. Brand v. Focht, 1 Abb. Dec. 185; Marsh v. Rouse, 44 N. Y. 643; Stone v. Browning, 68 N. Y. 598; Rourke v. Bullens, 74 Mass. (8 Gray) 549.

Manifestly the contract was not made valid by the credit given the deceased by the plaintiff and for two reasons: It was not made at the time of the agreement; the deceased was not in any way an actor in regard to it. Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508; Brabin v. Hyde, 32 N. Y. 519; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536.

The judgment should be affirmed, with costs.[33]

DRIGGS v. BUSH et al.

(Supreme Court of Michigan, 1908. 152 Mich. 53, 115 N. W. 985, 15 L. R. A. [N. S.] 654, 125 Am. St. Rep. 389, 15 Ann. Cas. 232.)

Action by Hue H. Driggs against Levi Bush and another. Judgment for plaintiff, and defendants bring error. Affirmed.

MONTGOMERY, J. The plaintiff is a buyer of hay, and through his agents, Homer B. McWilliams and John Van Horn, made a contract with the defendants, who own and operate two farms in Van Buren county, and who were the joint owners of the hay crop thereon, for the purchase of 24 tons of hay or more at the option of the defendants. The contract was by parol, and, as appears by the testimony offered on behalf of the plaintiff, was as follows: "Mr. Dean said: 'I want $10 a ton and you bale the hay.' We finally bought all of the hay for $10 a ton, and we to do the baling, and we were to take the hay the first cars we could get at Gobleville after the hay was baled." The testimony of the other witness for plaintiff does not vary materially from this, he stating: "We were to pay him $10 a ton for it, and we was to pay for the baling." It was also a part of the agreement that

[33] Acceptance and receipt of any part of the goods, however small, satisfies the requirements of the statute. Morris Spirt & Co. v. Prior, 93 Conn. 639, 107 Atl. 513 (1919), five barrels of sugar out of thirty-five; Garfield v. Paris, 96 U. S. 557, 24 L. Ed. 821 (1877), the labels to be pasted upon bottles of liquor to be shipped later; Walker Bros. & Co. v. Daggett, 115 Miss. 657, 76 South. 569 (1917); Adams v. King (Okl.) 170 Pac. 912 (1918), the statute is satisfied by delivery and acceptance of a part after the time agreed upon for performance. See, in general, Williston on Sales, §§ 73–96.

Delivery of the goods to a specified carrier may satisfy the statute as to receipt, but it does not operate as an acceptance of the goods in the absence of a power given by the buyer. Spedding v. Griggs, 196 Mich. 571, 162 N. W. 956 (1917); Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461 (1872). The acceptance and receipt need not be contemporaneous, and may be the separate acts of different persons. Cusack v. Robinson (1861) 1 Best & S. 299. See, further, Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316 (1848); Young v. Alexander (Miss.) 86 South. 461 (1920).

Where a shareholder in a corporation agreed to sell his shares to another shareholder, acceptance and receipt is not shown by the fact that the latter shareholder took possession of the entire assets of the corporation; there being no actual delivery of the existing certificates of stock. De Nunzio v. De Nunzio, 90 Conn. 342, 97 Atl. 323 (1916).

"Acceptance" of goods can be shown by evidence that the buyer offered to sell them to another person. Bicknell v. Owyhee Sheep Co., 31 Idaho, 690, 176 Pac. 782, 4 A. L. R. 897 (1918); Morton v. Tibbett, 15 Q. B. 428 (1850).

the defendants were to draw the hay to Gobleville and place the same on board cars. After the contract was made, the plaintiff sent balers to the premises of the defendants who baled the hay, the defendants being present and assisting in the work. The price paid for baling the hay was $1.10 per ton, or $33.55, that being the regular price for such services. The defendants subsequently refused performance of the contract, and this action was brought to recover damages for the breach. Plaintiff was permitted to recover below the difference between the purchase price of the hay and its actual market price at the date when delivery was contemplated. Defendants bring error, and contend that the contract was void under the statute of frauds, and has never been validated, and this presents the principal question for our consideration.

Our statute of frauds (Comp. Laws 1897, § 9516) reads as follows: "No contract for the sale of any goods, wares or merchandise for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest, to bind the bargain or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized."

It is obvious that at the time this contract was made there was no such delivery or part payment as satisfied the terms of this statute. But as this statute does not require the payment or acceptance to be at the time of the making of the contract, as is the case in New York and some other states (see Mechem on Sales, § 419), it is competent for the parties to validate their contract by any act which amounts to a delivery and acceptance or to a payment. The circuit judge was of the opinion that when the hay was baled by the plaintiff's agents upon the premises of the defendants and with their co-operation, this constituted such a delivery and acceptance as would answer the requirements of the statute of frauds.

It is strenuously insisted that there was no such delivery or acceptance, and plaintiff's counsel do not seek to maintain that there was. Without passing directly upon the question, therefore, in this case, we may assume that there was no such completed delivery as the statute requires, and that the defendants still retained the title to the property after the same was baled. We are not concerned with the correctness of the reasoning of the circuit judge if the correct result was reached. The question occurs, therefore, whether the expenditure of $1.10 per ton upon this hay, which remained the property of the defendants, which expenditure was received and accepted by them, and was made in pursuance of the contract between the parties, was such a part payment as answered the requirements of the statute. It is contended that the thing in earnest must be actually paid, and received by the seller. This we fully accept. But there can be no doubt in this

case that the service of baling this hay was received and accepted by these defendants, and if this was done at a time while the hay remained their property, and such service was received in pursuance of the contract made between the parties, we can conceive of no valid objection to treating this as a part payment of the consideration which was to pass from the plaintiff to the defendants at a time prior to the passing of the title of the hay to plaintiff. This being so, there has been a payment by the plaintiff and a receipt by the defendants of a part of the consideration. It was the hay in its improved form as baled hay which, according to the theory of the defendants, was to pass from the defendants to the plaintiff, and if this be accepted as true, which it doubtless is, it cannot be successfully contended that the defendants have not received the value of services performed by the plaintiff in pursuance of this contract. Suppose this agreement had been on the part of the plaintiff to pay a stated price for this hay when baled and delivered, and at the same time to thresh defendants' oats on the farm. The contract would not be materially different. In the one case, as in the other, plaintiff is performing a service for defendants which increases the value of their property. It was not necessary that the payment made upon the contract be in money. See Kuhns v. Gates, 92 Ind. 66; Howe v. Jones, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; McLure v. Sherman (C. C.) 70 Fed. 190. Defendants rely upon Corbett v. Woolford, 84 Md. 426, 35 Atl. 1088, Terney v. Dóten, 70 Cal. 399, 11 Pac. 743, Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575, and Hudnut v. Wier, 100 Ind. 501, which was again before the court as Weir v. Hudnut, 115 Ind. 525, 18 N. E. 24.[84] * * *

Judgment affirmed.[85]

[84] The court then proceeded to distinguish these cases relied on by the defendant.

[85] Where several items are included in a single contract of sale, a payment on account makes the oral contract enforceable as to every item. Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323 (1903).

A payment by check satisfies the statute, if the check operates as an extinguishment of the debt even before it is cashed. Parker v. Crisp, [1919] 1 K. B. 481, Summers v. Wood, 131 Ark. 345, 198 S. W. 692 (1917). But otherwise if it is only the cashing of the check that extinguishes the duty to pay. Bates v. Dwinell, 101 Neb. 712, 164 N. W. 722, L. R. A. 1918B, 900; and see, also, Walker v. Nussey, 16 M. & W. 302 (1847). See, also, Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544 (1881).

The plaintiff sold 10,000 bags of sugar to defendant at the market price on August 3, on the latter's oral promise to sell the plaintiff a like amount at the same price on demand within 10 days; it was held that the delivery of the first lot of sugar was not a part payment, making the defendant's oral promise enforceable. De Waal v. Jamison, 176 App. Div. 756, 163 N. Y. Supp. 1045 (1917).

Where the buyer sends money to the seller by mail, and the letter is duly received, this does not constitute a payment, unless the seller assents to it as such. Edgerton v. Hodge, 41 Vt. 676 (1869).

SECTION 6.—THE CHARACTER OF THE MEMORANDUM REQUIRED

SANBORN et al. v. FLAGLER.

(Supreme Judicial Court of Massachusetts, 1864. 9 Allen, 474.)

Contract, brought originally by the plaintiffs, who were partners under the firm of Sanborn, Richardson & Co., against John H. Flagler and ——— Holdane, as partners under the firm of Holdane & Co. The writ was served only upon Flagler, and he alone appeared to defend the action. The plaintiffs alleged that the defendants had refused to deliver to them fifty tons of best refined iron, in accordance with the terms of a written agreement entered into between them.

The defendant in his answer set up, among other defences, the statute of frauds.

At the trial in the superior court, before Morton, J., Josiah B. Richardson, one of the plaintiffs, was called to the stand, and produced, to be offered in evidence, a paper, of which the following is a copy as near as can be made:

"Will deliver S. R. & Co. Best Refined Iron 50 tons within 90 days—at 5 ct p lb 4 of cash. Plates to be 10 to 16 inches wide and 9 ft to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F. J. B. R."

The witness was proceeding to testify in relation to the execution and delivery of the same, when the defendant objected that the paper was not on its face or in fact any sufficient note or memorandum in writing of the alleged bargain signed by the party to be charged, and that parol evidence was not admissible to add to, modify or explain the paper, so as to make it such a memorandum as could be admitted. But the judge ruled that the paper was a sufficient note or memorandum under the statute, and would bind the defendant if he was a member of the firm of Holdane & Co. The witness then testified that the agreement was written by him, and that he and the defendant signed their initials, the defendant writing the initials "J. H. F." and he the initials "J. B. R.," and that before two o'clock on the day named, and before the defendant left the plaintiff's office, he accepted the proposition, and so stated to the defendant verbally. The witness also testified that he signed his initials on behalf of the plaintiffs, and that he understood the defendant to sign for the firm of Holdane & Co. This evidence was not controverted by the defendant.

The judge ruled that said paper, with the explanations given, if Richardson was believed, was a sufficient note or memorandum, and was binding on the defendant, if the jury found him to be a partner as alleged.

The jury found a verdict for the plaintiffs, and the defendant alleged exceptions.

BIGELOW, C. J. The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell.[36] Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence aliunde.

The objections on which the defendants rely are twofold. The first is, that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, the essential elements of a contract. But this position is not tenable. The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment and the time within which the article was to be delivered, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection, if well founded. There can be no contract

[36] In accord: Reuss v. Picksley, L. R. 1 Ex. 342 (1866); Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190 (1878); Lydig v. Braman, 177 Mass. 212, 58 N. E. 696 (1900); Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118 (1892); Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350 (1892).

A memorandum signed by one party only may be sufficient in case the party so signing is the party to be charged—the party now repudiating the contract; mutuality in this respect is not required. Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576, Id., 52 N. Y. 323 (1873); Jones v. School Dist. No. 48 of Lawrence County, 137 Ark. 414, 208 S. W. 798 (1919); Jaeger v. Shea, 130 Md. 1, 99 Atl. 954 (1917); Himrod Furnace Co. v. Cleveland & M. R. Co., 22 Ohio St. 451 (1872). Cf. Kerr v. Finch, 25 Idaho, 32, 135 Pac. 1165 (1913).

In Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818 (1919), the following memorandum, delivered to Wright, was held sufficient to bind the Grocery Company, although its name was merely printed at the top: "Seattle Grocery Company (Incorporated) Corner Western Avenue and Columbia Street. Phone Main 842. Seattle, Wash., April 6, 1917. Sold to Chauncey Wright, L. C. Smith Bldg., Seattle, Wash., Coffee, Spices, 'Halcyon' Food Products, 1 car Gold Medal flour, $2,790.46."

or valid memorandum of a contract, which does not show who are the contracting parties. But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price and on specified terms of payment is an agreement to sell. Delivery of goods at a stipulated price constitutes a sale; an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can therefore see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum, in this respect, than that of Salmon Falls Manuf. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of Bailey v. Ogden, 3 Johns. 399, 3 Am. Dec. 509; there was nothing in the memorandum to show which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document drawn up in the haste of business, and intended to express in a few words the terms of a bargain, we cannot entertain a doubt that it indicates with sufficient clearness that the plaintiffs were the purchasers and the defendant the seller of the merchandise, on the terms therein expressed. Indeed, we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly show that the latter is the purchaser and the former the seller as if the agreement had been in express terms by one to sell goods to the other.[87]

The other objection to the memorandum is, that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby bind

[87] Di Santis v. Cannata (R. I.) 105 Atl. 561 (1919); Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366 (1878); Mentz v. Newwitter, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514 (1890). But the letter addressed to a third party is sufficient if it contains the required names and terms. Peabody v. Speyers, 56 N. Y. 230 (1874); Spangler v. Danforth, 65 Ill. 152 (1872).

his principal; and parol evidence is competent to prove that he signed the memorandum in his capacity as agent.[38] On the same principle, a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shown by extrinsic evidence. Soames v. Spencer, 1 D. & R. 32; Long on Sales, 38; Browne on St. of Frauds, § 367; Higgins v. Senior, 8 M. & W. 834; Williams v. Bacon, 2 Gray, 387, 393. Besides, in the case at bar, the action is in effect against Flagler alone. He only has been served with process and appears to defend the action. . Whether he signed as agent for the firm or in his individual capacity is immaterial. In either aspect, he is liable on the contract.

It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to explain and apply them. Phillimore v. Barry, 1 Camp. 513; Salmon Falls Manuf. Co. v. Goddard, ubi supra; Barry v. Coombe, 1 Pet. 640, 7 L. Ed. 295.

Exceptions overruled.

KILDAY v. SCHANCUPP.

(Supreme Court of Errors of Connecticut, 1916. 91 Conn. 29, 98 Atl. 335, L. R. A. 1917A, 151.)

Action by Annie Kilday against Jacob Schancupp. Judgment for plaintiff, and defendant appeals. Affirmed.

On August 5, 1914, the plaintiff orally agreed to sell the defendant the two lots, 38 and 40 Emmett avenue, in Derby, Conn., for $4,350, payable, $50 in cash, the assumption of a mortgage for $2,000 upon the property, and a note for $1,500 secured by a second mortgage on the property, and the balance in cash at delivery of deed on or before September 1, 1914. In the afternoon of this day the defendant pre-

[38] In accord: Donahue v. Rafferty, 82 W. Va. 535, 96 S. E. 935 (1918); Union Bag & Paper Corporation v. Bischoff (D. C.) 255 Fed. 187 (1918); Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340 (1903); Sholovitz v. Noorigian (R. I.) 107 Atl. 94 (1919). A few states have statutes requiring the agent to have written authority.

A common agent may be authorized to sign for both parties; but it is well settled that one party cannot sign as agent for the other and thus satisfy the statute. Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., 246 Fed. 375, 158 C. C. A. 439 (1917); Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295 (1857); Asbury v. Mauney, 173 N. C. 454, 92 S. E. 267 (1917); O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54 (1857); Johnson v. Dodge, 17 Ill. 433 (1856); Browne, Statute of Frauds, §§ 367–370; Wright v. Dannah, 2 Camp. 203 (1809).

The memorandum of an auctioneer made at time of the sale binds both parties. Martin v. Mathis, 184 Ky. 20, 211 S. W. 198 (1919). His power to bind the seller lasts a reasonable time after the sale. White v. Dahlquist, 179 Mass. 427, 60 N. E. 791 (1901); Sweeney v. Brow, 35 R. I. 227, 86 Atl. 115, Ann. Cas. 1915C, 1075 (1913).

sented to the plaintiff and requested her signature, which she made, to the following instrument:

"J. Schancupp, Dealer in Diamonds, Watches and Jewelry, 222 Main Street.

"Derby, Conn., Aug. 5, 1914.

"Sold to J. Schancupp #38–40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150, next to second house for the sum of forty-three hundred and fifty dollars. Received by check deposit on the above $50.00, same to apply to purchase price. Assuming mortgage of $2,000 held by the Derby Savings Bank, and agree to take a second mortgage of $1500.00 for three years at 5%. Balance of purchase price to be paid in cash on delivery of deeds. Deeds to pass hands on or before the first of September, 1914.

" [Signed] Mrs. Annie Kilday.

"In the presence of
"Etta Kilday.
"S. Liftig."

The defendant directed his daughter to make a copy of this paper and give the same to the plaintiff. He himself kept the original, and did not sign it, unless his name in the body of the instrument is held to be a signing. The defendant at the delivery of the instrument to him gave the plaintiff his check for $50, written as follows:

"Deposit on house and extra lot.

"Birmingham National Bank, Derby, Conn.,

"Aug. 5, 1914.

"Pay to the order of Mrs. Kilday fifty and 00/100 dollars.

"J Schancupp."

—and the plaintiff cashed this. On August 6, 1914, the defendant told the plaintiff he did not intend to buy the property. On August 31, 1914, the plaintiff tendered the defendant a warranty deed of the premises and the mortgage deed required to be executed by him in accordance with said instrument, and requested the payment of the balance of the purchase price and the performance by the defendant of his part of the agreement. This the defendant refused to do, and declined to accept the deed. On August 5, 1914, plaintiff, believing she had sold her property to the defendant, moved out of the house and lived elsewhere for eight months. She then returned and resumed possession. On August 5, 1914, the plaintiff's property, which defendant agreed to pay $4,350 for was worth $4,000.

WHEELER, J. (after stating the facts as above). The trial court held that there was no sufficient memorandum in writing to support a decree for specific performance, but that the plaintiff was entitled to a judgment for damages based upon the agreement for the sale of land. General Statutes, § 1089, provides that:

"No civil action shall be maintained * * * upon any agreement for the sale of real estate, or any interest in or concerning it * * *

unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent."

We have said that our statute does not make agreements not made in this way invalid, but prevents their proof unless by such a writing. Fisk's Appeal, 81 Conn. 433, 438, 71 Atl. 559.

It is immaterial whether the action be one for specific performance, or for damages for the breach of a contract of sale of land. The proof must be in the manner provided by our statute. And the agreement, in its essentials, must be the same in either action. Lord Farwell succinctly stated the principle in Wild v. Woolwich Borough Council, 1 Ch. Div. 35, 42: "It is perfectly clear that if there was no contract, there can be no damages for breach of contract, and any claim to compensation is out of the question."

But before specific performance will be decreed, something further must be shown than that the contract is made in accordance with the requirements of law. It must, in addition, be one of such a character as that the court will enforce its performance. The governing principles are clearly specified in our decisions. Patterson v. Bloomer, 35 Conn. 57, 63, 95 Am. Dec. 218; Platt v. Stonington Savings Bank, 46 Conn. 476, 478.

The conclusion of the learned trial court is not necessarily erroneous, though the reason given may be.

If the memorandum by which the agreement was proved meets the requirements of the statute, a contract within the requirements of the statute has been established sufficient to support the action for damages, or the action to secure specific performance, in the absence of equitable considerations which would lead a court in the exercise of its discretion to refuse to issue its decree.

The memorandum upon which the case must stand or fall is Exhibit B. When analyzed it discloses the parties to a contract of sale of land, the subject of sale described, a consideration, the terms of the sale, and the time of delivery of the deed. When the agreement was offered in evidence, the defendant duly excepted to its admission.

In two particulars only does the appellant attack the agreement: (1) Because of indefiniteness; (2) because it was not signed by the defendant.

The claimed indefiniteness of this agreement rests upon the description of the subject of the sale, viz.— "# 38–40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150 next to second house."

In the body of the agreement the locality of Emmett avenue is not given. But the agreement bears date at Derby, Conn., and from this the inference of fact follows, in the absence of evidence to the contrary, that the property described in the agreement is located in Derby, Conn. This inference is rebuttable by parol proof, for example, that there was no such avenue or street in Derby. Mead v. Parker, 115 Mass. 413, 415, 15 Am. Rep. 110; Kraft et al. v. Egan, 76 Md. 243, 252, 25 Atl.

469; Shelinsky v. Foster, 87 Conn. 90, 97, 87 Atl. 35, Ann. Cas. 1914C, 1007; Hodges v. Kowing, 58 Conn. 20, 21, 18 Atl. 979, 7 L. R. A. 87.[39]

The agreement must have been signed by this defendant, since he is the party to be charged. This agreement was caused to be prepared by the defendant, and it begins, "Sold to J. Schancupp." This is the written declaration of the defendant himself that the plaintiff has sold him the property described upon the terms described, and likewise it is his written declaration of purchase of this property upon the named terms. The statute is intended to relieve against fraud. To hold that this defendant by writing his name in the body of this instrument instead of at its end did not sign the instrument would help perpetrate, instead of prevent, a wrong.

An instrument, signed by one in any part of it after the body of it is written, or signed in any part and when completed produced from his custody, must be taken to be the instrument of the party so signing. Under these circumstances he authenticates by his signature, or by the signature to the instrument produced from his custody, the instrument so signed, and such a signature fully meets the requirements of the statute of frauds. New England, etc., Co. v. Stand. Worsted Co., 165 Mass. 328, 331, 43 N. E. 112, 52 Am. St. Rep. 516; Penniman v. Hartshorn et al., 13 Mass. 87; Cal. Canneries Co. v. Scatena, 117 Cal. 447, 49 Pac. 462; Drury et al. v. Young, 58 Md. 553, 42 Am. Rep. 343.[40]

The authorities are equally decisive that the signature may be printed or written. Schneider v. Norris, 2 M. & S. 286; Drury et al. v.

39 The description must identify the property sold. Doherty v. Hill, 144 Mass. 465, 11 N. E. 581 (1887); Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447 (1889); Fortesque v. Crawford, 105 N. C. 29, 10 S. E. 910 (1890). But parol evidence is admissible to show the application of the description to the facts. An informal memorandum was held to describe the property sufficiently in Sholovitz v. Noorigian (R. I.) 107 Atl. 94 (1919); Desmarais v. Taft, 210 Mass. 560, 97 N. E. 96 (1912), "for a piece of land next to P., 70 feet on the road and back to an old wall"; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836 (1894), "my right in my father's estate"; Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340 (1903); Auerbach v. Nelson, [1919] 2 Ch. 383; Anderson v. Hall (Mo.) 188 S. W. 79 (1916), "the Joe Shelby farm, * * * an 800-acre farm near A."; Miller v. Dargan, 136 Ark. 237, 206 S. W. 319 (1918). The description was held insufficient in Howard & Co. v. Innes, 253 Pa. 593, 98 Atl. 761 (1916); Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S. W. 723 (1916); Burley-Winter Pottery Co. v. Onken Bros. & West Co., 26 Wyo. 287, 183 Pac. 747 (1919), description of goods; Rogers v. Lippy, 99 Wash. 312, 169 Pac. 858, L. R. A. 1918C, 583 (1918), "my stock ranch located in sections 9, 17, and 21, Tp. 3 S., R. 13 E., Sweetgrass county, Mont."—see dissent.

40 In accord: Higdon v. Thomas, 1 Har. & G. (Md.) 139 (1827); Evans v. Hoare, [1892] 1 Q. B. 593; Clason's Ex'rs v. Bailey, 14 Johns. (N. Y.) 484 (1817); Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493 (1852).

If the name is written in the body of the instrument solely to identify the party, and not as an authenticating signature, with the intention that the instrument shall become operative only when duly signed later, the memorandum does not satisfy the statute. Sutherland v. Munsey, 119 Va. 791, 89 S. E. 882 (1916).

Young, 58 Md. 554, 42 Am. Rep. 343. And we have held that a signature by a rubber stamp, made by an agent duly authorized, is a signature within the statute. Deep River Nat. Bank's Appeal, 73 Conn. 341, 346, 47 Atl. 675.

Exhibit B was properly admitted in evidence; it was not indefinite, and it was duly signed by the defendant.

No facts are found which would prevent a court of equity decreeing specific performance. Therefore the trial court would have been justified in decreeing specific performance, and was justified in rendering a judgment for damages upon the second prayer for relief.

There is no error. The other Judges concurred.

PACKARD v. RICHARDSON et al.

(Supreme Judicial Court of Massachusetts, 1821. 17 Mass. 122, 9 Am. Dec. 123.)

Assumpsit by the endorsee of a promissory note, made by the Stony Brook Manufacturing Company, of which the defendants were members.

PARKER, C. J.[41] * * * The original promise is by the Stony Brook Manufacturing Company, by a note payable on demand. After the making of the note, and after it was endorsed to the present plaintiff, the defendants severally signed their names on the back, and over their signatures were written these words: "We acknowledge ourselves holden as surety for the payment of the within note." The consideration existing was, that these defendants were members of the company which made the note; and that a suit, which had been commenced, was stopped by the plaintiff, at their request. But this consideration was proved by parole, and the writing acknowledges no consideration whatever.

It is somewhat remarkable that a statute, which has so important a bearing upon contracts in daily use, should have remained without the construction recently given to it, from the time of its enactment, which was in the 29 Car. 2, to the year 1804, when the case of Wain v. Warlters was decided. That it did so remain will appear from the circumstance, that neither the counsel in arguing that case, nor the Court in deciding it, refer to any preexisting case in support of their doctrine; a doctrine which, when announced, excited much surprise both in England and in this country.

Our provincial act was passed in the year 1692, [Prov. Laws 1692-93, c. 15,] and continued in force until the year 1788, when it was superseded by the statute of the commonwealth, which, as well as the provincial act, is similar in substance, and, except in one instance where the sense is not altered, is copied verbatim from the English

[41] The statement of facts is condensed and parts of the opinion are omitted.

statute. So that we have had the statute in operation more than a century, within which period innumerable collateral engagements have been made, and it has never, until within a few years, as far as we can ascertain, been doubted that, if one man, for a sufficient consideration, deliberately signed his name to a promise to pay the debt of another, he would be bound by it, although no consideration whatever was mentioned in the writing which he signed.

Although some consideration must exist to give validity to such a promise, it is generally of a nature not to be disputed; and if disputed, has been proved by parole testimony. The consideration need not be for the benefit of the party making the promise, and it seldom is for his benefit; forbearance to sue, or the surceasing of a suit, being most frequently the consideration of such undertakings, and these being altogether for the benefit of the original debtor. This being the case, it would seldom, if ever, enter into the imaginations of the parties to such a contract, that, unless the motives and considerations, which led to it, were put down in writing, the engagement was void.

Having made these preliminary remarks, I shall proceed to consider the statute, and what is its most obvious construction, without reference to decided cases; and then take a view of the decisions which have been had upon it, both in England and in this country.

The first section of our Statute of 1788, c. 16, corresponds, as has been observed, exactly with the fourth section of the Statute of 29 Car. 2. Exclusive of other subjects provided for in the same section, it enacts, "That no action shall be brought, * * * whereby to charge the defendant, upon any special promise, to answer for the debt, default or misdoings of another person, * * * unless the agreement, upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party, to be charged therewith, or some person thereunto by him lawfully authorized."

The obvious purpose of the Legislature would seem to be to protect men from hasty and inconsiderate engagements, they receiving no beneficial consideration; and against a misconstruction of their words by the testimony of witnesses, who would generally be in the employment and under the influence of the party wishing to avail himself of such engagements. To remove this mischief, the promise or engagement shall be in writing, and signed; in order that it may be a deliberate act, instead of the effect of a sudden impulse, and may be certain in its proof, instead of depending upon the loose memory or biased recollection of a witness. The agreement shall be in writing —what agreement? The agreement to pay a debt, which he is under no moral or legal obligation to pay, but which he shall be held to pay, if he agrees to do it, and signs such agreement.

This appears to be the whole object and design of the Legislature; and this is effected, without a formal recognition of a consideration;

which, after all, is more of a technical requisition, than a substantial ingredient in this sort of contracts. And it would seem, further, that the Legislature chose to prevent an inference that the whole contract or agreement must be in writing; for it is provided that some memorandum or note thereof in writing shall be sufficient. What is this but to say, that if it appear by a written memorandum or note, signed by the party, that he intended to become answerable for the debt of another, he shall be bound; otherwise not?

How then is it possible, with these expressions in the statute, to insist upon a formal agreement, containing all the motives or inducements which influenced the party to become bound? Yet such is the decision of the Court of King's Bench, in the case of Wain v. Warlters.

But in a case happening in the same court a short time afterwards, on another section of the same statute, a different construction is adopted. By the seventeenth section of the British statute, and the second section of our own, it is provided, "That no contract for the sale of any goods, wares or merchandise, for the price of ten pounds or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed, by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Yet in the case of Egerton v. Matthews it was decided that a memorandum, containing only one side of the bargain, and without any consideration expressed, was sufficient. When this case came before Lord Ellenborough, at nisi prius, he thought it governed by the case of Wain v. Warlters; and it is certainly difficult to perceive a difference between the two cases.

If the word "agreement" imports a mutual act of two parties, surely the word "bargain" is not less significative of the consent of two. In a popular sense, the former word is frequently used as declaring the engagement of one only. A man may agree to pay money or to perform some other act; and the word is then used synonymously with "promise" or "engage." But the word "bargain" is seldom used, unless to express a mutual contract or undertaking. If then the technical meaning of the word "agreement" made it necessary to insert the consideration in a collateral promise to pay, why not the word "bargain" also, as Lord Ellenborough at first supposed? But the court, Lord Ellenborough consenting, overruled the decision at nisi prius, and decided that a contract for the sale of goods was valid without any consideration expressed in the contract.

There are certainly grounds to suppose that some doubts began to be entertained of the correctness of the decision in Wain v. Warlters. We cannot otherwise account for the unwillingness to apply the same principle to the case of Egerton v. Matthews; and we shall see here-

after, that there was considerable cause for the Court of King's Bench to hesitate, before they applied the rule to other cases. * * *

[The court carefully reviewed the authorities and gave judgment for the plaintiff.][42]

MARKS v. COWDIN et al.

(Court of Appeals of New York, 1919. 226 N. Y. 138, 123 N. E. 139.)

Action by Leon Marks against John E. Cowdin and another. From a judgment of the Appellate Division (175 App. Div. 700, 162 N. Y. Supp. 567) reversing a judgment in favor of the plaintiff and dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

CARDOZO, J. The action is one by employé against employer for wrongful discharge.

The plaintiff entered the defendants' service in 1910. The defendants wrote him that his employment was to continue for two years from January 1, 1911, at an annual salary of $15,000. The hope was expressed that at the end of the term he might be accepted as a partner. He was given the privilege of starting his employment earlier if he pleased. In point of fact, he did start it in July, 1910. He took the place of another man, then leaving the defendants, who had acted as general manager. At once, the defendants gave written notice to their salesman. They wrote that the plaintiff was about to join their staff. "He will become our sales manager." And again: "We feel confident that with him in command, we will not only keep up our business, but will increase it to the largest dimensions."

The plaintiff's position is thus described in letters signed by the defendants. Its range is sketched in outline. The picture is completed when we view the course of dealing. The defendants were manufacturers, importers and sellers of ribbons. The plaintiff took charge of the selling department. He supervised and directed the salesmen. He helped the defendants themselves in selecting designs and fixing prices. He made trips abroad, inspected the foreign styles, and purchased the foreign merchandise. His position was one of general supervision. The partners were his sole superiors.

[42] In accord: Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352 (1882), sale of goods; Sage v. Wilcox, 6 Conn. 81 (1826), guaranty of note (see definition of "agreement" by the court); De Camp v. Scofield, 75 Mich. 449, 42 N. W. 962 (1889), guaranty; Brown v. Fowler, 70 N. H. 634, 47 Atl. 412 (1900), guaranty; Egerton v. Matthews, 6 East, 307 (1805), sale of goods. Contra: Wain v. Warlters, 5 East, 10 (1804), guaranty (now nullified, in case of guaranties, by statute; see 7 Halsbury, Laws of England, 374); Cooley v. Lobdell, 153 N. Y. 596, 47 N. E. 783 (1897), land; Siemers v. Siemers, 65 Minn. 104, 67 N. W. 802, 60 Am. St. Rep. 430 (1896), marriage.

The state statutes often expressly provide whether the consideration must be stated in the memorandum. See Hayes v. Jackson, 159 Mass. 451, 34 N. E. 683 (1893), need not be; Commercial Natl. Bank of Appleton v. Smith, 107 Wis. 574, 83 N. W. 766 (1900), must be.

At the beginning of 1913 there was a renewal of the employment for three years, but at a larger compensation. The new contract was made by word of mouth. Nearly a year later its terms were put in writing. Some of the defendant's salesmen had expressed hostility toward the plaintiff. The defendants reproved him, and said that he would have to leave. The disagreement, though amicably adjusted, seems to have been a warning to the plaintiff that his tenure was insecure. Thus warned, he requested and received the following memorandum:

"New York, December 22, 1913.

"It is understood between Johnson Cowdin & Co. and Leon Marks that the arrangements made for employment of Leon Marks in our business on January first, 1913, for a period of three years from that date at a salary of $15,000.00 (fifteen thousand) per year plus five (5 %) per cent. of the gross profits earned in our business which we agree shall be not less than $5,000 00/100 per year—continues in force until Jan. 1st, 1916.

Johnson Cowdin & Co.
"John E. Cowdin.
"E. N. Herzog."

For a time the plaintiff's services continued unchanged. The trouble began in the summer of 1914. Some of the events of that season are in dispute. We state the plaintiff's version, for it was accepted by the jury. One of the defendants said to the plaintiff: "I am going to put Mr. McLaren, who has been assisting you, in your position." The plaintiff was notified in writing: "The selling department will be in the hands of Mr. McLaren, and you will naturally report to him."

The title of sales manager, which had once been his, was thenceforth to be another's. In the past the chief business had been the sales to dealers in ribbons. One of the minor incidents had been the sales to manufacturers of dresses, underwear, and other articles, who used ribbons incidentally in making up their products. The plaintiff was directed in the future to attend to this trade exclusively. According to his testimony, he was to do the work of salesmen who had formerly been paid at the rate of $25 a week. According to the testimony of the defendants, he was to have salesmen under him, and was to develop a new branch of trade. Over him, however, was to be McLaren, with general power of control. The plaintiff protested that the defendants in thus changing his duties were changing his position. His refusal to submit to the change was followed by his discharge, and the discharge by this lawsuit. The plaintiff had a verdict of $24,794.-52. The Appellate Division reversed the judgment and dismissed the complaint.

The chief question in the case grows out of the statute of frauds. The contract of employment was not to be performed within a year. There is need, therefore, of a note or memorandum of its terms, subscribed by the parties to be charged. Personal Property Law, § 31; Consol. Laws, c. 41. The defendants signed a memorandum which continued an existing employment, but which did not describe its du-

ties. The question is whether the position may be identified by proof of the surrounding circumstances. The employment under the new contract began in January. The memorandum was not signed till the following December. It assumes the existence of a position which the plaintiff is then filling. It says that the employment shall be continued for a term and at a salary prescribed. A position then held is carried forward and preserved. The tests to be applied in order to identify the employment are thus embodied in the writing. We are not left to gather the relation between the parties from executory promises. We are informed that the relation then existing is the one to be maintained. If A. agrees to sell to B. "the house and lot now occupied by the seller," the description is not void because the bounds of occupation must be established by parol. Doherty v. Hill, 144 Mass. 465, 467, 11 N. E. 581; Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Shadlow v. Cottrell, L. R. 20 Ch. D. 90; Plant v. Bourne, 1897, 2 Ch. 281; Cave v. Hastings, 7 Q. B. D. 125; Carr v. Lynch, 1900, 1 Ch. 613; Catling v. King, 5 Ch. D. 660; Hodges v. Kowing, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; Richards v. Edick, 17 Barb. 260, 269. It is not otherwise where A. agrees with B. that a position in A.'s service then held shall be continued. "I will keep you until January 1, 1916, at so much a year, in your present place." By necessary implication, by inevitable construction, that is what this memorandum says. It makes no difference whether the place is land to be occupied or a relation of employment to be filled. Whether it is the one or the other, we do not violate the statute when we fit the description to the facts. In thus identifying the position we are not importing into the contract a new element of promise. We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. "In every case, the words used must be translated into things and facts by parol evidence." Holmes, J., in Doherty v. Hill, supra, 144 Mass. 468, 11 N. E. 583; Mead v. Parker, supra, 115 Mass. 415, 15 Am. Rep. 110; 4 Wigmore on Evidence, § 2454.

How far the process may be extended is a question of degree. Doherty v. Hill, supra, 144 Mass. 469, 11 N. E. 581. We exclude the writing that refers us to spoken words of promise. We admit the one that bids us ascertain a place or a relation by comparison of the description with some "manifest, external, and continuing fact." Doherty v. Hill, supra, 144 Mass. 469, 11 N. E. 584. The statute must not be pressed to the extreme of a literal and rigid logic. Some compromise is inevitable if words are to fulfill their function as symbols of things and of ideas. How many identifying tokens we are to exact, the reason and common sense of the situation must tell us. "What, then, is a sufficient description in writing? No one can say beforehand." Jessel, M. R., in Shadlow v. Cottrell, supra. "You cannot have a description in writing that will shut out all controversy,

even with the help of a map." Id. "In every case it must be considered what is a sufficient description with reference to the surrounding circumstances and the facts." Jessel, M. R., in Catlin v. King, supra, p. 664. Some description there must be. Its adequacy depends upon the degree of certainty attained when the words are applied to things. From correspondence we infer identity. Beckwith v. Talbot, 95 U. S. 289, 292, 24 L. Ed. 496. A. has been employed by B. as a bookkeeper and accountant. He receives a writing to the effect that his employment, which is stated to have begun some years before, is continued, for a given term. We shall make a farce of the statute if we say that oral evidence is incompetent to show that A. is not expected to do the work of a porter. "There is no mystery about the statute of frauds." Chitty, L. J., in Plant v. Bourne, supra. The memorandum which it requires, like any other memorandum, must be read in the light of reason. Id.

In this case the plaintiff does not need the aid of one spoken word of promise to identify his place. His first contract was for two years, from January 1, 1911, to January 1, 1913. During that period, writings subscribed by the defendants attest the nature of his position. The memorandum exacted by the statute does not have to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion. Ridgway v. Wharton, L. R. 6 H. L. C. 238; Cave v. Hastings, L. R. 7 Q. B. D. 125; Oliver v. Hunting, L. R. 44 Ch. D. 205; Bibb v. Allen, 149 U. S. 481, 496, 13 Sup. Ct. 950, 37 L. Ed. 819; Peck v. Vandemark, 99 N. Y. 29, 34, 1 N. E. 41; Coe v. Tough, 116 N. Y. 273, 22 N. E. 550; Levin v. Dietz, 106 App. Div. 208, 211, 94 N. Y. Supp. 419; Title G. & T. Co. v. Lippincott, 252 Pa. 112, 97 Atl. 201; Pollock, Contracts (8th Ed.) p. 171. It is not even necessary that they be writings from the promisor to the promisee. They may be from the promisor to his own agent. Gibson v. Holland, L. R. 1 C. P. 1; Townsend v. Hargraves, 118 Mass. 325, 335; Argus Co. v. Mayor, etc., of Albany, 55 N. Y. 495, 505, 14 Am. Rep. 296; Peabody v. Speyers, 56 N. Y. 230, 237; Browne, Statute of Frauds, § 354a.

Tested by these rules, the first contract is plainly valid. The second must be interpreted in the light of what had gone before. The circumstances are persuasive in their collective force. We see this when we put them together. There is a note or memorandum in writing that the plaintiff was employed in 1911 to act for two years as the defendants' sales manager. There is evidence, not contradicted, that for two years he did occupy that position. There is evidence, again uncontradicted, that after the expiration of his first contract, he occupied the same position. And there is a note or memorandum in writing that in December, 1913, the position then filled was continued for a term of years. To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agree-

ment. It is to explain the memorandum without changing or enlarging it. We think the process is one that is justified by precedent. Beckwith v. Talbot, 95 U. S. 289, 291, 292, 24 L. Ed. 496; Hagan v. Domestic Sewing Machine Co., 9 Hun. 73; Davis v. Dodge, 126 App. Div. 469, 476, 110 N. Y. Supp. 787; Carr v. Lynch, supra; Plant v. Bourne, supra; Title G. & T. Co. v. Lippincott, supra.

The plaintiff, then, was employed as sales manager, or at least a jury might so find. Finding that, they might also say that the defendants removed him from that position when they changed his powers and his duties. It is true that in the past he had visited the manufacturers and solicited their trade. But that had been a mere incident to the work of management and supervision. The defendants did not fail to appreciate the significance of the change. They told the plaintiff, if we may credit his testimony, that they were giving his position to another. He had been sales manager before. He was to be sales manager no longer. We do not mean to say that he was at liberty to show, by evidence dehors the writing, that under his contract of employment special rights had become his by force of special promises. To do that would be to do more than identify a position with known and established attributes. It would be to surround the position with peculiar privileges and exemptions. The defendants were free to change the plaintiff's duties at their pleasure as long as the position was unchanged in the things that determine its identity. Beyond that they could not go. It is no answer to say that, even then, the definition of the duties is left open to extrinsic evidence. That would be just as true if the description of the position as that of "superintendent" or "manager" had been embodied in the writing. Hagan v. Domestic Sewing Machine Co., supra. There would still be lacking a catalogue of the things that a superintendent or a manager does. Yet it would hardly be contended by any one that such a writing would be inadequate. The difficulty, if there is any, is the usual one that we meet in passing from the particular to the general. There are certain common properties that characterize a class and mark it off from others. These must remain constant, or class identity is lost. There are certain other qualities that characterize the individual. These may be changed, and a place within the class retained. The plaintiff makes no complaint of changes in those qualities that are merely accidental. He does not complain that the defendants subtracted one incident from his position, or added another to it. He says that they changed it altogether; they took the position from one man, and gave it to another. Whether that was in truth the effect of their conduct was a question for the jury.

The Appellate Division dismissed the complaint, but also reversed upon the facts. A new trial is therefore necessary. Gressing v. Musical Instrument Sales Co., 222 N. Y. 215, 221, 118 N. E. 627; Maguire v. Barrett, 223 N. Y. 49, 56, 119 N. E. 79; Meisle v. N. Y. C.

& H. R. R. R. Co., 219 N. Y. 317, 322, 114 N. E. 347, Ann. Cas. 1918E, 1081.

The judgment should be reversed, and a new trial granted, with costs to abide the event.[43]

LUSKY et ux. v. KEISER.

(Supreme Court of Tennessee, 1914. 128 Tenn. 705, 164 S. W. 777, L. R. A. 1915C, 400.)

Action by Louis Lusky and wife against Amelia Keiser. Judgment for defendant, and plaintiffs appeal. Affirmed.

WILLIAMS, J.[44] Complainants, husband and wife, executed to one Loventhal, a real estate agent, a contract authorizing the latter to sell a tract of land belonging to the wife. Acting under that contract, Loventhal opened negotiations with defendant, Keiser, who agreed to purchase. The instrument executed to the real estate agent by complainants, so far as pertinent, is quoted, as follows:

"We, Louis Lusky and Lettie Lusky, hereby authorize and empower Dorris S. Loventhal, a real estate dealer in Nashville, Tennessee, to sell for us our farm, containing 106 acres, more or less in the 12th Civil District of Davidson county, Tennessee (here giving boundaries) at and for the sum of $11,000.00, payable $4,500.00 in cash, and an assumption of a mortgage thereon for $3,500.00. * * * And we agree to make a deed to any good purchaser, complying with said terms,

[43] The memorandum may consist of several separate documents, no one of which would be sufficient standing alone. Some courts are inclined to require that the document signed by the party to be charged must identify by an internal reference the other documents and thus authenticate them; but the reference need not be in express words, and most courts are very liberal in admitting parol evidence to identify and connect. See Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496 (1887); Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., 158 C. C. A. 439, 246 Fed. 375, 158 C. C. A. 439 (1917); Nickerson v. Weld, 204 Mass. 346, 90 N. E. 589 (1910); Shelinsky v. Foster, 87 Conn. 90, 87 Atl. 35, Ann. Cas. 1914C, 1007 (1913); Lerned v. Wannemacher, 9 Allen (Mass.) 412 (1864); Brewer v. Horst & Lachmond Co., 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240 (1900); O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54 (1857); Thayer v. Luce, 22 Ohio St. 62 (1871); Bayne v. Wiggins, 139 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144 (1891); Gibson v. Holland, L. R. 1 C. P. 1 (1865).

A signed letter, acknowledging that the contract was made and stating its terms, either expressly or by reference to another document, is a sufficient memorandum, even though it expressly repudiates and refuses to be bound by the contract. Bailey v. Sweeting, 9 C. B. N. S. 857 (1861); Thirkell v. Cambi, [1919] 2 K. B. 590 (semble); Brewer v. Fairmount Creamery Co., 104 Kan. 100, 178 Pac. 250 (1919); Drury v. Young, 58 Md. 546, 42 Am. Rep. 343 (1882); Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212 (1888).

A memorandum does not cease to be sufficient merely because it is lost; its contents may be proved by parol. Woodruff Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., 158 C. C. A. 439, 246 Fed. 375, 158 C. C. A. 439 (1917).

[44] Parts of the opinion are omitted.

procured by said Loventhal, with the usual covenants of warranty and seisin.

"This February 16, 1912. Lettie Lusky.
"Louis Lusky."

Defendant's acceptance was appended:

"February 17, 1912. I hereby accept the proposition.
"Amelia Keiser."

The bill of complaint recites that, in order to carry out the contract in good faith, the complainants on March 14, 1912, notwithstanding the refusal of defendant to abide by and perform her contract, executed a deed in accordance with the above-quoted instrument, and tendered same, but that its acceptance and contract performance were declined by defendant, who gave no reason or excuse therefor. Suit was brought to recover the difference between the contract price claimed to be thus fixed and the market price as determined by a fully advertised auction sale of the land made in May, 1912, to wit, $3,400.

Defendant, Keiser, interposed a demurrer to the bill of complaint on the grounds: (1) That no contract binding on her was entered into; and (2) the instrument relied upon as an agreement falls within, and fails because of, the statute of frauds. The chancellor sustained both of these grounds of demurrer, and from that decree an appeal was prayed to this court.

It is urged in argument in behalf of complainants and appellants that the instrument signed and delivered to the real estate agent by them was a memorandum sufficiently binding them as the "party to be charged" under our statute of frauds, when defendant's acceptance was indorsed.

Our statute, as to this phrase, has been construed by this court to mean the owner of the realty rather than the party attempted to be charged or held liable in an action based on the memorandum. Frazer v. Ford, 2 Head, 464; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800.

It is by the defendant insisted that the instrument so signed and delivered was not one with her as a contracting party, and operated only as between and on the rights and liability of the owners signing and the real estate agent; that is, was, in no proper sense, a memorandum or contract of sale contemplated by the statute.

Thus is raised a sharp issue as to the nature and sufficiency of the instrument thus signed by the owners.

It is not necessary that the contract of sale shall be in writing, provided there outstands a writing which contains evidence of the essential terms of the oral contract, and which is signed by such party to be charged. The memorandum is not the contract, but the written evidence of it required by the statute.

A written offer when signed and accepted may constitute a memorandum of the contract, adequate, though it consist of several parts, such as letters relating to the subject, and even though they may be

addressed to the owner's agent. Lee v. Cherry, supra; Otis v. Payne, 86 Tenn. 666, 8 S. W. 848; 20 Cyc. 254, 255.

It is thereupon argued that here there is such an offer shown addressed to the agent of the owners. But does the instrument tend to evidence, what it must do, a contract of sale between complainants as offerers and defendant as offeree? The defendant was not mentioned in the instrument, when signed, as offeree or buyer, as seems requisite. Lee v. Cherry, supra; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366; Lewis v. Wood, 153 Mass. 321, 26 N. E. 862, 11 L. R. A. 143; 20 Cyc. 261.

In the case of Haydock v. Stow, 40 N. Y. 363, it appeared that an instrument was executed and delivered to a firm of real estate agents by the owner, as follows:

"I hereby authorize and empower Peck, Hillman & Parks, agents for me, to sell the following property (describing it) to be sold within ——— days from this date, on the following terms (giving them), with interest semiannually, if desired by the purchaser; reserving the right to withdraw the property at any time before the sale, by giving Peck, Hillman & Parks notice thereof.

"Troy, February 18, 1864." F. A. Stow."

Indorsed thereon was, "I hereby agree to purchase the property herein mentioned upon the terms expressed," signed by plaintiff, who brought suit to enforce the contract, as one properly evidenced by the above as the memorandum, after Stow had served notice declaring null the instrument thus signed by him. The situation of the parties was the reverse of what appears in the pending case, but the question in each was and is as to the sufficiency of the claimed memorandum. The Court of Appeals, through Hunt, J., said of the instrument: "It is variously styled an agreement to sell, an offer or proposition of sale, and a power of attorney. It is not an agreement to sell, for the reason that there are not two parties to it. An agreement cannot be made by one party alone. There is no pretense that Peck and Hillman agreed to buy, or that the defendant agreed to sell to them, and they are the only parties named in the paper, except the defendant himself. Nor do I see any ground upon which it can be called an offer of sale. except so far as the appointment of an attorney to sell may include such offer. I agree that if the defendant had addressed plaintiff a letter offering to sell him these premises upon the terms specified herein, and plaintiff had made a written acceptance of the same, addressed and delivered to the defendant, that a contract of sale would have been thereby created. * * * But that is not the present state of facts. I consider the instrument to be a plain, direct, unqualified power of attorney to sell the land mentioned in it; nothing more, nothing less. I do not discover in it a single expression that embarrasses such a conclusion. * * * In law, this reservation" to withdraw the right to sell "was unnecessary," as "the right belonged to the defendant * * * without the formal reservation. * * * This is neither an

agreement for sale nor an offer to sell to any particular person, or to the world at large. It is simply a vesting in Peck & Co. of a power before existing in the defendant only. * * * A giving of power and authority, in law creates an agency; but the defendant and Peck & Co. were not content with the declaration of law to that effect, but take the pains to allege that, in fact, Peck & Co. are the agents of the defendant to sell his property. They stand then as agents empowered to sell, * * * and, if they had made such a contract with plaintiff, the defendant would have been bound by it. No such agreement or subscription was made. Plaintiff has, indeed, expressed in writing his readiness to purchase upon the terms that Peck & Co. were authorized to accept, but Peck & Co. have put nothing in writing. This is not a compliance with the statute, which requires the writing 'to be subscribed by the party by whom the sale was made, or by the agent of such party lawfully authorized.' The defendant or his agent must sign, to make a compliance with the statute, and no aid is derived from the signature of plaintiff." * * *

We think it clear that the instrument executed by the owners, Lusky and wife, was one whose function and end was to define in contract form the relationship betwen them and their agent, Loventhal; and it is difficult to see how, without a further step by or in behalf of the owners towards contractual assent with defendant, Keiser, that instrument, so perfected as a contract proper, may be deemed a memorandum evidencing another and different contract between the owners and defendant, Keiser—a contract of sale. There was no existent oral contract between the latter parties on February 16, 1912, which could have been evidenced by the contract of agency. * * * [45]

On these authorities, and on principle, we conclude that the contract between the complainants and their real estate agent cannot be made to serve as a memorandum which adequately evidenced the essentials of a contract for the sale of realty between the complainants and the defendant. The complainants, unless and until they came more immediately into contractual relation to defendant, were at liberty to decline to proceed. If this be true, the defendant was not bound to do so. Her signature was not, as we have seen, that of "the party to be charged," and it did not avail to consummate a contract binding on her, where none existed before.

There is no error in the decree of the chancellor. Affirmed.[46]

[45] The court here cited in accord: Lasher v. Gardner, 124 Ill. 441, 449, 16 N. E. 919, 922 (1888); Jordan & Davis v. Mahoney, 109 Va. 133, 135, 63 S. E. 467 (1909), and Donnell v. Currie & Dohoney, 62 Tex. Civ. App. 134, 131 S. W. 88 (1910). Contra: Evans v. Stratton, 142 Ky. 615, 134 S. W. 1154, 34 L. R. A. (N. S.) 393 (1911).

[46] In accord: Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106 (1908). A similar letter was held to be a sufficient memorandum in Willey v. Goulding, 99 Kan. 323, 161 Pac. 611 (1916).

Letters from the principal to his agent, written after the formation of the contract, may be a sufficient memorandum. Roach v. Lane, 226 Mass. 598, 116 N. E. 470 (1917); Gibson v. Holland, L. R. 1 C. P. 1 (1865).

LUCAS v. DIXON.

(In the Court of Appeal, 1889. 22 Q. B. Div. 357.)

The action was brought for the non-acceptance of goods on a contract coming within the 17th section of the Statute of Frauds. The plaintiff having made an application under Order XIV, r. 1, the defendant made an affidavit in opposition. At the trial the plaintiff relied on the affidavit so made as constituting a note or memorandum of the contract sufficient to satisfy the statute. The learned judge was of opinion that the terms of the contract sufficiently appeared in the affidavit to make it a note or memorandum but that it could not be available to the plaintiff as it was not in existence when the action was brought. He therefore gave judgment for the defendant.

Plaintiff appealed.

BOWEN, L. J.[47] The question is whether there is a note or memorandum in writing sufficient to satisfy the Statute of Frauds, and the evidence in support of that view consists of an affidavit sworn by the defendant in opposition to an application under Order XIV. If this affidavit, which I will assume for the purpose of the argument contains sufficient evidence of the contract, had been sworn in some previous action and had been used in this, Goode v. Job, 28 L. J. (Q. B.) 1, and Barkworth v. Young, 4 Drew. 1, show that the document is not necessarily the less a sufficient memorandum because it is sworn in an action. What we have to consider is whether such a memorandum after action is sufficient in that action. I think the true view is that expressed by Lord Blackburn in Maddison v. Alderson, 8 App. Cas. 467, at page 488: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts under them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." That still leaves it open to question as to what is the time at which it can be said the contract is sought to be enforced—when the action is brought, or when it is sought to prove the case by adducing the evidence. I cannot help thinking that the view of Lord Blackburn was that at the time the action is brought the evidence ought to be in existence, at all events in a contract under section 4, because he speaks of a contract not being "enforceable" unless signed by or on behalf of the party to be charged.

But we must consider the matter partly on the statute and partly on the authorities. Looking at the statute itself it strikes one that it is for the prevention of fraud as well as perjury. It may well be that though the contract may not be void, the legislature intended to prevent persons being vexed with actions that could not succeed.

[47] Part of Lord Justice Bowen's opinion and the concurring opinions of Lord Esher, M. R. and Fry, L. J., have been omitted.

But when we come to section 4, I cannot help thinking that it is perfectly clear that the memorandum or note must be in existence at the time the action is brought. That was the view taken by the Courts in Equity which had to deal with the 4th more perhaps than they had with the 17th section. I think it follows that was their view, because they allowed a bill, which showed on the face of it that the conditions of the statute had not been complied with, to be demurred to, or, in other words, allowed a defendant to take by demurrer an objection to the institution of the action, which would show that they thought that the matter could not be cured by evidence. Wood v. Midgley, 5 De G. M. & G. 41.

It was held, no doubt, that if the defendant admitted his liability that was sufficient—not on the ground that his admission was a memorandum of the contract, but that it was an admission that there was such a memorandum. That is shown by the fact that if, at the same time, he set up the statute his admission did not operate. So a plea of the statute was allowed, and as a plea goes to the state of things at the time of action brought that leads to the same conclusion. Then when we come to section 17, is there any distinction in reason between the matters dealt with in the two sections so as to lead us to think that some different reasoning applies to them? The words are different, but in section 17 one of the things for which a contract shall be allowed to be good is acceptance of part of the goods, which one would certainly expect to take place before action, and another is the giving of something in earnest to bind the bargain, to which the same remark applies. It is reasonable to suppose from this that the note or memorandum was to be something completed before action. Turning to the cases, the Courts have never drawn a distinction in this respect between the two sections, on the contrary, the general opinion expressed in the cases is that they are in pari materia.

There is a great deal of authority at common law that a memorandum coming into existence after action brought is not available to the plaintiff under section 17. In Fricker v. Thomlinson, 1 M. & G. 772, there was no decision, but Maule, J., expressed an opinion on the point. In Bill v. Bament, 9 M. & W. 36, the point was made which is sought to be argued in the present case, but it was abandoned, or at all events treated as untenable, because the counsel on the other side were stopped. Lord Abinger thought it too untenable to require discussion, and Parke, B., said: "There must, in order to sustain the action, be a good contract in existence at the time of the action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned." * * *

Appeal dismissed.[48]

[48] Bailey v. Sweeting, 9 C. B. (N. S.) 843 (1861), per Williams, J.; Williston Sales, § 117; Tisdale v. Harris, 20 Pick. (Mass.) 9 (1838), semble; Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571 (1877). Contra: Cash v. Clark, 61 Mo. App. 636 (1895).

SECTION 7.—THE LEGAL OPERATION OF THE STATUTE

BIRCH v. BAKER et al.

(Court of Errors and Appeals of New Jersey, 1914. 85 N. J. Law, 660, 90 Atl. 297, L. R. A. 1916D, 485.)

BERGEN, J.[49] The plaintiff and the five defendants, being residents of the town of Dover, were interested in procuring the Sims-Kent Company to locate there a manufacturing plant, and to accomplish this entered into negotiations with the company, which resulted in a written agreement between the plaintiff and the defendants, as joint contractors, and the company, in which the plaintiff and the defendants agreed "to secure and convey to said company in fee simple the title of said land and premises from the said Foster F. Birch," the premises being a tract of land in Dover belonging to the plaintiff. In consideration of this conveyance, to be without cost to it, the Sims-Kent Company agreed to erect its factory on the lands. The plaintiff subsequently conveyed the land to the company, and it erected thereon its factory. The plaintiff, claiming that the defendants, to induce him to make the conveyance to the Sims-Kent Company according to their contract, promised orally to pay him $2,000 of the consideration price, upon their refusal to pay, brought his suit against the defendants on their oral promise. There was evidence from which it could be inferred that the defendants, to induce plaintiff to enter into the contract, and subsequently convey the land to the Sims-Kent Company, promised to pay him $2,000.

The trial court ordered a judgment of nonsuit from which plaintiff appeals, and the defendants now seek to sustain the nonsuit upon the ground that the oral promise was one concerning the sale of lands, and, not being in writing, void under the statute for the prevention of frauds and perjuries (C. S. 2610), section 5 of which prohibits an action to charge any person "upon any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning them," unless the agreement be in writing, signed by the person charged.

This case was before the Supreme Court on a rule to show cause, where it was held that such a promise was within the statute (79 N. J. Law, 10, 74 Atl. 151), and on the second trial, the judge at circuit, following the judgment of the Supreme Court, ordered the nonsuit. The plaintiff having appealed from the judgment of nonsuit, the question presented is whether a promise, not in writing, to pay the owner of lands an agreed consideration if he convey the land to one in performance of a written contract by the promisor to secure such con-

[49] Parts of the opinion, and the specially concurring opinion of White, J., are omitted. Three of the twelve judges dissented.

veyance, and the owner does convey as requested, relying upon such promise, is enforceable as not being barred by the statute of frauds.

That a vendor may recover in assumpsit upon an oral promise by the vendee to pay the consideration agreed upon for land conveyed, and that such promise is not within the statute, has the sanction both of legal reasoning and adjudged cases. It was so held by the Supreme Court of this state in Murray v. Schuldt, 73 N. J. Law, 489, 63 Atl. 904, where the court said "that, the property having been conveyed to the defendant, the plaintiff's action was not upon the express contract of sale, but upon the debt which arose upon the conveyance," and that such promise was not within the statute. * * *

In the case under review, the defendants had in writing contracted to "secure and convey to said company in fee simple" land the title to which was vested in the plaintiff. This was a binding contract which the defendants fulfilled by inducing plaintiff to convey upon their oral promise to pay him a portion of the consideration money. He, relying upon that promise, parted with his land to the party the defendants had contracted with, thus completing for them the sale they had in writing agreed to secure, and thereby relieving them from their obligation to the vendee concerning the sale of the land, or of any interest therein, which is a sufficient and legal consideration for their promise. Having by their promise to plaintiff been enabled to fulfill their written obligation, binding under the statute, it would further the perpetration of a fraud of most flagrant character to allow the defendants to escape carrying out their bargain with the landowner, and this ought not to be permitted, unless their promise is barred by the statute, and we think it is not. If the conveyance had been made to the defendants, their promise, although oral, to pay the consideration would not be within the statute, and their legal obligation to the vendor is not altered because he conveys to their nominee instead of to them, for they get a benefit from the conveyance in either event, and it is illogical to argue that what the plaintiff did for the defendants at their request was not a performance of their contract by the plaintiff, who advanced his land for their exoneration. Whether it was money or land which they had contracted to supply, and which the plaintiff supplied for them, is of no consequence, for, as was well said by Chief Justice Hornblower in Linn v. Cook, 19 N. J. Law, 11, whenever the plaintiff has discharged an obligation of the defendant "to any other person, by applying his own money, goods, chattels, securities, or land to such discharge, he may recover the amount so paid or satisfied, in an action of general indebitatus assumpsit for money paid." * * *

We have no doubt that where a sale of land is executed by delivery and acceptance of a conveyance passing the title, a previous oral promise to pay the consideration, whether the conveyance be to the promisor or to his nominee, is not within the statute of frauds, for the consideration of the promise is executed, and the law implies a debt recoverable in assumpsit, when there has been a previous request by the

defendant to convey to him, or his nominee, coupled with circumstances showing that both parties expected that plaintiff would be recompensed for complying with such request, and the action is not limited to cases where money alone has been expended, but extends to those where goods, securities, or land have been parted with on a previous express request.

It is not without significance that these defendants, in the contract they made with the Sims-Kent Company, required it to deposit in the bank a sum of money subject to their order, or to the order of a majority contracting to convey, as a guaranty that after conveyance that company would proceed to erect the factory on the land. The sum required to be deposited was not the full consideration named in the deed, but only $2,000, which was the precise sum which plaintiff's case shows they promised to pay him, and the inference is permissible that this was required to secure the defendants for the cost of the land, if the Sims-Kent Company did not make the agreed use of it.

It further appears that these defendants subsequently assented to the withdrawal of the $2,000 by the depositing company when it had, to their satisfaction, complied with the terms of its contract with them, which may be taken, until otherwise explained, as an indication that the consideration which defendants contracted for as the price of the conveyance of the land had been fulfilled by their nominated vendee to their satisfaction, which would justify the inference of an accepted performance of the covenant contained in the contract of sale beneficial to them.

In this case there was testimony from which may be inferred, not only a request to convey, but a promise by the defendants to pay a part of the value of the land, which at their request the plaintiff conveyed to their nominee in satisfaction of their contract, and when plaintiff advanced his land to relieve these defendants, at their request, the law raised an implied promise by the defendants so benefited to reimburse him, a promise which has no concern with the sale of land or of any interest therein. The sale was closed when plaintiff conveyed, and nothing remained to be done to complete the sale of the land. The promise which induced the conveyance became a debt of those who agreed to pay the consideration, enforceable as an implied obligation arising in part from what the plaintiff did under the influence of the contract. * * *

Reversed.[50]

[50] The oral executory agreement is prevented by the statute from having full legal operation; but performance is not forbidden, and when such acts of performance are complete they are given almost the same legal effect that they would have had if the contract had been in writing. Thus, where land is duly conveyed by deed, in accordance with an oral contract, title passes, and is not affected by the fact that the deed is later destroyed before recording. Shipley v. Shipley, 274 Ill. 506, 113 N. E. 906 (1916). See, further, as to the effect of full performance: Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654 (1832); Brown v. Farmers' Loan & Trust Co.,

IMPERATOR REALTY CO., Inc., v. TULL.

(Court of Appeals of New York, 1920. 228 N. Y. 447, 127 N. E. 263.)

Action by the Imperator Realty Company against Samuel P. Tull. From a judgment of the Appellate Division, First Department (179 App. Div. 761, 167 N. Y. Supp. 210), reversing on questions of fact and law a judgment of the Trial Term in favor of plaintiff, and dismissing the complaint, plaintiff appeals. Reversed, and judgment of the Trial Term affirmed.

CHASE, J. The parties to this action entered into a written contract under seal for the exchange of pieces of real property in the city of New York. On the day fixed therein for carrying out the contract and making the conveyances, the defendant deliberately defaulted. The action was brought to recover damages alleged to have been sustained by the plaintiff.

At the trial the jury determined all of the issues in favor of the plaintiff and rendered a verdict for it. The defendant appealed from the judgment entered upon such verdict, and the Appellate Division reversed the judgment and dismissed the complaint. Imperator Realty Co., Inc., v. Tull, 179 App. Div. 761, 167 N. Y. Supp. 210.

One of the provisions of the contract is: "All notes or notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by any department of the city of New York against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same."

There were several notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by a department of the city of New York against or affecting the premises to be conveyed by the plaintiff at the date of the contract which, although aggregating an amount that is comparatively very small, were not satisfied or discharged on the day when the property was to be conveyed. The plaintiff sought to avoid the failure to procure the discharge of such violations by an alleged modification of the contract pursuant to a conversation between the president of the plaintiff and the defendant in which it is claimed that there were reciprocal promises. The president of the plaintiff testified that after the making of the contract, and on the same day thereof, it was agreed between the parties to the contract that either party in place of satisfying any of the so-called violations that might be filed against the pieces of real property therein mentioned might deposit with the New York Title Insurance Com-

117 N. Y. 266, 22 N. E. 952 (1889). A plaintiff who has partly performed to the benefit of the defendant before the latter repudiates can recover in quasi contract. McDonald v. Crosby, 192 Ill. 283, 61 N. E. 505 (1901); Wallace v. Long, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222 (1886); Spinney v. Hill, 81 Minn. 316, 84 N. W. 116 (1900). See Woodward, Quasi Contracts, Thurston's Cases on Quasi Contracts, 312–352.

pany a sufficient amount of cash to pay and discharge the same. There is evidence in the record to show that the plaintiff was able and willing on the day and at the time and place for closing the contract to carry out the same as therein provided except that he could not convey the property to be transferred by him free from such violations, and there is also evidence that he was able and willing to deposit a sufficient amount of cash to comply with and free the property from the violations as required by such oral agreement between the parties.[51] * * *

CARDOZO, J. (concurring in result). The statute says that a contract for the sale of real property "is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the * * * grantor, or by his lawfully authorized agent." Real Property Law (Consol. Laws, c. 50) § 259 (statute of frauds). In this instance, each party was a grantor, for the sale was an exchange. I think it is the law that, where contracts are subject to the statute, changes are governed by the same requirements of form as original provisions. Hill v. Blake, 97 N. Y. 216; Clark v. Fey, 121 N. Y. 470, 476, 24 N. E. 703. Abrogated by word of mouth such a contract may be (Blanchard v. Trim, 38 N. Y. 225), but its obligation may not be varied by spoken words of promise while it continues undissolved (Swain v. Seamens, 9 Wall. 254, 271, 272, 19 L. Ed. 554; Emerson v. Slater, 22 How. 28, 42, 16 L. Ed. 360; Goss v. Lord Nugent, 5 B. & Ald. 58; Harvey v. Graham, 5 Ad. & El. 61; Hickman v. Haynes, L. R. 10 C. P. 598; Abell v. Munson, 18 Mich. 307, 100 Am. Dec. 165; Malkan v. Hemmung, 82 Conn. 293, 73 Atl. 752; Long v. Hartwell, 34 N. J. Law, 116; Rucker v. Harrington, 52 Mo. App. 481; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Jarman v. Westbrook, 134 Ga. 19, 67 S. E. 403; 1 Williston on Contracts, § 593). A recent decision of the House of Lords reviews the English precedents, and declares the rule anew. Morris v. Baron & Co., 1918, A. C. 1, 19, 20, 31. Oral promises are ineffective to make the contract, or any part of it, in the beginning. Wright v. Weeks, 25 N. Y. 153; Marks v. Cowdin, 226 N. Y. 138, 123 N. E. 139. Oral promises must also be ineffective to vary it thereafter. Hill v. Blake, supra. Grant and consideration alike must find expression in a writing. Real Prop. Law, § 259; Consol. Laws, c. 50.[52]

[51] The remainder of the opinion of Chase, J., is omitted.

[52] A contract within the statute of frauds and actually in writing can be rescinded by a mutual unwritten agreement. Grand Traverse Fruit & Produce Exch. v. Thomas Canning Co., 200 Mich. 95, 166 N. W. 878 (1918); Ely v. Jones, 101 Kan. 572, 168 Pac. 1102 (1917), rescission of contract for sale of land. Contra: Woolen v. Sloan, 94 Wash. 551, 162 Pac. 985 (1917), written option on land.

In Morris v. Baron, [1918] A. C. 1, Ann. Cas. 1918C, 1197, and note, it was held that a written contract for the sale of goods was effectively rescinded by a subsequent agreement, even though the latter agreement was itself for a new sale of goods within the statute of frauds and was not independently enforceable for want of a writing. The court drew a distinction between rescission and variation, the former being possible by parol and the latter not

Some courts have drawn a distinction between the formation of the contract and the regulation of performance. Cummings v. Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. (Mass.) 31; Whittier v. Dana, 10 Allen (Mass.) 326; Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462;[53] Wood on Statute of Frauds, p. 758. The distinction has been rejected in many jurisdictions. See cases cited supra; also, L. R. A. 1917B, 141 note. It has never been accepted by this court, and the question of its validity has been declared an open one. Thomson v. Poor, 147 N. Y. 402, 408, 42 N. E. 13, characterizing as dicta the statements in Blanchard v. Trim, supra. I think we should reject it now. The cases which maintain it hold that oral promises in such circumstances constitute an accord, and that an accord, though executory, constitutes a bar if there is a tender of performance. Cummings v. Arnold; Whittier v. Dana, supra. There seems little basis for such a distinction in this state where the rule is settled that an accord is not a bar unless received in satisfaction. Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453; Morehouse v. Second Nat. Bank of Oswego, 98 N. Y. 503, 509; cf. Ladd v. King, 1 R. I. 224, 51 Am. Dec. 624; Pollock on Contracts (3d Am. Ed.) p. 822. But there is another objection, more fundamental and far-reaching. I do not know where the line of division is to be drawn between variations of the substance and variations of the method of fulfillment. I think it is inadequate to say that oral changes are effective if they are slight and ineffective if they are important. Such tests are too vague to supply a scientific basis of distinction. "Every part of the contract in regard to which the parties are stipulating must be taken to be material." Per Parke, B., Marshall v. Lynn, 6 M. & W. 116, 117; 1 Williston on Contracts, § 594. The field is one where the law should hold fast to fundamental conceptions of contract and of duty, and follow them with loyalty to logical conclusions.

The problem, thus approached, gains, I think, a new simplicity. A contract is the sum of its component terms. Any variation of the parts is a variation of the whole. The requirement that there shall be a writing extends to one term as to another. There can therefore be no contractual obligation when the requirement is not followed. This is not equivalent to saying that what is ineffective to create an obligation must be ineffective to discharge one. Duties imposed by law irrespective of contract may regulate the relations of parties after they have entered into a contract. There may be procurement or encouragement of a departure from literal performance which will forbid the assertion that the departure was a wrong. That principle will be found the solvent of many cases of apparent hardship. There may be an election which will preclude a forfeiture. There may be an ac-

possible. The intention to rescind may be quite independent of the intention to sell goods on new terms, even though expressed at the same time.

[53] See also Conroy v. Toomay, 234 Mass. 384, 125 N. E. 568 (1920).

ceptance of substituted performance, or an accord and satisfaction. McCreery v. Day, 119 N. Y. 1, 9, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; Swain v. Seamens, supra; Long v. Hartwell, supra; Ladd v. King, supra. What there may not be, when the subject-matter is the sale of land, is an executory agreement, partly written and partly oral, to which, by force of the agreement and nothing else, the law will attach the attribute of contractual obligation.

The contract, therefore, stood unchanged. The defendant might have retracted his oral promise an hour after making it, and the plaintiff would have been helpless. He might have retracted a week before the closing, and, if a reasonable time remained within which to remove the violations, the plaintiff would still have been helpless. Retraction even at the very hour of the closing might not have been too late if coupled with the offer of an extension which would neutralize the consequences of persuasion and reliance. Arnot v. Union Salt Co., 186 N. Y. 501, 79 N. E. 719; Brede v. Rosedale Terrace Co., 216 N. Y. 246, 110 N. E. 430. The difficulty with the defendant's position is that he did none of these things. He had notified the plaintiff in substance that there was no need of haste in removing the violations, and that title would be accepted on deposit of adequate security for their removal in the future. He never revoked that notice. He gave no warning of a change of mind. He did not even attend the closing. He abandoned the contract, treated it as at an end, held himself absolved from all liability thereunder, because the plaintiff had acted in reliance on a consent which, even in the act of abandonment, he made no effort to recall.

I do not think we are driven by any requirement of the statute of frauds to sustain as lawful and effective this precipitate rescission, this attempt by an ex post facto revocation, after closing day had come and gone to put the plaintiff in the wrong. "He who prevents a thing from being done may not avail himself of the nonperformance, which he has, himself, occasioned, for the law says to him, in effect: 'This is your own act, and, therefore, you are not damnified.'" Dolan v. Rodgers, 149 N. Y. 489, 491, 44 N. E. 167, quoting West v. Blakeway, 2 M. & Gr. 751. The principle is fundamental and unquestioned. U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46; Gallagher v. Nichols, 60 N. Y. 438; Risley v. Smith, 64 N. Y. 576, 582; Gen. El. Co. v. Nat. Contracting Co., 178 N. Y. 369, 375, 70 N. E. 928; Mackay v. Dick, 6 App. Cas. 251; New Zealand Shipping Co. v. Societe des Aletiers, etc., 1919 A. C. 1, 5. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. Gallagher v. Nichols; Gen. El. Co. v. Nat. Contr. Co.; Thomson v. Poor, supra. We need not go into the question of the accuracy of the description. Ewart on Estoppel, pp. 15, 70; Ewart on Waiver Distributed, pp. 23, 143, 264. The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or

take advantage of his own wrong. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice. An apposite precedent is found in Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13. In deciding that case, we put aside the question whether a contract within the statute of frauds could be changed by spoken words. We held that there was disability, or, as we styled it, estoppel, to take advantage of an omission induced by an unrevoked consent. Cf. Swain v. Seamens, supra, 9 Wall. at page 274, 19 L. Ed. 554; Arnot v. Union Salt Co., supra; Brede v. Rosedale Terrace Co., supra; 1 Williston on Contracts, § 595. A like principle is recognized even in the English courts, which have gone as far as those of any jurisdiction in the strict enforcement of the statute. They hold in effect that, until consent is acted on, either party may change his mind. After it has been acted on, it stands as an excuse for nonperformance. Hickman v. Haynes, L. R. 10 C. P. 598, 605; Ogle v. Lord Vane, 2 Q. B. 275; 3 I. B. 272; Cuff v. Penn, 1 Maule & S. 21; Morris v. Baron & Co., 1918 A. C. 1, at page 31. The defendant by his conduct has brought himself within the ambit of this principle. His words did not create a new bilateral contract. They lacked the written form prescribed by statute. They did not create a unilateral contract. Aside from the same defect in form, they did not purport to offer a promise for an act. They did, however, constitute the continuing expression of a state of mind, a readiness, a desire, persisting until revoked. A seller who agrees to change the wall paper of a room ought not to lose his contract if he fails to make the change through reliance on the statement of the buyer that new paper is unnecessary and that the old is satisfactory. The buyer may change his mind again and revert to his agreement. He may not summarily rescind because of the breach which he encouraged. That is what the defendant tried to do. When he stayed away from the closing and acted upon an election to treat the contract as rescinded, he put himself in the wrong.

I concur in the conclusion that the judgment must be reversed.

CARPENTER v. MURPHY.

(Supreme Court of South Dakota, 1918. 40 S. D. 280, 167 N. W. 175.)

Action by James S. Carpenter against James Murphy. Judgment for defendant, from which, and an order denying new trial, plaintiff appeals. Affirmed.

WHITING, P. J. Plaintiff seeks the specific performance of a contract to convey real property. Findings, conclusion, and judgment were in favor of defendant. From such judgment and an order denying a new trial this appeal is taken.

It is appellant's contention that the contract was in writing, and that the trial court erred when it held that such writing was "not a valid, binding, and legal contract for the sale of real estate, and that specific performance of same cannot be enforced."

Parties contracting for the sale and purchase of real property follow one of two courses, either of which was sanctioned by the early common law: They attempt to put the terms of their transaction in writing to preserve indisputable evidence of such terms; or they intentionally leave part or all the terms of the contract unevidenced by any writing. As said in Mull v. Smith, 132 Mich. 618, 94 N. W. 183: "When the contract itself is in writing and signed by both parties, the writing is the contract. When the memorandum of the oral contract is in writing and signed by the vendor, it is not the contract, but a memorandum."

Statutes of frauds have condemned oral contracts; some by leaving such contracts valid, but declaring them unenforceable; others, like ours, by declaring the contracts invalid unless there be some note or memorandum signed by the parties sought to be charged, which note or memorandum furnishes evidence of the material terms of such contracts. Section 1238, C. C.[54] The difference in the two classes of statutes was very fully noted in Jones v. Pettigrew, 25 S. D. 432, 127 N. W. 538, and in which we said: "Considering now the difference between these two classes of statutes—that under one the contract is valid, but not enforceable without certain proof can be made, while under the other the contract itself never becomes valid until it is entered into (evidenced) in the manner prescribed by statute or unless certain part performance prescribed by statute has taken place—we see that, upon the trial, if one is attempting to prove a state of facts which brings the particular case under the bar of a statute such as we have in South Dakota, it would be an attempt to prove an invalid contract by perfectly competent evidence; while in the other case it would be an attempt to enforce a contract which, under the law, was absolutely valid, but by means of incompetent evidence."

[54] The words are: "The following contracts are invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent."

It follows that, under our statute, the rules of evidence would be just as at the early common law. In case of the written contract the writing is the only competent evidence. In case of an oral contract the terms thereof may be established by parol. In case the rights of a party rest upon an oral contract two questions are presented to the court: What were the terms of the contract? Has the contract ever been validated by the party to be charged? Such oral contract can only be validated by the party to be charged—the vendor in this case—by his executing, over his signature, some memorandum or memoranda evidencing all those terms of the contract which affect the vendee's right of recovery. Thus an oral contract may be entered into where the whole contract is subject to certain conditions upon which the right to enforce the contract depend. A memorandum of the terms of such a contract, which memorandum omits all reference to the conditions affecting such contract, might evidence all the terms essential to a binding contract, and thus be sufficient prima facie evidence to prove the terms of the contract as well as to prove that the party executing such memorandum had validated such contract; but yet, as a matter of fact, such oral contract would not have been validated, and the party against whom it was sought to be enforced would be at liberty, in order to prove that such oral contract had not been validated, to show by parol that there were essential terms or conditions of such contract of which no written memorandum had been introduced in evidence.

It must be remembered that, under our statute, the party sought to be charged may admit every term of the oral contract and yet rely upon its invalidity under the statute of frauds. As was well said in Fisher v. Andrews, 94 Md. 46, 50 Atl. 407, in speaking of a contract coming under the provisions of another section of the statute of frauds: "The principal object in making a memorandum of sale in mercantile transactions is to comply with the requirements of the statute of frauds, and the general rule is that, if the memorandum does not embrace all the material terms of the verbal contract, it is not sufficient. It frequently happens, therefore, that in such cases parol evidence is admitted, not for the purpose of varying or contradicting a written agreement, as was suggested by the appellants that the appellee was attempting to do, but to show that what [was] professed to be a memorandum of the contract did not in fact truly state it, but had omitted some essential terms that had been agreed upon in the verbal contract. The case of Kriete v. Myer, 61 Md. 558, is a good illustration of the sufficiency of such memorandum. There a sold note was given by the agents of the vendor, and it was held that the memorandum of sale need not state the time of the delivery if no time was fixed in the parol agreement, as the law would imply that it is, in such case, the duty of the seller to deliver the goods in a reasonable time; or, if there be an established custom among merchants dealing in such goods regulating the time of delivery, it will be controlled by such

custom. But it was further held that, if a time for delivery be fixed in the verbal agreement of sale, such time must be incorporated in the memorandum, and, if it is not, it is insufficient."

In the case before us it is absolutely without dispute that the contract was oral, and that, after the contract was entered into, appellant, as vendee, made the advance payment that had been agreed upon, and respondent executed to him a receipt for such payment. It is this receipt which appellant speaks of as a written contract, but which is in fact but a memorandum of some or all of the terms of the oral contract. It is this receipt or memorandum that the trial court held to be "not a valid, binding and legal contract for the sale of real estate." The oral contract was entered into April 27th and the receipt or memorandum was executed that day. The trial court finds: "That during the negotiations between the plaintiff and defendant the defendant stated in effect to the plaintiff that if he sold the land in controversy to the plaintiff that he needed the money to meet bills that were then coming due and wished to take advantage of the discounts allowed on the bills if paid when due, and if the deal could not be closed by May 1, 1915, he would not sell the land to the plaintiff."

Appellant contends that the above finding is unsupported by the evidence. In this contention appellant is in error; such finding is fully supported by undisputed testimony. The time of closing the deal thus became a controlling provision of said contract, and therefore, even if the memorandum should be held to contain ample evidence of all the terms essential to a complete contract, yet it does not contain all the material terms and conditions of the contract that was in fact entered into; and, for that reason alone, it remained invalid under the statute of frauds. Moreover, it is perfectly clear that, if there had been a written contract embodying therein this condition upon which the continued binding force of such contract depended, and such contract was not closed within the time provided by such condition, and this through no fault of the vendor, the vendor would be released. It appears without dispute that upon examination of the abstract of title appellant refused to accept the title as it appeared on such abstract; that he received this abstract on April 28th; and that at least one of the alleged defects could not, prior to May 1st, have been cured in the method insisted on by appellant—an action in court to quiet title. It was therefore up to appellant to accept the title and close the deal or to allow the deal to fall through. To require specific performance after May 1st would have been to compel respondent to do what he had contracted against being compelled to do.

It might be urged that it appears from the evidence that, after May 1st, these parties were still negotiating with a view to a possible closing of this deal. Even though this be so, it is immaterial in the absence of a new and valid contract. Parties to an oral contract of which there is no memorandum whatsoever may proceed with their negotiations up to the very point of closing the deal by the delivery of

a deed and the payment of the consideration therefor, and yet, at the last moment, the vendor may lawfully elect to refuse to carry out such contract. At the best, such negotiations but furnish evidence of what the oral agreement was. In this case it is clear that respondent did nothing after May 1st which in any manner validated the oral contract or which could estop him from alleging and relying upon its invalidity.

The record in this case peculiarly discloses the importance of foreclosing all chance for innocent mistake or for actual fraud in transactions of this kind by contracting in writing. If people see fit to enter into invalid contracts, and thus rely upon each other's honor, they must do so at their peril.

Under the views herein expressed it is clear that the judgment and order appealed from should be, and they are, affirmed.[55]

[55] There is a difference in wording between sections 4 and 17 of the original statute; section 4 saying that "no action shall be brought" upon certain contracts, and section 17 saying that "contracts * * * shall not be allowed to be good." In Maddison v. Alderson, 8 App. Cas. 467, 488 (1883), Lord Blackburn said: "I think it is now finally settled that the true construction of the Statute of Frauds, both the fourth and the seventeenth sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." This was quoted with approval by several of the Lords Justices in Morris v. Baron, [1918] A. C. 1. In the Sale of Goods Act the wording of section 17 was changed so as to agree with that of section 4.

It cannot be properly said that the statute lays down a mere rule of evidence. It does not prevent proof by parol of the oral agreement, but merely makes the oral acts of offer and acceptance inoperative to create a legally enforceable right. Thus the parol agreement can be proved in a quasi contractual suit for the value of services for the purpose of showing that they were not rendered as a gift. Laughnan v. Laughnan's Estate, 165 Wis. 348, 162 N. W. 169 (1917); Gay v. Mooney, 67 N. J. Law, 27, 50 Atl. 596 (1901). Also a parol gift of land can be proved to show that the donee entered under claim of ownership and thereafter held adversely. Pope v. Hogan, 92 Vt. 250, 102 Atl. 937 (1918). Parol evidence is admissible to show that the oral agreement in fact contained a term not included in the written memorandum, in order to nullify such memorandum. O'Neil v. Crain, 67 Mo. 250 (1878), agreed price of goods; Roe v. Naylor, 119 L. T. 359 (1918, C. A.), the memorandum contained a term not in fact agreed upon.

Many decisions have held that the statute affects only the remedy, and not the validity of the contract. See Townsend v. Hargraves, 118 Mass. 325 (1875); Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571 (1877); Buhl v. Stephens (C. C.) 84 Fed. 922 (1898). And so in the leading case of Leroux v. Brown, 12 C. B. 801 (1852), the statute was held to affect procedure rather than substance, and the statute of the forum was applied to prevent the enforcement of a contract made in a jurisdiction having no such statute. In Minnesota, however, it is held that the contract is enforceable there if the memorandum complies with the lex loci contractus, even though it does not satisfy the statute of Minnesota. Matson v. Bauman, 139 Minn. 296, 166 N. W. 343 (1918); Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, 162 N. W. 1082, L. R. A. 1917E, 777 (1917).

The actual decisions seem to justify the statement that the statute confers on a party who has not signed a memorandum a legal privilege not to perform as he has orally agreed. He has the legal power of validating the contract and creating a legal duty on himself, by signing a written memorandum; the oral agreement, therefore, cannot be said to be void. The statute affects substance, and not merely procedure, in that it determines the legal

relations that are consequent upon the operative facts of offer and acceptance. Such a statute does not apply to contracts made prior to its passage. Collin v. Kittelberger, 193 Mich. 133, 159 N. W. 482 (1916).

The more generally prevailing rule is that the statute can be taken advantage of only by special plea and not under the general issue. See Browne, Statute of Frauds, § 508 et seq.; Williston, Contracts, § 527. It is often held, however, that if the declaration discloses a case in which the statute has not been satisfied it is demurrable. Posten v. Clem, 201 Ala. 529, 78 South. 883, 1 A. L. R. 381 (1918); Evans v. Atlanta Paper Co., 21 Ga. App. 114, 93 S. E. 1023 (1917); Izard v. Connecticut Fire Ins. Co., 128 Ark. 433, 194 S. W. 1032 (1917); Clinton Sugar Refining Co. v. Horras, 176 Iowa, 706, 158 N. W. 602 (1916). It is also often held that the defendant may deny the contract and then prevent its proof by parol testimony. Ziegener v. Daeche, 91 N. J. Law, 634, 103 Atl. 82 (1918); Robinson v. Cruzen (Mo. App.) 202 S. W. 449 (1918); Pace v. Springer, 23 N. M. 586, 170 Pac. 879 (1918); Brown v. Kausche, 98 Wash. 470, 167 Pac. 1075 (1917); Cooley v. Hatch, 91 Vt. 128, 99 Atl. 784 (1917); Walsh v. Standart, 174 Cal. 807, 164 Pac. 795 (1917); Alkire v. Alkire Orchard Co., 79 W. Va. 526, 91 S. E. 384 (1917); Buttemere v. Hayes, 5 M. & W. 456 (1839).

INDEX

[THE FIGURES REFER TO PAGES]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]

[The figures refer to pages]